* Together with Case No. 611, Buck et al. v. Watson.

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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., APPELLANTS,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

No. 611

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

FILED DECEMBER 6, 1940.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

CARY D. LANDIS, Individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., Individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., Individually, and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, Individually, and as State Attorney for the Third Judicial Circuit of Florida; William A. Hallowes, III, Individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, Individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, Individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, Individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. Adkins, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, Individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, Individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, Individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Roy D. Stubbs, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, Individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "John Doe" and "Richard Roe", Defendants

[fol. 2] BILL OF COMPLAINT--Filed February 7, 1938

Complainants, suing on behalf of themselves and others similarly situated bring this Bill of Complaint against the aforementioned defendants, and allege as follows:

1. The complainant, American Society of Composers, Authors, and Publishers (hereinafter referred to, for brevity's sake, as the "Society"), at all times hereinafter mentioned, was and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business, in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. The membership of the Society exceeds 1,000, and is comprised of authors, composers and publishers of musical works; said Society was organized and has been issuing licenses for the public performance for profit of musical compositions copyrighted by its members to users located throughout the United States, including the State of Florida, and said Society has protected the performing rights of musical works copyrighted by said members respectively, against infringement because of the public performance thereof for profit, and continues so to do.

2. Complainant, Gene Buck is President of said Society; because said membership, as is above indicated, is exceedingly numerous and it would be impracticable to join all the members of said Society as parties plaintiff, and as the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by Gene Buck as President, for and on behalf of said Society, as well as in his own individual right.

3. Complainant, Carl Fischer, Inc., is a corporation, duly organized and existing under and by virtue of laws of the State of New York, having its principal place of business in the City of New York in said State; complainant G. Schirmer, Inc., is a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; complainant, Irving Berlin, Inc., is [fol. 3] a corporation, duly organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of New York in said State; all of said last mentioned complainants have been for upwards of twenty-five years and are presently engaged in the business of publishing musical compositions

in the State of New York and elsewhere, and are hereinafter for brevity's sake referred to as "Publishers".

4. Complainant, Gene Buck, for upwards of twenty years has been and now is an author of lyrics of musical compositions; complainant, Deems Taylor, for upwards of fifteen years has been and now is a composer of musical and dramatico-musical works; complainant, Oley Speaks, for upwards of fifteen years has been and now is a composer of musical compositions; complainant, William J. Hill, for upwards of five years has been and now is a composer of musical compositions; complainant, Anne Paul Nevin, is the widow of Ethelbert Nevin, who was for more than twenty years a composer of musical compositions, and who departed this life in 1901; complainant, Ella Herbert Bartlett, is the daughter of Victor Herbert, who was for over twenty years a composer and who departed this life in the year 1924; complainant, Jane Sousa, is the widow of John Philip Sousa, who was for more than thirty years a composer and who departed this life in the year 1932, having been a member of the Society for many years. All of the complainants in this paragraph mentioned are citizens of the United States and all are residents and citizens of the State of New York, and of the Southern District of New York, with the exception of Buck and Sousa, who are residents of the Eastern District of New York, and Nevin, who is a resident and citizen of the State of Maine.

5. Upon information and belief, the defendant, Cary D. Landis, is the duly elected, appointed, qualified and acting Attorney General of said State; the defendant, E. Dixie Beggs, Jr., is the duly elected, appointed, qualified and acting State Attorney for the First Judicial Circuit in said State; the defendant, O. C. Parker, Jr., is the duly elected, appointed, qualified and acting State Attorney for the Second Judicial Circuit in said State; the defendant, A. K. Black, is the duly elected, appointed, qualified and acting State Attorney for the Third Judicial Circuit in said State; the defendant William A. Hallowes, III is the duly elected, [fol. 4] appointed, qualified and acting State Attorney for the Fourth Judicial Circuit in said State; the defendant, J. W. Hunter, is the duly elected, appointed, qualified and acting State Attorney for the Fifth Judicial Circuit in said State; the defendant, Chester B. McMullen, is the duly elected, appointed, qualified and acting State Attorney for

the Sixth Judicial Circuit in said State; the defendant, Murray Sams, is the duly elected, appointed, qualified and acting State Attorney for the Seventh Judicial Circuit in said State; the defendant, J. C. Adkins, is the duly elected, appointed, qualified and acting State Attorney for the Eighth Judicial Circuit in said State; the defendant, Murray W. Overstreet, is the duly elected, appointed, qualified and acting State Attorney for the Ninth Judicial Circuit in said State; the defendant, L. Grady Burton, is the duly elected, appointed, qualified and acting State Attorney for the Tenth Judicial Circuit in said State; the defendant, G. A. Worley, is the duly elected, appointed, qualified and acting State Attorney for the Eleventh Judicial Circuit in said State; the defendant, Roy D. Stubbs, is the duly elected, appointed, qualified and acting State Attorney for the Twelfth Judicial Circuit in said State; the defendant, J. Rex Farrior, is the duly elected, appointed, qualified and acting State Attorney for the Thirteenth Judicial Circuit in said State; defendant John H. Carter, Jr., is the duly elected, appointed, qualified and acting State Attorney for the Fourteenth Judicial Circuit in said State; defendant Louis F. Maire is the duly elected, appointed, qualified and acting State Attorney for the Fifteenth Judicial Circuit in said State; and the defendants, "John Doe" and "Richard Roe", are the duly elected, appointed, qualified and acting officials of the State of Florida, whose names are at present unknown to complainants, who are also charged with the enforcement of Senate Bill No. 679, enacted by the Legislature of Florida, and signed by the Governor of that State on June 9th, 1937, and made effective immediately (such Statute being hereinafter referred to throughout as the "State Statute"), and each of said defendants is a citizen and resident of the State of Florida.

6. The value of the matter in dispute herein between complainants and defendants is in excess of the sum of $3,000.00, exclusive of interest and costs.

[fol. 5] 7. This action is a suit in equity arising under the Constitution and laws of the United States, as will hereafter more particularly appear. Among other things, this suit is brought to repress and prevent the deprivation under color of the said Statute of certain rights, privileges and immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State

of Florida, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted musical compositions, which has been vested in the complainant Society for a limited period, as hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article 1, Section 8 of the Constitution of the United States, and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078 U. S. Code, Title 17); to repress and prevent the deprivation of such rights without due process of law and without the equal protection of the laws, and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of the said State Statute as an ex post facto law, and to repress and prevent the interference by the State of Florida with the federal judicial power and the privileges of complainants as citizens of the United States by denying the complainants the right of access to the Federal Courts; to repress and prevent a compulsory, irrevocable grant of special privileges to the users of complainants' copyrighted music in the State of Florida in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement of said State Statute as a special law granting to corporations, associations or individuals a special privilege and retroactive in its operations; and this suit, among other things, involves the question as to whether or not each of the complainants may combine with a substantial number of other persons, corporations or associations for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Florida and without doing any act within the State of [fol. 6] Florida; whether or not the complainants have the right to issue to citizens of Florida licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants, apart from the sale of copies of such compositions in the form of sheet music; whether the complainants have the right to act collectively in combination with a substantial number of persons, corporations or associations for the purpose of

granting blanket licenses at fixed fees for the public performance for profit of the complainants' copyrighted musical compositions to users located within the State of Florida; whether the State of Florida has the right to require and compel complainants to fix a price for their copyrighted musical compositions for all uses and purposes and to affix such price upon the musical composition in whatever form the same may be published, printed, manufactured, or otherwise prepared for use or rendition; whether the State of Florida has the right to declare void and unenforc-able all existing contracts, agreements, licenses and arrangements made by complainants with or granted to users in the State of Florida; whether the State of Florida may impose a penalty upon complainants for collecting or attempting to collect the moneys due them under said existing contracts; whether the State of Florida has the right to grant to owners, lessees, operators or managers of radio broadcasting, radio receiving or radio rebroadcasting stations within that State, the right to receive, broadcast and rebroadcast complainants' copyrighted musical compositions without the payment to complainants of any license fee or other compensation for such use; whether the State of Florida has the right to grant to owners, lessees, operators or managers of any theatre, moving picture house or similar place for amusement and public performance within Florida, the right to receive, use and render or cause to be received, used or rendered the copyrighted musical compositions of the combinations declared unlawful by said Statute, including the musical compositions of complainants, without the payment to complainants of any license fee or other compensation for such use; whether the State of Florida has the right to prevent the complainants from suing users in Florida for infringement of their respective copyrighted musical compositions or for loss or damage within Florida for the use or rendition, including the public performance for profit, of their respective copyrighted [fol. 7] musical compositions originating or emanating from outside the State of Florida and performed, rendered or otherwise used within said State; whether the State of Florida has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Florida, by providing that any representative of any combination declared to be unlawful under said State Statute shall be deemed an official representative and agent of such com-

bination and shall be construed to be doing business within Florida, and that service of any process may be had against complainants and others similarly situated by service upon said representative or the agent of any such representative, with the same force and effect as if service were made upon the duly elected officer or acting agent or other official representative; whether the State of Florida may prevent complainants from engaging an agent in said State, by enacting that any such agent shall be subject to the penal provisions of the said State Statute; whether the State of Florida may dissolve the Society, which is organized under the laws of the State of New York and has its principal place of business therein, by an action brought within the State of Florida for committing any of the acts specified in said Statute to be in violation thereof upon service secured by service upon any representative that the Society may have within said State; whether the State of Florida may require the complainants and others similarly situated under penalty of being held in contempt of Court and being fined $100.00 for every day that they shall fail or refuse to furnish such documents, to file with the Clerk of the Court in which any civil or criminal action or proceeding is pending against complainants, or others similarly situated, exact copies of all documentary evidence, records or data in the possession or under the control of complainants and others similarly situated (being defendants in such suit or proceeding) pertaining to the issues in said action; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including, fine, imprisonment, contempt and penalties therein provided for, and whether or not the defendants, in threatening to enforce the provisions of said State Statute against complainants are not depriving the complainants of their property and their right to liberty without due process of law, and whether they are not denying the complainants the equal protection [fol. 8] of the laws; whether the State of Florida may compel complainants and others similarly situated to be witnesses against themselves and be subjected to unlawful search and seizure, and whether the State of Florida may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies, who have authorized the Society to grant blanket licenses in the United States on their behalf, which conditions are

not embraced in, but are in conflict with existing Treaties, Presidential Proclamations, and the Copyright Act of the United States.

This suit is brought to repress and prevent defendants from proceeding under and by virtue of the provisions of said State Statute, and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment and penalties under the color of said State Statute.

8. The Publishers, in furtherance of their business of publishing musical compositions, acquired from writers and composers the right to publish musical compositions written and composed by such writers and composers, respectively, either by outright purchases of such rights or upon a royalty basis and will in the ordinary and usual course of their business continue to acquire similar rights in many thousands of musical compositions; in the great majority of cases, complainants acquired and will in the ordinary and usual course of their business continue to acquire from such writers and composers the right to secure copyright in the compositions purchased by Publishers; when such compositions are published by Publishers, two of the best copies thereof are deposited with the Register of Copyrights at Washington, D. C., and the required fee paid to him with a claim for copyright registration, and said compositions are always registered for copyright with the Register of Copyrights in Washington, D. C.; pursuant to the provisions of the Copyright Act of 1909 (hereinafter referred to as the "Copyright Act"), and on each and every one of the compositions published by publishers there appears upon the first page of music at the foot thereof, the copyright notice prescribed by said Copyright Act; each of the Publishers in the course of its many years of conducting its respective business, has registered many thousands of compositions with the Register of Copyrights, and each has se- [fol. 9] cured for its respective corporation the ownership of the copyright in many thousands of musical compositions; in the music business or trade the totality of copyrights of a particular publisher is known as its "catalogue"; the great majority of each Publisher's respective catalogue is likewise copyrighted in foreign countries, as well, and copyright protection is obtained by said publishers for their catalogues in almost every civilized country

of the world; none of the copyrights owned by the complainants has a situs within the State of Florida; that each publisher's business is extensive, and that the value of the copyrights owned by each publisher is in excess of $1,000,000.00; old copyrights expire currently and are renewed, sometimes by the publisher and sometimes by the writer and composer, or such others as may be entitled to renewal under the Copyright Act, and new compositions are constantly being registered; the rights in the copyrights are manifold and many of them are and have been granted by the Publishers to others separate and apart from other rights and are subdivided as to locality, extent and term; in many cases certain rights are reserved to the author or composer and disposition thereof is not within the control or knowledge of the publisher complainant, and is not ascertainable.

9. Each of the publishers has secured copyright registration in many thousands of musical compositions of which copyrights each of said publishers is respectively the proprietor; said copyrights have been secured in manner similar to that described hereinabove, and with respect to each of said copyrights, the publishers have respectively obtained copyright cards, and all such copyrights are on file in the office of the Register of Copyrights in Washington, D. C., as prescribed by Statute, and copies of such cards are not annexed hereto in order to avoid unduly encumbering this complaint, but reference is made hereto and the same are incorporated herein, and copies of said cards will be produced upon the trial of this case, if necessary.

10. Complainant Gene Buck wrote the lyrics of many musical compositions, for over twenty years last past, and from time to time he entered into contracts with various music publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works, as required by the Copyright Act; said copyrights expire by limitation [fol. 10] of time at various dates in the future, and complainant Buck is advised and verily believes, that he is entitled to secure a renewal of each such copyright for an additional period of twenty-eight years, in his own name and on his own behalf, in each of said works; in such renewals of copyright, complainant Buck will have all the rights that vested in the proprietor of the original copy-

rights; among such works are the following: "Tulip Time", "Hello Frisco", "Garden of My Dreams", "No Foolin'", "The Love Boat", "Florida, The Moon and You"; for over fifteen years, complainant Buck wrote the words and lyrics for the Florenz Ziegfield Follies, as well as the words and lyrics of other musical shows produced with great success; Buck's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000.

11. Complainant Deems Taylor composed the music for two musical compositions entitled "Banks O' Doon" and "Captain Stratton's Fancy", in 1923, and entered into a contract for the publication of said compositions with J. Fischer & Bro., a music publisher; a copy of said contract is hereto annexed and marked Exhibit "A"; said publisher secured copyright of said compositions by publication and deposit of the work, as required by the Copyright Act, in and about the year 1923, and said copyrights expire by limitation of time in the year 1951, and complainant Taylor is advised and verily believes, that he is entitled to secure a renewal of said copyrights for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyrights, complainant Taylor will have all the rights vested in the proprietor of the original copyrights; the complainant Taylor has composed the music for a great many other works, among them "The King's Henchman", "Peter Ibbetson" and "Through A Looking Glass Suite"; "Peter Ibbetson" has been successfully produced at the Metropolitan Opera House in the City of New York; Taylor's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000. Under said contract, Exhibit "A", and other contracts between complainant Taylor and his publisher, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his pub- [fol. 11] lisher averaging about 10% thereof. Under the contract between complainant Taylor and the Society, complainant Taylor is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Taylor receives approximately 50% of all

moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if said Statute be enforced, complainant Taylor will be entitled to receive only an average of 10% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, and said Taylor will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

12. Complainant Oley Speaks composed the music for many musical compositions and entered into numerous contracts for the publication of said compositions with the complainant G. Schirmer, Inc., a music publisher; said publisher secured copyrights in said compositions by publication, deposit and registration of the works, as required by the Copyright Act, and said copyrights will expire by limitation of time at various dates in the future, twenty-eight years from the respective dates of registration of said works; and complainant Speaks is advised and verily believes that he is entitled to secure renewals of said copyrights for an additional period of twenty-eight years respectively, in each one in his own name and on his own behalf; in such renewals of copyright complainant Speaks will have all the rights that vested in the proprietor of the original copyrights; among the works composed by Speaks are the following: "Sylvia", "Road to Mandalay" and "Morning"; Speaks' right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000. Under the contracts between complainant Speaks and his publishers, said complainant is entitled to receive a certain percentage of the market or retail price on every copy of sheet music sold by his publisher averaging about 10% thereof. Under the contract between complainant Speaks and the Society, complainant Speaks is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; [fol. 12] in other words, complainant Speaks receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant Speaks will be entitled to

receive only an average of 10% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, and said Speaks will have no right to participate in said royalties in any other manner, or to license to the right to publicly perform for profit on any other basis.

13. Complainant Hill composes music, and he has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., a *a* music publisher who has secured copyrights of said compositions by publication, deposit and registration of such works as required by the Copyright Act, and said copyrights expire by limitation of time at various dates in the future, twenty-eight years from the date of registration of such respective works, and the complainant Hill is advised and verily believes that he is entitled to secure renewals of said copyright for an additional period of twenty-eight years in his own name and on his own behalf; in such renewals of copyright complainant Hill will have all the rights that vested in the proprietor of the original copyrights; the complainant Hill has composed the music for a great many works, among them "The Last Roundup", "Chapel in the Moonlight", "The Old Spinning Wheel", "Lights Out", "Wagon Wheels", "Empty Saddles", "The Glory of Love" and "Timber"; Hill's right to collect royalties from his works, as aforementioned, as well as his right to secure renewals of copyright therein are worth in excess of $100,000. Under the contracts between complainant Hill and his publishers, said complainant is entitled to receive a certain royalty on every copy of sheet music sold by his publisher averaging about one and one-half cents on each such sale. Under the contract between complainant Hill and the Society, complainant Hill is entitled to such a portion of 50% of all royalties collected as the classification committee of the writer members of the Society allots to him; in other words, complainant Hill receives approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of his copyrighted musical compositions; if the said Statute be enforced, complainant [fol. 13] Hill will be entitled to receive only an average of 6% of the moneys paid to the publisher by users in Florida publicly performing for profit his copyrighted musical compositions, since such sheets of music are ordinarily sold for about twenty-five cents; and said Hill will have no right to

participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

14. Complainant Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed, among others, the following musical compositions which were duly published and copyrighted: "The Rosary", "Mighty Lak a Rose", "Venetian Suite" and "Narcissus," and she has obtained renewals of some of said compositions in her own name, and is advised and verily believes that she will be entitled under the copyright act to obtain renewals of all of such compositions as and when the original terms thereof expire, during her lifetime; Ella Herbert Bartlett is the daughter of Victor Herbert, the foremost composer in America, who wrote and composed, among others, the following works, all of which were duly registered for copyright: "Kiss Me Again", "Natoma", "Sweet Mystery of Life", "I'm Falling in Love With Someone", "Mlle. Modiste", "Red Mill", "Naughty Marietta", "Irish Fantasy" and "Pan Americana"; she has renewed some of the works on which the original term of copyright has expired, and is advised and believes that she will be entitled to renew the other works as and when they expire; Jane Sousa is the widow of John Phillip Sousa, who wrote and composed a great many compositions, and who was known as the "March King"; among his compositions are the following: "Stars & Stripes Forever", "Adeste Fidelis", "Washington Post March" and "El Capitan"; said compositions were duly registered for copyright and said complainant Jane Sousa has renewed some of said compositions, and is advised and believes that she will have the right to renew the other works as and when they expire; the rights, which the complainants mention in this paragraph have, in the renewal of the works written and composed respectively by the husbands and father of said complainants, are of great value and are worth in excess of $100,000. with respect to each of said complainants. Under their respective contracts with their publishers, said complainants are entitled to receive a certain percentage of the market or retail price on every [fol. 14] copy of sheet music sold by their publishers averaging about 10% thereof. Under the respective contracts between said complainants and the Society, said complainants are entitled to such a portion of 50% of all royalties

collected as the classification committee of the writer members of the Society allots to them; in other words, said complainants receive approximately 50% of all moneys collected by the Society as royalties or license fees for the public performance for profit of their copyrighted musical compositions; if the said Statute be enforced, said complainants will be entitled to receive only an average of 10% of the moneys paid to their respective publishers by users in Florida publicly performing for profit their respective copyrighted musical compositions, and said complainants will have no right to participate in said royalties in any other manner, or to license the right to publicly perform for profit on any other basis.

15. Prior to 1917, none of complainants, nor the respective husbands and father of complainants mentioned in the next preceding paragraph, received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; although the copyright Statute gave to the complainants the exclusive right to publicly perform for profit their respective musical compositions, users of musical compositions throughout the country refused to recognize such exclusive rights in complainants, and persistently and stubbornly refused to pay any royalties for such public performance for profit, but, on the contrary, users of music throughout the country publicly performed for profit the musical compositions owned, written and composed by complainants respectively, without payment of any royalties; complainants and others similarly situated were unable to enforce their exclusive rights in the public performance for profit of their compositions; individually they had no means of enforcing such rights; they could not employ investigators throughout the country to detect infringement because such public performances for profit were fugitive, fleeting and ephemeral, and no record was made by users of such performances; complainants had no effective means of employing lawyers throughout the United States to bring infringement suits against users for the wrongful public performance for profit of their musical compositions; and complainants and [fol. 15] others similarly situated were helpless to enforce the rights granted to them by the Copyright Act; those of the users of music who might be willing or inclined to pay

for the public performance for profit of the compositions of complainants and those similarly situated, were unable to do so because it was necessary to have ready access to a great number of musical compositions to be performed in a single evening and at a moment's notice; under such circumstances it was impossible to get in touch with the individual owners of the particular musical compositions, many of whom were scattered throughout the world; the users of music, consisting primarily of hotel owners, innkeepers, cabaret and dance hall proprietors and motion picture exhibitors were organized into very powerful trade associations who employed counsel to defend such users against claims of infringement for the unauthorized performance of public performance of musical works of complainants, and others similarly situated, and such associations of users even offered to defend infringers who were not members of their respective associations.

16. On February 13, 1914, a small group of composers, authors and publishers, under the leadership of Victor Herbert, Irving Berlin, Silvio Hein, William Jerome, Gustav Kerker, John Golden, Glen McDonough, Ernest R. Ball, Raymond Hubbell, James Weldon Johnson, Louis A. Hirsch, Henry Blossom, George Maxwell, Jay Whitmark, the complainant Gene Buck and the complainant publisher Irving Berlin, Inc., and others, organized a voluntary unincorporated non-profit association under the laws of the State of New York, which they designated as the American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"); said Society was formed for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members; said Society did not and does not deal in any commodity, did not and does not deal in any sheet music, exercised and exercises no function with respect to mechanical rights of reproduction, and was and is limited solely as aforesaid to the right of public performance for profit; said Society has functioned continuously since said date; from its very commencement it encountered tremendous opposition on the part of organized groups of users of music throughout the country; one of the functions of the Society was to detect infringements of the right of public performance for profit of its [fol. 16] members and to institute suits on behalf of its

members for such infringements; it also licensed establishments throughout the country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees; the organized groups of users of music resisted efforts to compel them to pay compensation for the performance for profit of the Society's members; with the advent of radio broadcasting in 1922, powerful groups of radio broadcasters throughout the United States joined with the other groups, aforementioned, in opposing the Society; such groups of users attacked the Society by interposing defenses in suits for infringement, by complaints made to the Attorney-General of the United States, by a suit brought against the Society in the State of New York, by attempts made annually in Congress for over fifteen years last past to amend the Copyright Act so as to permit the users of music to publicly perform for profit the musical compositions of the Society's members without compensation, by initiating tax legislation in various States, and lately by introducing into various States bills similar to the Statute of the State of Florida herein complained of, with a view of destroying and nullifying the rights of the Society's members given to them by the Copyright Act.

17. At the present time there are approximately 123 publisher members of the Society; there are approximately 1000 writer and composer members of the Society; from time to time said publisher, writer and composer members have entered into contracts with the Society, wherein and whereby said members of the Society have assigned to the Society the exclusive right of public performance for profit in their respective musical compositions for periods of five years at a time, the last contracts were signed prior to and became operative January 1, 1936; annexed hereto and made part of this complaint is the contract entered into on the 12th day of April, 1935 between complainant Carl Fischer, Inc. and the Society and marked Exhibit "B"; annexed hereto and made part of this complaint is the contract entered into on the 25th day of June, 1935 between complainant Gene Buck and the Society and marked Exhibit "C"; the other complainants, G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, prior to January 1, 1936, executed and delivered to the Society [fol. 17] contracts in form similar to the contracts entered

into between the Society and Carl Fischer, Inc. and Gene Buck; all of said contracts executed and delivered by the complainants to the Society expire by limitation of time on the 31st day of December, 1940; all of the publisher members of the Society have executed contracts similar to Exhibit "B"; all of the other members of the Society have executed contracts similar to Exhibit "C".

18. Annexed hereto and made a part of this complaint and marked Exhibit "D" are the present Articles of Association of the Society.

19. Complainants' respective businesses and occupations are lawful ones, and the pursuit thereof cannot be prohibited directly or indirectly; the rights vested in the complainants by the Constitution of the United States and the Copyright Laws enacted by the Congress thereunder are exclusive and cannot be limited, curtailed, forfeited, confiscated or circumscribed by any of the Statutes of the several States, including the State of Florida.

20. The users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; the practice of the Society has been to license theatres according to their seating capacity, radio broadcasting stations according to their income, power and coverage, and hotels, cabarets and dance halls according to the respective size, business done, number and size of orchestras, methods of performance, income and standing; licenses are granted by the Society to such users in which all the musical compositions owned, written, and composed by members of the Society are made available to such users for use at any time within the contract period without requiring the specific consent of the owner of the particular composition played; such licenses include likewise the right on the part of the users to publicly perform for profit the musical compositions copyrighted, written and composed by members of societies throughout the world organized on a basis similar to the Society with whom Society has contracts, so that by licenses made with the Society the users obtain the right to publicly perform for profit the works of over 44,000 composers, authors and publishers; [fol. 18] said rights granted by the Society are of great value to the users who have consistently and uniformly

objected to the separate licensing of individual compositions, on the ground that it would involve a great amount of bookkeeping, clerical hire and expense; the system of blanket licenses conferred by the Society performs a useful service for the users and enables them to have available at all times for their own special purposes a vast reservoir of musical compositions that are pleasing and entertaining to the public, classical, modern, as well as popular; and the Society since 1914 has looked after the interests not only of its own members, but of other members of the musical profession who have been in distress by reason of age and indulgence and who otherwise have been unable to support themselves, and the Society has paid sick benefits to such individuals, as well as to its members, and has looked after the widows and orphans of indigent composers and writers throughout the United States whose families would otherwise have been objects of public charity; the individual complainants herein have neither the resources, funds, organization or ability to protect the musical copyrighted works in which they are authors and composers, or which they own, or in which they have renewal rights, or obtain renewals, against infringement by unauthorized performances for profit within the State of Florida in their individual capacity; and have been compelled, as aforesaid, to unite and combine for the purpose of preventing such infringement and enforcing the rights granted to them under the Copyright Act, and such rights cannot be enforced by said individual complainants without such combination; if the individual complainants were to create an agency within the State of Florida to protect against infringement of their respective musical copyrights by unauthorized public performances for profit and to issue licenses thereunder to users in the State of Florida and check up on the accuracy of uses reported, the cost thereof to each of such individual complainants would be greatly in excess of $10,000., which expenditure would be necessary in the employment of investigators, clerical help, accountants and lawyers.

21. Upon information and belief the State Statute was sponsored by an organized group of radio broadcasters and other users of music in an endeavor to destroy the Society [fol. 19] so that they might have for their own selfish aggrandizement free access to all musical compositions

without compensation; said group of users caused a similar statute to be enacted by the State of Montana in or about February, 1937, known as Chapter 90 of the Laws of 1937 of the State of Montana; and they caused to be enacted in the State of Washington in or about March, 1937, a similar statute known as Chapter 218 of the Laws of 1937 of the State of Washington; and a similar statute in the State of Nebraska, known as Legislative Bill No. 478 of the Laws of 1937, and a similar statute of the State of Tennessee, known as Chapter 212 of the Public Acts of 1937; and similar bills have been prepared by such group of users who have circularized the legislatures of other States with a view to presenting to them for enactment similar statutes in all the forty-eight States; said State Statute was passed by the legislature of the State of Florida (as were the similar bills passed by the legislatures of the States of Montana, Washington, Nebraska and Tennessee) without an adequate opportunity for a hearing being afforded to complainants and others similarly situated. The following radio broadcasting stations in the State of Florida are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society, as well as for other purposes:

Station	Owner	Location
WFLA	Florida West Coast Broadcasting Company, Inc.	Clearwater
WRUF	State and University of Florida	Gainesville
WMBR	Florida Broadcasting Co.	Jacksonville
WIOD	The Isle of Dreams Broadcasting Corp.	Miami
WQAM	Miami Broadcasting Co., Inc.	Miami
WDBO	Orlando Broadcasting Co.	Orlando
WSUN	Chamber of Commerce of St. Petersburg	St. Petersburg
WDAE	The Tampa Times Company	Tampa

22. Annexed hereto and made a part of this complaint is a copy of the State Statute marked Exhibit "E".

23. The Society pursuant to the rights vested in it by the contracts made with complainants herein, and other simi- [fol. 20] larly situated, has for many years entered into numerous contracts which are now in force between it, acting on behalf of and jointly for all the members of Society and for the joint benefit of all such members, and users of music

within the State of Florida. Under these contracts the Society has licensed such users to publicly perform for profit the musical compositions of its members; under these contracts, the Society licenses the users to perform all of the compositions in the repertoire of the Society and its affilated foreign societies for a single license fee, fixed and determined by the Society in negotiations with the respective users.

With respect to radio broadcasters, the Society, after extensive negotiations with the National Association of Broadcasters, has charged a sustaining fee based upon the power, wattage, listening audience and other important factors connected with each station, plus a fixed percentage of the revenues derived by each radio broadcasting station from its sponsored programs, after making certain deductions.

With respect to motion picture theaters, the Society negotiated for a long time with the trade associations of theatre owners, and finally, a rate of ten cents per seat per theatre was agreed upon as a fair and reasonable rate. That rate was in operation for a great many years. Recently, in negotiations with the theatre owner associations, the rate was modified so that it is now, as follows:

10¢ per seat per year for theatres containing 800 seats and under;
15¢ per seat for theatres containing 801 to 1599 seats;
20¢ per seat above that number; and
5¢ per seat for all theatres under 800 seats, operating only three days a week.

The uniform rate for hotels with radio in each room is $1.00 per room per year; in addition thereto, there is an annual rate for hotels having orchestras or giving other musical entertainment for the profit of the management, based upon the size, prestige, gross business, nature of entertainment, size of the orchestra, extent of music used and audiences attracted thereby, and the profits derived therefrom.

The license fees in all these cases are fixed and determined by the Society on behalf of all its members, after negotiations with either the trade association or the individual [fol. 21] user; there are about 367 contracts in force at the present time from which the Society received for the year 1936 the sum of $59,306.81; on or about the 15th day of

January 1936, the Society entered into a contract with Isle of Dreams Broadcasting Corporation, proprietor of a radio broadcasting station having call letters WIOD, a copy of which is hereto annexed and made a part hereof and marked Exhibit "F" which contract is presently in force and effect and has been duly performed both by the Society and by the radio broadcasting station; in addition to said contract, there are 11 other contracts made between the Society and the radio broadcasters in the State of Florida similar to Exhibit "F" presently in force and up to the enactment of said State Statute performed both by the Society and each respective broadcaster; on or about the 28th day of November, 1936, the Society entered into a contract with Marianna Theatres, Inc., proprietor of a motion picture theatre, known as the Ritz Theatre, Panama City, Florida, a copy of which is hereto annexed and made a part hereof and marked Exhibit "G", which contract is presently in force and effect, and was up to the enactment of said State Statute duly performed both by the Society and by the motion picture theatre exhibitor; in addition to said contract, there are 170 other contracts made between the Society and the motion picture theatres in the State of Florida similar to Exhibit "G" presently in force and up to the enactment of said State Statute being performed both by the Society and each respective motion picture theatre exhibitor; on or about the 8th day of January, 1937, the Society entered into a contract with Carling Hotel at Jacksonville, Florida, a copy of which is hereto annexed and made a part hereof and marked Exhibit "H", which contract is presently in force and effect, and was made up to the enactment of said State Statute duly performed both by the Society and by the hotel owner; in addition to said contract, there are 183 other contracts made between the Society and hotels, restaurants, dance-halls and miscellaneous in the State of Florida similar to Exhibit "H" presently in force and up to the enactment of said State Statute duly performed both by the Society and each respective hotel, restaurant, dance-hall and miscellaneous establishment proprietor.

24. Societies similar in purpose and scope to the Society have been in existence and are organized and operating [fol. 22] under and by virtue of the laws of Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho-Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy,

Jugoslavia, Norway, Portugal, Roumania, Spain, Sweden and Switzerland.

By vitue of various treaties and proclamations of the Presidents of the United States, issued pursuant to Section 8 of the Copyright Act, and which are now in force between the United States and Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho-Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Roumania, Spain, Sweden and Switzerland, reciprocal rights are granted to citizens of the United States and to citizens of the foreign countries named whereby the citizens of such foreign countries are extended copyright protection within the United States, upon compliance with the Copyright Act with respect to their several musical compositions, and citizens of the United States are extended reciprocal protection, with respect to their several musical compositions, under the copyright acts of said countries upon complying with the copyright acts thereof. Such reciprocal protection is based upon the determination that certain reciprocal conditions for the enjoyment of copyright exist as between the United States and such respective foreign states or nations, and is accorded under and by virtue of proclamations and treaties establishing the existence of such conditions, and having the force and effect of law.

Under contracts with foreign societies, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies under such contracts have the exclusive right to, and do license within the territorial limits of their respective countries, the public performance for profit of the musical compositions copyrighted by members of the Society. The catalogues of musical compositions of said foreign societies exceed many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies, the exact number of compositions being utterly impossible to state at any one time on account of the expiration, renewal and obtaining of new copyrights. The right to perform the musical compositions embraced [fol. 23] in said foreign catalogues are included in the blanket licenses issued to individual licensees by the Society in the United States. Their 44,000 members are scattered

throughout the world, and they are not required to fix a selling price for all uses of their respective musical compositions in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid:

25. Upon information and belief, compliance with said State Statute would require the Society and its licensees to abandon the contracts between them and would compel each of the complainants, as well as other members of the Society, similary situated, to rescind their respective contracts with the Society unless they were willing to have their works used for purposes of public performance for profit in Florida by any purchaser of a sheet of music, phonograph record, music roll, electrical transcription or film, who pays the price thereof fixed by the publisher of such composition or the manufacturer of such phonograph record, music roll, electrical transcription or film; under Section 1 (e) of the Copyright Act of 1909, as amended, any manufacturer of parts of instruments serving to reproduce mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured, but the Copyright Act provides that the payment of such royalty shall not free such articles or devices from further payment of royalties in case public performances for profit are made by means of such articles or devices; many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions; the Copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or [fol. 24] electrical transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price

for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public performance for profit thereof. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Florida publicly for profit upon such a basis or on any basis wherein the fee or compensation would be included in the price paid for a copy of the sheet of music of said composition or phonograph record, music roll, electrical transcription or film thereof; complainants believe that such a requirement and compulsory license would deprive them of the exclusive rights vouchsafed to them under the Copyright Law.

26. If each complainant would be required to act independently in order to have the right to determine and fix license fees, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in the State of Florida to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants many thousands of dollars and would in fact greatly exceed the revenue which each of them might hope to collect in the State of Florida; all the users of music in the State of Florida paid for the music of the 44,000 composers represented by the Society and its affiliated societies for the year 1936, the aggregate sum of $59,306.81. In the year 1936, users located in the following counties of the State of Florida paid to the Society for licenses to publicly perform for profit musical compositions of complainants and the other members of the Society and all other Societies throughout the world affiliated with the Society, the following sums:

County	Amount
Alachula	$518.39
Bay	137.55
Bradford	27.00
Brevard	414.94
Calhoun	34.40
Citrus	63.00
[fol. 25] Clay	7.50
Columbia	90.00
Dade	21,770.36

County	Amount
DeSoto	183.95
Duval	6,161.85
Escambia	1,748.45
Franklin	67.50
Godsen	79.50
Hamilton	23.75
Hernando	30.60
Hillsborough	6,334.10
Holmes	29.30
Jackson	130.40
Jefferson	20.50
Lafayette	20.00
Lake C	190.79
Lee	82.27
Leon	535.02
Madison	38.20
Manatee	1,080.05
Marion	164.56
Monroe	154.00
Nassau	30.00
Okaloosa	20.70
Orange	3,691.61
Osceola	77.00
Palm Beach	1,791.42
Padco	50.00
Pinellas	9,646.40
Polk	1,047.22
Putnam	97.99
St. Johns	181.43
St. Lucie	260.55
Santa Rosa	95.30
Seminole	300.60
Sumter	25.40
Suwanee	40.00
Taylor	40.00
Volusia	1,706.26
Walton	42.00
Washington	25.00
Total	$59,306.81

[fol. 26] The proportion collected from each county represents the approximate proportions that were collected from

each county for other years prior to 1936, and similar sums will be collected in the same proportion in the future unless prevented by the operation of the said State Statute.

27. Complainants will be able to license users of their music in Florida without doing any act in said State, but unless the injunction prayed for herein is granted, complainants will be unable to issue any licenses from without the State of Florida without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies have at one time or another been publicly performed for profit in the State of Florida, and a great number of the copyrighted works of the complainants are being constantly performed in the State of Florida, and will continue to ~~be~~ performed in that State.

28. The following radio broadcasting stations within the State of Florida, and their respective locations, are affiliated with, and rebroadcast programs emanating from without the State of Florida, and respectively, in the studios of the Columbia Broadcasting System, Inc., National Broadcasting Co. Inc. and the National Independent Broadcasters, Inc.:

Columbia Broadcasting System, Inc.

Station	Location
WMBR	Jacksonville
WQAM	Miami
WDBO	Orlando
WDAE	Tampa
WJNO	West Palm Beach
WCOA	Pensacola

National Broadcasting Co.

WFLA	Clearwater
WJAX	Jacksonville
WIOD	Miami
WSUN	St. Petersburg

National Independent Broadcasters, Inc.

WMFJ	Daytona Beach

It is a general practice with respect to national networks to have musical programs performed in the City of New

York and in other large cities and broadcast from the radio [fol. 27] station where such program is performed. At the same time the program is transmitted by telephone wires to other stations located throughout the country, and particularly the aforementioned broadcasting stations located within the State of Florida so that the broadcast originating in the home studio of the National Broadcasting Company or of the Columbia Broadcasting Company or of the National Independent Broadcasters, Inc., or of the Mutual Broadcasting System, as the case may be, is simultaneously performed by means of a broadcast from the connecting stations, including the abovementioned stations within the State of Florida; the programs broadcast by many stations outside of the State of Florida, whether affiliated or not with any station located within the State of Florida are heard within the State of Florida, and such programs include the broadcasting of music copyrighted by the members of the Society, including the complainants herein; broadcasting stations without the State of Florida broadcast daily in excess of 100 copyrighted works of the complainants and other members of the Society and of its affiliated societies, which broadcasts are heard on receiving sets within the State of Florida.

29. The said State Statute prevents complainants from licensing the broadcasting of their compositions outside of the State of Florida if such broadcast may be heard within or transmitted by wire or otherwise to the State of Florida; it deprives complainants of the means of detecting infringements in the State of Florida; it attempts to deprive complainants of unrestricted access to the Federal Court for redress for infringement of their copyrights; it sets up a system of compulsory price-fixing of copyrights in destruction of existing copyrights and of rights to obtain the full benefits of the Copyright Act in securing future copyrights; it interferes with the publication of complainants' copyrighted compositions by compelling them to keep a record of all purchasers of copies or records thereof in the State of Florida, and imposes upon them the impossible task of determining whether public performances for profit were given or authorized by purchasers of the sheets of music or of phonograph or other records thereof in the State of Florida, or whether such performances were made or authorized by persons who had pur-

chased sheets of music or records without that State or [fol. 28] who had obtained so-called "professional" or complimentary copies thereof; unless the enforcement of this State Statute is restrained by this Court, other States in addition to Florida, Montana, Washington, Nebraska and Tennessee may enact similar Statutes requiring complainants to fix a price for all uses in each of such States, or may enact a compulsory price-fixing system entirely different from that enacted in each of the said States, all of which would work undue hardship on complainants and would violate the spirit of the Constitution and the Copyright Laws enacted thereunder.

30. Upon information and belief said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said State Statute.

31. The complainant publishers, in the regular course of their business, ship sheets of music from New York State into the State of Florida, as well as to all the other States of the Union. This is done solely in connection with their publishing business and has nothing to do with the licensing of the right of public performance for profit or any other rights given to the publishers or copyright owners under the Copyright Act. The purchasers of the sheets of music may use the same for purposes of private performance or for non-profit public performances, but they may not use them for the purpose of making mechanical records or for the purpose of public performance for profit, or for any other uses and purposes granted to the owners of the copyright by the Copyright Act.

The publishers and the Society have kept the sale of sheet music, which is the material object copyrighted, separate and apart from the copyright itself, in accordance with the provisions of the Copyright Act.

Under the State Statute, this right of separability is wholly denied. Under their contracts with the Society, the

publishers reserve the right to restrict the public perform-
[fol. 29] ance for profit of their musical compositions for the purpose of protecting investments in dramatico-musical productions wherein investments of hundreds of thousands of dollars are involved. Unless the publishers or other copyright owners can assure investors in such productions that there will be no indiscriminate and wholesale public performances of the "hit" musical compositions in such productions, the production rights will be wholly destroyed. Under the State Statute, the only alternative left to complainant publishers is to wholly refrain from shipping sheets of music through the channels of interstate commerce into the State of Florida, and said State Statute directly compels the complainant publishers to withhold shipping music into said State, except upon condition that they forego rights granted to them under the Constitution and the Copyright Laws of the United States.

32. Upon information and belief, the said State Statute is not a reasonable exercise of the police power; it is a pretext under which the State of Florida is attempting to usurp power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said State Statute interferes with the copyrights of the complainants and others similarly situated under the guise of an exercise of the police power of said State; the said State Statute, in truth and in fact, was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated, without paying compensation therefor, and without danger of being compelled to pay damages for infringement as provided for in the Copyright Act.

33. The system of licensing provided for in said State Statute would deprive complainants and others similarly situated of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted musical works, and of the right to determine the conditions under which such works might be performed, and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof.

34. The defendants, and each of them, individually and as respective officials charged with the duties of enforcing [fol. 30] said State Statute have threatened to, and will enforce such State Statute in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refuse to accept or submit to a system of compulsory licensing; and said defendants have threatened to enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail or refuse to submit to the jurisdiction of the State Courts of Florida; and defendants have threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

35. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so

great, that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without [fol. 31] the State of Florida if the public performance for profit of such music may be reproduced or performed within the State of Florida. There are 47 counties in the State of Florida, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal contracts, and if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable Court; complainants will be unable to secure any compensation for the public performance for profit of their respectice copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by any other means of rendition whatsoever within the State of Florida from any radio broadcasting, radio receiving or radio rebroadcasting station, or in any theatre or motion picture house located in the State of Florida; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of the State of Florida; complainants and others similarly situated, as well as the Society, have been compelled since the effective date of the Statute, to desist from licensing the public performance for profit of their copyrighted musical compositions in the State of Florida and have been deprived of all sources of revenue therefrom, and have been denied the privileges granted to them by the Copyright Act; and the Society has been compelled to desist from enforcing collection of payments under existing contracts between it and users since the effective date of said Statute, and has been compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions, and complainants will continue to suffer as aforesaid unless

this Court grant an injunction as prayed for; and the complainants and the Society and its affiliated societies have been and will be hindered, delayed and impeded in enforc- [fol. 32] ing their rights and remedies under the Copyright Act in the Federal Court located in the State of Florida, for infringements committed by users within the State of Florida by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated will be unable to detect and sue for infringement of their copyrighted musical works within the State of Florida; unless this Court shall determine the validity and application of said Statute in this proceeding, complainants and others similarly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Florida, and they will therefore be deprived of their property and liberty without due process of law, and denied the equal protection of the laws, all in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Sections 1, 8, 11, 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida, and Article III, Section 20 of the Constitution of the State of Florida; and complainants have no adequate remedy at law, and are relievable only in a court of equity and if complainants are not afforded the equitable relief prayed for herein, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under the State Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

36. Each of the complainants has received from the Society for the year 1936, as compensation for the public performance for profit of the complainants' works, respectively, in excess of the following sums: Carl Fischer, Inc. in excess of $50,000.00; G. Schirmer, Inc. in excess of $50,000.00;

Irving Berlin, Inc. in excess of $50,000.00; Gene Buck in excess of $5,000.00; Deems Taylor in excess of $5,000.00; Oley Speaks in excess of $5,000.00; William J. Hill in excess of [fol. 33] $5,000.00; Anne Paul Nevin in excess of $5,000; Ella Herbert Bartlett in excess of $5,000.00; and Jane Sousa in excess of $5,000.00; upon information and belief, complainants will be entitled to receive for the balance of the period for which they have entered into contracts with the Society, and for which the Society has contracts with users of music, similar amounts for each year, down to December 31, 1940, and such complainants will receive such amounts for said period if their right thereto is not interfered with and destroyed by such State Statute; approximately two-thirds of the revenue obtained by the Society and distributed to the complainants and others similarly situated, is derived from moneys paid for the right to perform publicly for profit by means of radio broadcasting, and if this Court does not interfere and restrain the enforcement of such State Statute, such revenue may be lost to the Society, and the complainants and others similarly situated will not participate in royalties from the public performance for profit by means of radio broadcasting, because such performances, even though given in other parts of the United States, may, under the provisions of such State Statute, be deemed a violation of such State Statute in the State of Florida, and complainants will lose the benefit of their said contracts with the Society and all the contracts made between the Society and users of music, and will receive no further moneys from public performance for profit by means of radio broadcasting of their musical compositions.

Said State Statute and each and every section thereof is unconstitutional and void under the aforesaid Articles and Sections of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, in that it deprives complainants of their liberty and property without due process of law and the equal protection of the laws, impairs the obligation of contract, destroys the rights of complainants in their copyrighted works, nullifies valid contracts theretofore entered into, interferes with the Federal judicial power, destroys the privileges and immunities granted to complainants, and attempts to subordinate the Federal Constitution, Treaties of the United

States with foreign nations, Presidential Proclamations and the Copyright Act of the State of Florida, and to subject complainants to an unreasonable search and seizure of their properties, effects, papers and persons.

[fol. 34] 38. If defendants are not restricted in their threatened and attempted enforcement of such State Statute, complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law, but are relievable only in court of equity.

Therefore, the complainants pray:

1. That defendants, and each of them, individually and in their respective capacities as officials of the State of Florida charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the above-named defendants, and each of them, requiring them to show cause why a temporary injunction should not issue as prayed for herein.

2. That said State Statute, and each and every part and section thereof, be declared to be unconstitutional, illegal and void, and that a perpetual injunction be issued restrain-

ing the enforcement of said State Statute and each and every part and section thereof, as hereinabove prayed for.

3. That a writ of subpoena may issue to the defendants, requiring them to answer this bill of complaint fully and [fol. 35] truthfully, but not on oath, an oath being hereby waived, and that further and general relief be granted as the nature of complainants' case may require, or to equity may seem just and proper.

Wideman, Wardlaw & Caldwell, Solicitors for Complainants, Office & P. O. Address, 1400 Harvey Bldg., West Palm Beach, Florida. Frank J. Wideman, of Counsel. Gene Buck, J. Field Wardlaw, Manley P. Caldwell, of Counsel.

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Exhibit "A"

No. 5242—5210

AGREEMENT

between

J. Fischer & Bro. (Inc.), New York City, party of the first part, and Deems Taylor of New York City party of the second part:

I. J. Fischer & Bro. agree to publish Banks O'Doon — Captain Stratton's Fancy by Deems Taylor.

II. J. Fischer & Bro. agree to defray all expenses made necessary to produce printed copies of the first and all subsequent editions of the musical compositions mentioned in Article I.

III. Deems Taylor, party of the second part, or his assigns to receive in consideration of this agreement, ten per cent (10%) of the marked or retail price on every copy sold.

IV. In said J. Fischer & Bro., its successors or assigns, or legal representatives, shall be vested the exclusive right of copyrighting, publishing and vending the said musical compositions by Deems Taylor, party of the second part, or of making arrangements for so doing with its agents and representatives in all countries.

V. J. Fischer & Bro. agree to make settlement annually in the month of January as of January First.

VI. Copies of musical compositions mentioned in Article I. are to be printed and placed on sale when J. Fischer & Bro. find it convenient so to do.

VII. It is further agreed that said Deems Taylor, party of the second part, shall forthwith sell, assign, transfer and turn over to J. Fischer & Bro., party of the first part, his copyright and all his title and interest in and rights under the same unto the said J. Fischer & Bro., for the consideration aforesaid.

VIII. In said J. Fischer & Bro., party of the first part, its successors or assigns, shall be vested the rights during the full life of copyright to authorize or permit the performance of the musical compositions mentioned in Article I.

IN WITNESS WHEREOF the party of the first part has hereunto affixed its corporate seal and the party of the second part his hand and seal this Sixteenth day of March, 1923.

Witness:

A. Schmitt ..... as to

H. Roth ..... as to

J. FISCHER & BRO.

by .....

.....Deems Taylor.....(L. S.)

1936-1940

No.

Rec'd 4/25/35

Exhibit "B"

Agreement Between

Carl Fischer, Inc.

and

American Society

of

Composers, Authors & Publishers

Thirty Rockefeller Plaza

NEW YORK CITY

DATED:

April 12th, 1935.

37

38

called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The **Owner** sells, assigns, transfers and sets over unto the **Society** for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the **Owner** is a copyright proprietor; or

Which the **Owner**, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the **Owner** now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the **Owner**, alone, jointly or in collaboration with others; or

In which the **Owner** may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the **Society** by this instrument and shall vest in and be the absolute property of the **Society** for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the **Owner** and/or others, as well as the right to sue under such copyrights in the name of the **Society** and/or in the name of the **Owner** and/or others, to the end that the **Society** may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the **Owner** reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sound; Provided, however, that the **Owner** shall have the right, in good faith, by written notice to the **Society**, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the **Owner**, and the **Society** agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the **Owner** notify the **Society** in writing to restrict, limit or prohibit the public performance of such copyrighted work, the **Owner** shall not, by the service of such notice, become repossessed of any of the rights transferred to the **Society** by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The **Society** agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the **Owner**, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The **Owner** hereby irrevocably, during the term hereof, authorizes, empowers and vests in the **Society** exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the **Owner** and/or others, in any and all works copyrighted by the **Owner**, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the **Owner** and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the **Owner** and/or in the name of the **Society**, or others in whose name the copyright may

Tightly Bound

stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the **Owner** might or could do had this instrument not been made.

5. The **Owner** hereby makes, constitutes and appoints the **Society**, or its successor, the **Owner's** true and lawful attorney, irrevocably during the term hereof, and in the name of the **Society** or its successor, or in the name of the **Owner**, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The **Owner** agrees from time to time to execute, acknowledge and deliver to the **Society**, such assurances, powers of attorney or other authorizations or instruments as the **Society** may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the **Society** shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the **Owner** within his class may be changed.

8. The **Owner** agrees that his classification in the **Society** as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the **Society**, in case of appeal by him, shall be final, conclusive and binding upon him.

The **Society** shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the **Society's** membership a just, fair, equitable and accurate classification.

The **Society** shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. **"Public Performance" Defined.** The term **"public performance"** shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. **"Musical Works" Defined.** The phrase **"musical works"** shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the **Society**, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

12*—As per rider below

SIGNED, SEALED AND DELIVERED, on this 12th day of April, 1935.

Earl Fischer Inc.

Owner

per Walter Fischer Pres

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

Society

By Joseph Young
Secretary

*—12. This rider constitutes #12 of the foregoing contract.

By accepting this contract the Society agrees that all agreements heretofore or hereafter entered into with members for the period beginning January 1st, 1936, are or will be identical in all respects with this agreement.

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FOREIGN AGREEMENTS AT THIS DATE IN EFFECT

(See paragraph 11 of the within agreement)

It is distinctly agreed and understood that the powers, rights, authorities and privileges vested in the Society by this instrument, do not include world rights, but are restricted to the United States, ——, Austria, Denmark, France, Belgium, Egypt, Greece, Holland, Japan, Monaco, Portugal, Roumania, Switzerland, Germany, Hungary and Italy.

1—8—36.

It is also understood and agreed that the powers, rights, authorities and privileges vested in the Society by the within instrument shall include Great Britain.

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1940

No. 42

Rec'd 6/25/35

Exhibit "C"

Agreement Between

Gene Buck

and

American Society

of

Composers, Authors & Publishers

Thirty Rockefeller Plaza

NEW YORK CITY

DATED:

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June 25th, 1935.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (for brevity called "Society"), in consideration of the premises and of the mutual covenants hereinafter contained, as follows:

The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined), in each musical work:

Of which the Owner is a copyright proprietor; or

Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or

In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or

Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or

In which the Owner may hereafter, during the term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately upon the work being written, composed, acquired, owned, published or copyrighted.

The rights hereby assigned shall include:

(a) All the rights and remedies for enforcing the copyright or copyrights of such musical works, whether such copyrights are in the name of the Owner and/or others, as well as the right to sue under such copyrights in the name of the Society and/or in the name of the Owner and/or others, to the end that the Society may effectively protect and be assured of all the rights hereby assigned.

(b) The exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this assignment the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

(c) The right of public performance by means of radio broadcasting, telephony, "wired wireless," all forms of synchronism with motion pictures, and/or any method of transmitting sounds. Provided, however, that the Owner shall have the right, in good faith, by written notice to the Society, to restrict, limit or prohibit the public performance by radio broadcasting of works the copyright of which is vested in the Owner, and the Society agrees that all licenses by it issued shall contain a provision reserving its right to restrict or limit, or to prohibit entirely, the performance by broadcasting of any works in its repertory; and Provided further, that if the Owner notify the Society in writing to restrict, limit or prohibit the public performance of such copyrighted work, the Owner shall not, by the service of such notice, become repossessed of any of the rights transferred to the Society by this assignment.

2. The term of this agreement shall be for a period of five (5) years from the first day of January, 1936, and expiring on the 31st day of December, 1940.

3. The Society agrees, during the term hereof, in good faith to use its best endeavors to promote and carry out the objects for which it was organized, and to hold and apply all royalties, profits, benefits and advantages arising from the exploitation of the rights assigned to it by its several members, including the Owner, to the uses and purposes as provided in its Articles of Association (to which reference is hereby made), as now in force or as hereafter amended.

4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society exclusively, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may

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stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the **Owner** might or could do, had this instrument not been made.

5. The **Owner** hereby makes, constitutes and appoints the **Society**, or its successor, the **Owner's** true and lawful attorney, irrevocably during the term hereof, and in the name of the **Society** or its successor, or in the name of the **Owner**, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises.

6. The **Owner** agrees from time to time to execute, acknowledge and deliver to the **Society**, such assurances, powers of attorney or other authorizations or instruments as the **Society** may deem necessary or expedient to enable it to exercise, enjoy and enforce, in its own name or otherwise, all rights and remedies aforesaid.

7. It is mutually agreed that during the term hereof the Board of Directors of the **Society** shall be composed of an equal number of writers and publishers respectively, and that the royalties distributed by the Board of Directors shall be divided into two (2) equal sums, and one (1) each of such sums credited respectively to and for division amongst (a) the writer members, and (b) the publisher members, in accordance with the system of distribution and classification as determined by the Classification Committee of each group, in accordance with the Articles of Association as they may be amended from time to time, except that the classification of the **Owner** within his class may be changed.

8. The **Owner** agrees that his classification in the **Society** as determined from time to time by the Classification Committee of his group and/or the Board of Directors of the **Society**, in case of appeal by him, shall be final, conclusive and binding upon him.

The **Society** shall have the right to transfer the right of review of any classification from the Board of Directors to any other agency or instrumentality that in its discretion and good judgment it deems best adapted to assuring to the **Society's** membership a just, fair, equitable and accurate classification.

The **Society** shall have the right to adopt from time to time such systems, means, methods and formulae for the establishment of a member's status in respect of classification as will assure a fair, just and equitable distribution of royalties among the membership.

9. **"Public Performance" Defined.** The term "public performance" shall be construed to mean vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including transmissions by radio broadcasting stations, transmission by telephony and/or "wired wireless"; and/or reproductions of performances and renditions by means of devices for reproducing sound recorded in synchronism or timed relation with the taking of motion pictures.

10. **"Musical Works" Defined.** The phrase "musical works" shall be construed to mean musical compositions and dramatico-musical compositions, the words and music thereof, and the respective arrangements thereof, and the selections therefrom.

11. The powers, rights, authorities and privileges by this instrument vested in the **Society**, are deemed to include the World, provided, however, that such grant of rights for foreign countries shall be subject to any agreements now in effect, a list of which are noted on the reverse side hereof.

SIGNED, SEALED AND DELIVERED, on this 20th day of June, 1935.

Owner ..... Ben Buck .....

.....

Society AMERICAN SOCIETY OF COMPOSERS AUTHORS AND PUBLISHERS

By ..... Joseph W. Young, Jr. .....

Secretary

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Exhibit "D"

Articles of Association

of the

American Society
of
Composers, Authors
and
Publishers

AS IN EFFECT
1937

ARTICLES OF ASSOCIATION
Of
AMERICAN SOCIETY of COMPOSERS, AUTHORS and PUBLISHERS

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* Page references are to the original articles as printed and not to this exhibit.

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* Page references are to the original articles as printed and not to this exhibit.

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* Page references are to the original articles as printed and not to this exhibit.

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* Page references are to the original articles as printed and not to this exhibit.

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* Page references are to the original articles as printed and not to this exhibit.

Article I
Objects

SECTION 1. We constitute ourselves a voluntary association under the name of "American Society of Composers, Authors and Publishers," for the following purposes, to-wit:

(a) To protect composers, authors and publishers of musical works against piracies of any kind;

(b) To promote reforms in the law respecting literary property;

(c) To Procure uniformity and certainty in the law respecting literary property in all countries;

(d) To facilitate the administration of the copyright laws for the protection of composers, authors and publishers of musical works;

(e) To abolish abuses and unfair practices and methods in connection with the reproduction of musical works;

(f) To promote and foster by all lawful means the interest of composers, authors and publishers of musical works;

(g) To grant licenses and collect royalties for the public representation of the works of its members by instrumentalists, singers, mechanical instruments, radio broadcasting stations, or any kind of combination of singers, instrumentalists and mechanical instruments, and to allot and distribute such royalties;

(h) To adjust and arbitrate differences and controversies between its members and between its members and others, and to represent its members in controversies, actions and proceedings, involving the right of public performance of any work of any member, or the question of authorship in any work of any member;

(i) To promote friendly intercourse and united action among composers, authors, publishers and producers of musical works;

(j) To acquire, own and sell real and personal property, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the society.

(k) To enter into agreements with other similar associations in foreign countries, providing for the reciprocal protection of the rights of the members of each society.

(l) To do any and all other acts or things which may be found necessary or convenient in carrying out any of the objects of the Society or in protecting or furthering its interests or the interests of its members.

SECTION 2. The principal office of the Society is to be located in the City of New York.

Article II
Duration

The duration of the Society shall be ninety-nine years.

Article III
Membership

SECTION 1. The membership of this Society shall be divided into five classes, as follows:

Music Publishers

Any person, partnership, firm or corporation regularly engaged for a period of not less than one year in the music publishing business shall be eligible to membership in this class.

Composers and Authors

Any composer and/or author of musical works who regularly practices the profession of writing music and/or the text or lyrics of musical works, and who shall have had not less than five works of his composition or writing regularly published, shall be eligible to membership in this class.

Non-Participating

Each person, partnership, firm or corporation hereafter elected to membership shall be first assigned to this Class, and shall remain therein for a period not exceeding one year from election. At the termination of the said period the Board of Directors shall, by two-thirds vote of those present, determine whether the membership in this class shall continue, and if so for what additional period, or shall be transferred to the appropriate one of the two preceding classes, or be discontinued. No such membership shall, however, be discontinued except after due notice to the member and an opportunity afforded him to appear before the Board of Directors and show cause why the same should not be discontinued.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the two preceding classes of members.

Honorary Membership

Any person, firm or corporation which has rendered to the art or industry of music, or to this Society, a notable or conspicuous service, may be eligible in this Class and elected thereto by unanimous vote of the Board of Directors. All nominations in respect of this class of membership shall, however, be tabled at the meeting first presented, and may not be acted upon until or after the next succeeding meeting.

Members in this Class shall not be entitled to vote, hold office, or share in any of the rights, benefits, privileges, royalties or emoluments of the first two Classes hereinabove described.

Successors of Deceased Composers and Authors

Any person who has acquired, by will or under any law, the right, title and interest of a deceased composer or author in any musical works, including the right of public performance thereof, may be elected to membership under this Class. Members of this Class shall not have voting power or be eligible to office.

Dues

SECTION 2. The annual dues, payable on the first day of January in each year, shall be as follows:

Music Publishers	$50.00
Composers and Authors	10.00
Successors to Deceased Composers and Authors	10.00

Upon election to either of the above Classes the member shall pay the pro-rata of annual rate to the first day of the following January, and thereafter at the annual rate of his Class.

Non-Participating	None
Honorary	None

Unless otherwise directed by the Board of Directors, all sums received in payment of dues shall be for the use and benefit of the Relief Fund of the Society.

Upon the default in excess of ninety days in payment of any dues, after notice thereof to the member, the Board of Directors may suspend or expel the delinquent member.

Application for Membership

SECTION 3. Shall be made in writing upon a printed blank form prepared by the Committee on Membership. Every application shall be signed by an individual applicant in person, by a firm, through a co-partner, by an association or corporation through a duly authorized officer. The application shall be submitted to the Membership Committee and shall be accompanied by proof of eligibility to membership.

Intent of Application

SECTION 4. The signing and presentation of such an application to the Membership Committee, shall be deemed and construed to be an agreement on the part of the applicant to fulfill, duly perform, and abide by the Articles of Association, and all requirements herein contained; and to conform to, duly perform and abide by, all by-laws, rules, regulations or resolutions, whether expressed in the Articles of Association or otherwise, which may be in force at the time of such application or may thereafter from time to time be adopted, and to all amendments of and additions to the Articles of Association, by-laws, rules or regulations which after the time of such application may from time to time be adopted.

Election to Membership

SECTION 5. A majority vote of all members of the Board of Directors shall be necessary to elect an applicant to membership.

Obligation of Applicant

SECTION 6. Each member shall, upon election to Active Membership, execute an assignment in such form as the Board of Directors shall approve, vesting in the Society the exclusive right to license the non-dramatic public performance of the members works for the period of any then existing agreement between the Society and its members.

Members' List of Works

SECTION 7. The applicant on being elected to membership shall, upon request, state upon a regular printed form furnished by the Secretary, a brief title, description and the date of copy-

right, of each work published or written by him. Each member shall upon the publication of any work of which he is the author, composer or publisher, furnish to the Secretary, a brief title, description, and the date of copyright thereof.

Transfer of Non-Participating Member

SECTION 8. Upon the transfer of a non-participating member to either "Music Publisher" or "Composers and Authors" Class, and before the transfer shall be deemed as in effect, the member shall execute and deliver to the Society an assignment of non-dramatic public performing rights, in the form submitted by the Society, all of which rights so vested in the Society shall be known as the "performing rights" and are to be held and enjoyed by the Society from the date of election to expiration of any then existing agreement between the Society and its members.

Membership Roll

SECTION 9. It shall be the duty of the Membership Committee to prepare and keep a membership roll or list of members of the Society.

False Representation by Member

SECTION 10. Whenever it shall appear to a majority of the Membership Committee that a misstatement upon a material point has been made to it by a member, upon his application either for membership or reinstatement, it shall report the case to the Board of Directors, who by a two-thirds vote of all the members of the Board may expel the member after a trial as in these articles provided.

Failure of Member to Qualif

SECTION 11. If within six weeks after the transfer of a "Non-Participating" member to either "Music Publishers" or "Composers and Authors" Class, the members shall have failed to execute and deliver to the Society the assignment as provided by Section 8 preceding, and to comply with all other rules, regulations and requirements of the Society, the membership shall be discontinued.

Voting

SECTION 12. No co-partnership, firm, association or corporation shall have more than one vote or representative in the Society. In case of a co-partnership, a member thereof, and in case of an association or corporation, an officer thereof, shall be duly designated as its representative. Such designation shall be filed with the Secretary of the Society.

Article IV
Management
Board of Directors
Elections

SECTION 1. The government of the Society shall be vested in, and its affairs shall be managed by a Board of twenty-four directors. They shall be elected at each annual meeting of the Board of Directors by a two-thirds vote of the entire Board and shall continue until their successors are elected. They shall be divided into three divisions of equal number. At the first election hereafter held one division, consisting of four publishers, two authors and two composers, shall be elected for one year; one division similarly constituted for two years and one division similarly constituted for three years; but when the term of each division expires their successors shall be elected by the Board of Directors for three years.

At all times six of the members of the Board shall be composers, six authors and twelve publishers. Any vacancy in the Board shall be filled from the class of members in which the vacancy occurred and shall by nomination of the remaining Board members of such class, be elected by a two thirds vote of the directors present.

Thirteen members shall be necessary to constitute a quorum, and the affirmative vote of two-thirds of such quorum shall be required and shall be sufficient to adopt or pass any motion or resolution authorizing or directing any act or thing within the power of the Board. Any number less than a quorum may meet and adjourn from time to time until a quorum be present.

The Board may determine the rules of its procedure and make any and all regulations necessary for the carrying on of the business of the Board of Directors and the officers, agents and servants of the Society.

Any former President of the American Society of Composers, Authors and Publishers shall be ex-officio member of the Board of Directors, without the right to vote. *Adopted—March* 25, 1931.

Meeting of Board

SECTION 2. The Board shall meet at least once in each month except in the months of July, August and September, and shall hold an annual meeting in the month of January of each year. Notices of regular or special meetings of the Board of Directors shall be given by mail by the Secretary to each director at his last known post office address at least two days previous to the time fixed for the meeting. Special meetings of the Board of Directors may be called by the President or Secretary, and shall be called by either of them on written request of any seven directors.

Report of Board at Meetings

SECTION 3. The Board of Directors shall keep a record of its proceedings which shall be submitted at the annual meeting of the Society, and shall report at such meeting, or at any special meeting of the Society, any business which in its judgment requires the action of the Society.

Article V
Powers of the Board of Directors
Management

SECTION 1. The Board of Directors shall have charge of and supervision over the general management of the business of the Society, and in addition to the powers by these articles expressly conferred upon it, may exercise all such powers and do all such acts and things as may be exercised or done by the Society.

Contracts

SECTION 2. Without prejudice to the general powers conferred by the last preceding section and the other powers conferred by these articles, it is hereby expressly declared that the Board of Directors shall have the following powers, that is to say:

To make contracts or authorize contracts to be made by officers of the Society or by any of the committees provided for by these articles; to fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; to collect such royalties; to maintain all legal proceedings necessary to enforce payment of such royalties and compromise claims for damages and penalties for unlawful performances; to distribute among the members the royalties collected in the proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles; to enforce the fulfillment of all contracts, both on the part of the members of the Society and third parties, that may have been made by the Society; to authorize the prosecution and defense of any matter, action or proceeding within the scope of the Society, or affecting its interests or involving the rights of public performance of any work of any member or the question of authorship in any work of any member.

To purchase or otherwise acquire for the Society any property, rights and privileges which the Society is authorized to acquire, at such prices and on such terms and conditions, and for such considerations, as it thinks fit.

To appoint and at its discretion remove or suspend, such assistant secretaries, assistant treasurers, managers, subordinates, assistants, clerks, agents and servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties and fix and from time to time change their salaries or emoluments, and to require security in such instances and in such amounts as it may think fit.

To confer by resolution upon any committee or officer of the Society the right to choose, remove or suspend such subordinate officers, agents or servants.

To determine who shall be authorized to sign, on the Society's behalf, receipts, endorsements, checks, releases, contracts and documents.

From time to time to provide for the management of the affairs of the Society in such manner as it thinks fit, and in particular from time to time to delegate any of the powers of the Board of Directors to any Committees, officers or agents, and to appoint any persons to be the agents of the Society, with such powers (including the power to sub-delegate) and upon such terms as may be thought fit.

To appoint and dissolve all committees; to define, alter and regulate the jurisdiction and exercise original and supervisory jurisdiction over any and all subjects and matters referred to said committees; it may direct and control their actions or proceedings at any stage thereof, and shall try all charges against members and punish such as may be found guilty.

The Board of Directors shall have the power to make such regulations and to take such action not inconsistent with the articles of association and the by-laws, as it may deem advisable for the

protection of the property and for the general objects of the Society. It shall adopt a seal of the Society.

The Board of Directors shall have the control over and power of disposition of all funds belonging to the Society. It shall determine the manner and form of their investment and the depositaries of such funds.

Salaries of Directors

SECTION 3. Directors as such shall not receive any salaries for their services except that the sum of $240 may be appropriated out of the treasury at each meeting of the Board of Directors for distribution as attendance fees among such directors of the 24 members of the Board as shall be present within five minutes after the meeting has been called to order.

In case a director shall be absent from three consecutive meetings of the Board of Directors, unless he shall have been by the President excused from attendance, his office as a Director, and any other office held, shall be declared vacant, and at the next regular meeting of the Board of Directors a successor shall be elected.

SECTION 4. That no resolution increasing salaries or granting emoluments to officers and employees receiving $5,000.00 yearly or more, or making unusual or extraordinary expenditure or financial committment may be passed by the Board of Directors until such resolution is first proposed at a regular or special meeting of the Board of Directors and laid upon the table for final action at its next succeeding meeting. Notice of the meeting at which such resolution is to be voted upon granting the same must be given to the members of the Board in writing at least five days in advance.

Adopted—March 28th, 1929.

Vacancy in Board of Directors

SECTION 5. In case of the death, removal or resignation of a director, or of any vacancy in the Board of Directors, such vacancy shall be filled by the election of a director belonging to the same class of directors as the member of the Board whose place is to be filled, for the unexpired term, at the next regular meeting, in the manner provided for the election of directors by the Board of Directors at annual meetings.

Removal or Suspension of Director or Officer

SECTION 6. In case, at any regular or special meeting of the Board of Directors, two-thirds of those present shall be of the opinion that sufficient cause exists for the removal of any director or officer from such office, and that his removal is for the best interest of the Society, a special meeting of the Board of Directors shall be called, upon three days' written notice to each of the directors, specifying the charges against the director or officer against whom such are directed, and a copy of such charges shall be served upon the director or officer so charged, at least three days before such special meeting. In case, at such special meeting, the directors shall after hearing such director or officer, determine by an affirmative vote of two-thirds of all the directors in office, that sufficient cause exists for his removal, and that his removal is for the best interest of the Society, then such person shall immediately cease to be a director or officer as the case may be, and the resulting vacancy shall be filled as provided in Section 5 next above.

The Board of Directors may suspend from office any officer or director against whom charges have been preferred.

Disqualification of Member of Board of Directors

SECTION 7. No member of the Board of Directors shall be disqualified from participating in any meeting, action or proceeding of any kind whatever of said Board of Directors, by reason of being or having been a member of a Standing Committee or Special Committee which has made prior inquiry, examination or investigation of the matter under consideration. Nor shall any member of any Standing or Special Committee be disqualified, by reason of such membership, from acting as a member of the Board of Directors upon any appeal from any decision of such Standing or Special Committee. But no member shall participate in the adjudication of any case in which he is personally interested.

Examination of Member

SECTION 8. The Board of Directors may, by a two-thirds vote of its members present, require that any member of the Society shall submit to the Board of Directors or any Standing or Special Committee, for examination, such portion of his books or papers as are material and relevant to any matter under investigation by said Board of Directors or by any Standing or Special Committee.

Any member who shall refuse or neglect to comply with such requirements, or shall wilfully destroy any such required evidence, or who, being duly summoned, in pursuance of a two-thirds vote of the members of the Board of Directors present, shall refuse or neglect to appear before the Board of Directors or any Standing or Special Committee, as a witness, or refuse to testify before any such Committee, may be adjudged guilty of an act detrimental to the interest or welfare of the Society.

Final Decision by Trial

SECTION 9. Any hearing or trial may be adjourned, from time to time, by the Board of Directors in its discretion; but no member thereof, who shall not have been present at every meeting of said Board of Directors at which evidence is taken, or at which an accused member, or a member whose conduct is involved in the hearing or trial, is heard, shall participate in the final decision.

Article VI
Officers

SECTION 1. Shall consist of a President, two Vice-Presidents, a Secretary, Assistant Secretary, a Treasurer and an Assistant Treasurer who shall be Directors of the Society, and a Counsel who need not be a member of the Society.

Election of Officers

SECTION 2. The President, the Vice-Presidents, the Secretary, Assistant Secretary, the Treasurer, and Assistant Treasurer, shall be elected annually by the Board of Directors by a two-thirds vote of the entire board, and such officers shall hold the same offices in the Board of Directors. Each officer, excepting the Counsel, shall serve for the term of one year and until the election and qualification of his successor.

Appointment of Counsel

SECTION 3. The Counsel shall be appointed by the Board of Directors for such term as may be decided by the Board.

Vacancy of Office

SECTION 4. In case a vacancy shall occur in the office either of the President, Vice-Presidents, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer, an election shall be held forthwith to fill vacancy for the unexpired term.

Expulsion or Suspension of Officer

SECTION 5. The expulsion or suspension of a member holding any office or position, to which he has been either elected or appointed, shall create a vacancy therein which shall be filled as provided in these articles.

Article VII
The President

SECTION 1. The President shall be the chief executive officer of the Society. He shall preside at all meetings of the Board of Directors. He shall have general supervision over the business affairs and property of the Society and over its several officers.

He shall see that all orders and resolutions of the Board of Directors and of the Society are carried into effect and he shall sign all contracts and agreements authorized by the Board of Directors, unless the Board shall otherwise direct. The President shall submit to the Board of Directors, as soon as may be after the close of each fiscal year, and to the members at each annual meeting a complete report of the operations of the Society or the preceding year, and of the state of its affairs, making such recommendations as he thinks proper, and he shall from time to time report to the Board of Directors all matters within his knowledge which the interests of the members may require to be brought to its notice. The President shall be ex-officio a member of all standing committees.

Article VIII
The Vice-President

SECTION 1. The Vice-President shall have such powers and perform such duties as the Board of Directors may from time to time prescribe, and perform such other duties as may be prescribed in these by-laws. In case of the absence of the President or his inability to act, the Vice-President shall discharge the duties of the President.

Article IX
The Treasurer

SECTION 1. The Treasurer shall have charge of the funds, securities, receipts and disbursements of the Society. He shall deposit all moneys and other valuable effects in the name and to the credit of the Society in such depositaries as the Board of Directors may from time to time designate. He shall disburse the funds of the Society as may be ordered by the Board, by checks or drafts upon the authorized depositaries of the Society, signed by the President or Vice-President and countersigned by himself or an assistant Treasurer. He shall take and preserve proper vouchers for all moneys disbursed. He shall render to the President or to the directors, at the regular meetings of the Board, whenever the President or said Board shall require him to do so, and at every annual meeting of the Society an account of the financial conditions of the Society and of all of his transactions as Treasurer; and as soon as may be after the close of each fiscal year he shall make and submit to the Board of Directors a like report for each fiscal year. He shall keep at the principal office of the Society full and correct books of account of all its business and transactions. He shall give to the Society a bond in such sum as the Board of Directors may from time to time designate conditioned for the faithful performance of the duties of his office and the restoration to the Society at the expiration of the term of his office or in case of his death, resignation or removal from office, of all books, papers, vouchers, money or other property of whatever kind in his possession belonging to the Society. In the absence of the Treasurer or his inability to act, the Assistant Treasurer shall perform all the duties of the Treasurer. The Treasurer shall pay no bills unless they are properly certified by the officer or committee authorized by the Board of Directors to make the expenditures. The books and accounts of the Society shall be audited monthly in such manner as the Board of Directors may order.

Article X
The Secretary

SECTION 1. The Secretary shall be ex-officio Secretary of the Board of Directors and of all standing committees. He shall record all the votes and proceedings of the meetings of the Society, and of the Board of Directors, and of all committees, in a book or books. He shall record all the votes and proceedings of the meetings of the Society, and when authorized by the Board of Directors he shall affix such seal to any instrument requiring the same. He shall countersign all contracts and agreements signed by the President. The seal of the Society, so affixed, shall always be attested by the signature of the Secretary, or an Assistant Secretary. He shall give notice of all meetings of the Society, and of the Directors, and of all committees and of all calls for assessments to be paid by the members. The Secretary shall also have such other powers and perform such other duties as pertain to his office, or as the Board of Directors may from time to time prescribe. In the absence of the Secretary or his inability to act, the Assistant Secretary shall have all the foregoing duties.

Article XI
The Counsel

The Counsel shall be the legal adviser of the Society, the Board and the various committees. He shall have supervision of all matters involving legal questions, and shall appear for the Society in all actions or proceedings.

Article XII
Absence or Suspension of Officer

In case of the absence of the President, a Vice-President, the Secretary, Assistant Secretary, the Treasurer or Assistant Treasurer, or in case of the suspension of any such officer pending his trial on charges, the Board may delegate his powers and duties to any other officer, or to any Director for the time being.

Article XIII
Order of Business, Directors' Meetings

The order of business at the meetings of the Board shall be as follows:

1. A quorum of thirteen members being present the President shall call the Board to order.
2. The minutes of the last meeting shall be read and considered as approved, if there be no amendments.
3. Reports of officers of the Society.
4. Reports of Committees.

5. Unfinished business.
6. Miscellaneous business.
7. New business.

Article XIV
Standing Committees

SECTION 1. FINANCE COMMITTEE. There shall be a Finance Committee of three Directors appointed by the President, who shall attend to and supervise all the fiscal operations of the Society to the extent and in the manner directed by the Board, and this or such other committee as may be appointed by the President shall examine all accounts of the Society at the close of each fiscal year and at such other times as may be deemed necessary, and report thereon.

SECTION 2. ADMINISTRATIVE COMMITTEE. The President may also appoint an Administrative Committee from the members, who shall advise with and aid the officers of the Society in all matters concerning its interests and the management of its business and generally perform such duties and exercise such powers as may be prescribed or delegated by the Board of Directors from time to time. This Committee shall consist of such number as the President shall from time to time see fit. (See Section 5.)

SECTION 3. MEMBERSHIP COMMITTEE. The President shall appoint a Membership Committee consisting of five directors who shall pass upon the applications filed with the Committee and shall verify the statements therein contained, and may require of each applicant additional proof of eligibility to membership.

SECTION 4. COMPLAINT COMMITTEE. The Complaint Committee shall consist of three members of the Board appointed by the President.

Any member against whom a complaint is made before this Committee of violation of the Articles of Association, the by-laws or any resolution of the Society, or of the Board of Directors, regulating the conduct of the members, or of any conduct or proceeding inconsistent with the Articles of Association, or of misconduct, fraud, fraudulent acts or acts derogatory to the welfare of or prejudicial to the Society, shall be notified thereof, and if he desires he shall be heard in his defense, and shall be afforded an opportunity to examine all charges, papers and evidence submitted to the Committee, and to make answer thereto. The Committee shall have power to make rules respecting hearings upon such complaints. Proceedings before the Committee shall be confidential, and shall be disclosed only as the Directors order, after the proceedings have been reported to them. Should the circumstances warrant, the complaint shall be referred to the Board of Directors with all evidence taken before the Committee, and the Board, after investigating said charges, shall summon before it the accused member where he shall have an opportunity to be again heard in person before final action in the case, and, if in the opinion of the Board, the charge or charges against said accused member be substantiated, it may by a vote of not less than two-thirds of the entire Board, censure, fine, suspend or expel said member, and the decision of the Board of Directors shall be conclusive and final.

SECTION 5. TERM OF COMMITTEES. All standing committees shall be appointed for a term of one year, and shall remain in office until successors are appointed, or until vacated or voided by the Board of Directors.

Except as to the Administrative Committee the membership of Committees shall consist exclusively of members of the Society.

SECTION 6. CLASSIFICATION COMMITTEE. There shall be two Classification Committees for the allotment of royalties—one for the classification of "Music Publisher" members and one for the classification of "Composer and Author" members. The Classification Committee for the Music Publisher Members shall consist of the publisher members of the Board of Directors, and the Classification Committee for the composer and author of members shall consist of the composer and author members of the Board of Directors.

Each such committee shall meet not less than once in each quarter for the purpose of classifying the members over which it shall have jurisdiction.

It shall be the duty of the Classification Committee to determine the status of each member of the Society with respect to the share of the royalties to which he is entitled in the distribution of royalties directed to be made by the Board of Directors. Such Committees, in fixing the status of a member shall take into consideration the number, nature and character of works composed, written or published by such member, the popularity and vogue of such works, the length of time in which the works of the member have been a part of the catalogue of the Society and generally the prestige, reputation, qualifications, standing and service which such member has rendered to the

Society. Such Committee shall, before any distribution of royalties is ordered by the Board, review and revise the classification of the respective members, to the end that the allotment and apportionment of the royalties among the respective members shall be fair, just and equitable to the entire membership.

The Classification Committee shall create several classes, each such class to consist of a group of members having a like status; each member of such group to share equally in the distribution of royalties with the other members of such group. The Committees shall diligently and industriously make due and proper investigation, before each distribution, of the members' standing and advance or reduce a member, as the case may be, from one class to another as the facts and circumstances may warrant, based upon the standards hereinabove set forth.

Protest and Appeal from Classification

Any member, aggrieved by his classification may, after any distribution, file a protest in writing with the Classification Committee having jurisdiction over his classification. It shall be the duty of the Classification Committee to hear such member and to accept from him all papers in evidence submitted to the Committee. The Committee shall have the power to make rules respecting hearings upon such protests, with full power to appoint a sub-committee to investigate such protest.

The Committee shall make its decision within thirty days from the date of filing the protest. The member shall have the right to appeal from such decision to the Board of Directors by filing a notice of appeal in writing with the Secretary of the Society, in which case the protest, with all evidence taken before the Committee shall be referred to the Board of Directors. The Board, after investigating such protest, shall determine the classification of such member by a vote of not less than two-thirds of the directors present. The decision of the Board of Directors shall be conclusive and final. In case of a reclassification of a member, such reclassification shall not be retroactive but shall become effective on the succeeding distribution.

Writers' Board of Appeals

In addition to the composer and author Classification Committee, there shall be elected annually from the general membership (publisher members not voting) three committees, each to consist of three members, one committee of popular song composers and authors, one committee of production composers and authors, and one committee of standard composers and authors; these three committees shall constitute a composer and author board of appeals of nine men, and the personnel of said committees shall be made up as follows:

The Secretary of the Society shall, prior to ninety (90) days before the annual meeting, mail to the class AA members in the popular and production groups, a complete alphabetical list of all Class AA composer and author members of each group and to all standard members a complete alphabetical list of all Class AA composer and author members to BB (inclusive) without disclosing the classification of any of those whose names appear on the list; he shall at the same time mail to Class A through B (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class A through B members and each of these respective groups without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to the standard and composer groups from Classes B through C (inclusive), without disclosing the classification of any of the members whose names appear on the list; he shall, at the same time, mail to Class CC through 3 (inclusive), members in the popular and production groups, a complete and alphabetical list of all Class CC through 3 (inclusive), members of each of these groups without disclosing the classification of any of the members whose names appear on the list, and mail to the standard group classes DD through 3, a complete alphabetical list of members of these groups without disclosing the classification of any of the members whose names appear on the list.

The members of each group shall vote to elect one member of said group to each of the three committees constituting the composer and author board of appeals; the person receiving the greatest number of votes in his respective group shall be deemed to be elected to said board of appeals; in the event such member is not available for service, then the person in the same group receiving the next greatest number of votes shall automatically take the place of the absentee as an alternate member of the Board of Appeals.

These nine men so elected shall constitute the Board of Appeals, and said Board shall consist of the following three committees taken from the following groups of classification:

1 member on the Popular Writers' Committee from Class AA.

1 member on the Popular Writers' Committee from Classes A through B (inclusive).
1 member on the Popular Writers' Committee from Classes CC through 3 (inclusive).
1 member on the Production Writers' Committee from Class AA.
1 member on the Production Writers' Committee from Classes A through B (inclusive).
1 member on the Production Writers' Committee from Classes CC through 3 (inclusive).
1 member on the Standard Writers' Committee from Classes AA through BB (inclusive).
1 member on the Standard Writers' Committee from Classes B through C (inclusive).
1 member on the Standard Writers' Committee from Classes DD through 3 (inclusive).

The procedure on appeals shall be as follows:

Any member who is dissatisfied with the decision of the Classification Committee may give notice in writing to the Secretary that he proposes to appeal to the Committee on the Board of Appeals which represents his particular group (popular, production or standard), the said Committee shall entertain his appeal and give him an opportunity to appear in person, if he so desires, or to present his appeal in writing, or both; if the said Committee decides against the member, its decision shall be deemed final; if said Committee decides in favor of the member, its decision shall likewise be deemed final, unless the Classification Committee feels that it is to the interest and welfare of the Society that a further appeal be allowed; in such case, the Classification Committee shall so state in writing, and an appeal may thereupon be taken by the Classification Committee, itself, to the entire Board of Appeals of the composers and authors, consisting of nine members; such appeal may be presented in writing or by oral hearing, or both; the decision of such Board of Appeals shall be considered final.

Members shall be given not less than five (5) days notice of the date when their appeal will be heard.

Appeals shall be heard in regular order, and the Board of Appeals shall meet at least once every three months, and until all appeals have been heard.

A majority vote of the Board of Appeals shall rule.

If a member of the Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Classification Committee and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

The Classification Committee shall delegate one of its members to be at the disposal of the said Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Board of Appeals whenever so requested; the counting and tally of ballots of election shall be under the direction and supervision of the General Manager and President of the Society; the election of the members of the Committees and Board of Appeals of the Composers and Authors, shall take place at least one month prior to the annual meeting of the Society, and the results thereof shall be announced at the annual meeting of the Society, each year, except that the first election shall take place not more than two (2) weeks after the passing of this amendment by the general body.

The decisions of the Board of Appeals, with respect to the proper classification of members, shall not be retroactive.

The Board of Directors of the Society shall make the rules of procedure by which the Board of Appeals shall be governed.

If any member of the Board of Appeals is advanced out of the class and group from which he is elected, then he shall immediately be replaced by his alternate in that particular class and group.

No member elected to serve on the Board of Directors of the Society shall be eligible to serve on the Board of Appeals.

The Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers, under Article XIV, Section 6, and at all times take into consideration all data, etc., which from time to time are used by the Classification Committee in arriving at the just classification of members.

The Board of Dirctors shall, at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Board of Appeals, at such times as they are required to hold meetings.

The foregoing provisions shall apply only to Author and Composer members of the Society, and not to Publisher members.

This amendment is to take effect immediately.

Publishers' Board of Appeals

In addition to the Classification Committee for the music publisher members, there shall be elected annually from the general membership (composer and author members not voting) two separate committees of three members each, to be known respectively as the

(1) "Popular Publishers' Board of Appeals"

(2) "Standard Publishers' Board of Appeals"

and the personnel of each of said committee shall be selected as follows:

(1) The Secretary of the Society shall, prior to ninety (90) days before the Annual Meeting, mail to each and every publisher-member a complete alphabetical list of all publisher-members of the Society, without disclosing the classification of any of such members; he shall also at the same time send to each publisher-member a ballot.

(2) The publisher-member shall, prior to the Annual Meeting, fill out said ballot, each "Popular" publisher-member voting for three members of the "Popular Publishers' Board of Appeals"; and each "Standard" publisher-member voting for three members of the "Standard Publishers' Board of Appeals".

Each such ballot shall be returned by mail to the Society and shall be opened and inspected jointly by the President and General Manager of the Society who shall make a record of each vote. The three persons receiving the highest number of votes in each class shall be deemed elected the members of the indicated ("Popular" or "Standard") Publishers' Board of Appeals and the three persons in each class receiving the second highest number of votes shall be deemed to be alternates to serve in place of those elected in any case and under all circumstances and with the full powers of the duly elected incumbent in the event of his inability or refusal for any reason to serve.

(3) Appeals of "Popular" publisher-members may be presented to and considered by the "Popular Publishers' Board of Appeals" only, and appeals of "Standard" publisher-members may be presented to and considered by the "Standard Publishers' Board of Appeals" only.

(4) The Publishers' Board of Appeals shall meet only in the City of New York, and their respective procedure on appeals presented to them shall be as follows:

(a) Any publisher-member who is dissatisfied with the decison of the Publishers' Classification Committee, may give notice in writing to the Secretary that he proposes to appeal to the appropriate Publishers' Board of Appeals; the said Publishers' Board of Appeals shall entertain his appeal and give appellant an opportunity to appear in person, if he so desires; or to present his appeal in writing, or both; on such appeal a sub-committee appointed by the Publishers' Classification Committee may also appear and give evidence justifying its classification of said publisher member; if the said Publishers' Board of Appeals decides against the publisher-member, its decision shall be deemed final.

(b) If the said Publisher's Board of Appeals decides that the publisher-member has been improperly classified, said Board shall bring up such question for review before the Board of Directors as a whole, within thirty (30) days after the filing of the decision of the Board of Appeals and the Board of Directors shall proceed with the question in the manner provided for by these Articles of Association, and the decision of the Board of Directors shall be final.

(c) No member of the Publishers' Classification Committee nor of the Board of Directors shall be eligible to serve as a member of either Publishers' Board of Appeals, nor shall there be eligible to membership on said Board, more than one individual representative of a firm of publishers; such member is to be designated by the firm or corporation publisher-member and his name placed on file with the Secretary of the Society, prior to the annual vote; the expression—"Firm of Publishers" shall include not only publisher-members, corporate, partnership or individual, but all firms, whether corporate, partnership or individual allied with or subsidiary to such publisher-member. If a member of either Board of Appeals is dissatisfied with his classification and desires to make an appeal, he shall first do so to the Publishers' Classification Committee, and if not satisfied with its decision, then he shall have the right to appeal to the entire Board of Directors of the Society, whose decision shall be final.

(d) A majority of the Board of Appeals shall rule; publisher-members shall be given not less than ten (10) days' notice of the date when their appeal will be heard; appeals shall be heard in regular order.

(e) The Publishers' Classification Committee shall delegate at least one of its members to be at the disposal of the said Publishers' Board of Appeals at all times with the necessary data, cards and other information required, and shall supply all information required to said Publishers' Board of Appeals whenever so requested.

(f) The Publishers' Board of Appeals must at all times adhere to the rules and regulations of classification as contained in the Articles of Association of the American Society of Composers, Authors and Publishers under Article XIV, Section 6, and must at all times take into consideration all data, etc., which from time to time are used by the Publishers' Classification Committee in arriving at the just classification of members.

(g) The Board of Directors shall at its first regular meeting after this amendment is passed and put into effect, fix proper compensation to be paid to the members of the Publishers' Board of Appeals at such times as they are required to hold hearings.

(h) The General Manager shall, within ten (10) days after the adoption of this amendment send to each publisher-member a form upon which the said member shall be required to indicate into which class of membership, "Popular" or "Standard" he desires to be registered. Upon registration in such class a member may vote as provided in Paragraph 2 above only for members of the Publishers' Board Appeals of the Class indicated.

Any appeal brought by such member shall be considered only by the Board of Appeals functioning in respect to that class. However, a member desiring to change his class may do so upon request in writing addressed to the Secretary of the Society and approval of such request by the Board of Directors.

(i) The foregoing provisions shall apply only to publisher-members, and not to author and composer members of the Society.

This amendment to take effect immediately.

SECTION 7. RELIEF COMMITTEE. There shall be a Relief Committee of three Directors, appointed by the President, consisting of one publisher, one author and one composer, who shall investigate requests or applications for relief on behalf of a sick, infirm, needy or deserving member or his widow, infant children or indigent parent. Upon the recommendation of such Committee the Board may direct the payment of such sum or sums as in its judgment will satisfy the immediate necessities of such person or persons, and to make advances, from any royalties thereafter to accrue to the member, such advances to be repaid to the Society by deducting the whole or any part thereof from any subsequent distributions awarded to such member.

The Board of Directors shall annually devote a part of the proceeds derived from its operations to the purpose of giving financial aid to members of the Society, their widows, infant children or indigent parents. The giving of such assistance is optional and shall only be granted in cases of urgent necessity, and the Society does not vouchsafe to its members the right to receive assistance. Any moneys paid out on account of relief must always be entered in the books of the Society with a statement of the actual purpose for which they were disbursed, and not merely under the head of "Relief."

Article XV

Apportionment of Royalties

SECTION 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the "Music Publisher" members, and one-half (½) among the "Composer and Author" members respectively.

Reserve Fund

SECTION 2. The Board of Directors, by a two-thirds vote of all those present, shall have the right to create and from time to time to add to the reserve fund, and may direct that a portion of the royalties as and when collected be placed in such reserve fund.

Unclaimed Royalties

SECTION 3 Royalties which have been apportioned and which have not been claimed by the owners shall remain in the General Fund of the Society for a period of six years. Three months prior to the expiration of said six years, notices shall be given to the parties lawfully entitled thereto, by registered mail, requiring them to receive said royalties within three months, and after the expiration of said three months, such royalties, if not claimed, shall become the absolute property of the Society.

Article XVI

General Powers and Duties of Committees

Quorum of Committees

SECTION 1. A majority of each committee shall constitute a quorum thereof.

Meetings of Committees

SECTION 2. Each Committee, unless otherwise voted by the Committee, shall meet at least monthly upon a date to be fixed by the Committee, except during the months of July, August and September. The Secretary shall send notices of each meeting to the members thereof at least three days in advance of the meeting.

Absence of Member of Committee

SECTION 3. If any member of any Committee is absent from two successive meetings without an excuse presented to the Committee, his place may be declared vacant by the President.

Minutes of Committee

SECTION 4. The standing committees shall keep regular minutes of their transactions and cause them to be recorded in a book kept in the office of the Society for that purpose, and report the same to the Board of Directors at its regular meetings.

Article XVII

Special Committee

Whenever any twenty-five members of the Society shall certify to the Board of Directors that they desire the Society to prosecute any matter within the scope of the Society, the President shall appoint a special committee to investigate the matter and report to the Board of Directors with its opinion thereon whether it is advantageous and for the best interest of the Society to undertake the prosecution of such matter. The Board of Directors shall carefully consider such report and a two-thirds vote of all the directors shall determine whether or not such prosecution shall be undertaken.

Article XVIII

General Meetings of the Society

SECTION 1. The General Annual Meeting shall be held each year during the month of March. An additional General Membership Meeting shall be held in the month of October of each year. Special meetings may be called at any time by the Board of Directors.

Business Transacted at General Meetings

SECTION 2. No business shall be submitted to the General Annual Meeting, unless it has been brought to the knowledge of the Board of Directors at least eight days in advance. The General Annual Meeting shall, however, be entitled in any event to lay aside any such business as it may consider inopportune.

Motion or Resolution in Writing

SECTION 3. Every motion or resolution which shall be made or offered at any meeting of the Society shall, at the request of the Secretary, be reduced to writing and furnished to the Secretary before the question shall be put.

Article XIX

Notices

SECTION 1. Whenever notice is required to be given to any member, such notice shall not be required to be given by personal service, but such notice shall be deemed to have been given from and at the time when said notice in writing shall have been deposited in the Post Office, or in any regular United States mailing box in the City of New York, enclosed in a post-paid wrapper, addressed to the member at his last known place of residence, as the same shall appear upon the books of the Society, or if such address shall not appear upon the books of the Society, then to such address as may appear in any directory of the municipality in which he may reside or do business.

Article XX

Expulsion and Termination of Rights of Membership Suspension for Cause

SECTION 1. Any member who is expelled by the Board of Directors, or who is dropped for the non-payment of dues, fines or assessments, shall thereupon lose and forfeit any and all interest, right or claim in, to or under the Society, the property thereof, and the dues and assessments paid thereto. Upon expulsion, death, bankruptcy, insolvency or other severance of membership in or connection with the Society, all rights and interest of whatsoever character, sort or kind, to, of, in or concerning the Society by virtue of such membership, shall instantly cease and be of no further force and effect. Expulsion shall not relieve any member from his obligations to the Society up to the date of such expulsion.

Posthumous Membership

SECTION 2. On the death of any member his rights in the Society and membership shall cease, and neither his rights nor his membership nor any right therein shall at any time be, by voluntary assignment, operation of law, legal proceedings or otherwise, vested in any other person whomsoever; provided, however,

That in the sole discretion of the Board of Directors the heir, heirs, or next of kin of a deceased member may be awarded a share in royalty distributions not exceeding that which would, in the judgment of the proper Classification Committee, have been awarded to the deceased member had he been living at the time of such royalty distribution.

Bankruptcy of Member

SECTION 3. The Board of Directors shall have the right to suspend payments of royalties to any member in case of the filing of a petition in bankruptcy by or against him, and/or the adjudication of such member a bankrupt, or the execution by such member of an assignment for the benefit of creditors, or the taking advantage by him of the insolvency laws of any State, Territory or Country, or the appointment of a receiver, trustee or liquidator of the assets and property of the member, or the voluntary or involuntary dissolution of a member.

The representative of any member of "Music Publishers" class who shall be a member of the Board of Directors shall immediately upon the happening of any such contingencies be dropped from the Board of Directors.

The royalties, or the right to participate in the royalties, and the rights of the members in the Society, shall not be sold or otherwise disposed of by any member, and shall not be the subject of sale or other disposition by voluntary action, operation of law, legal proceedings or otherwise, and no member shall sell, otherwise dispose of, hypothecate or create a lien upon any royalties accruing, or that may thereafter accrue to him, by virtue of his membership, or any of the rights, privileges, benefits, royalties or emoluments to which he may be entitled by virtue of his membership.

Article XXI

Amendments

These Articles may be amended by a vote of two-thirds of the members present at any meeting of the Society held for the purpose of voting on such amendment.

Exhibit "T"

[FLORIDA STATUTE]

SENATE BILL NO. 679

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors, or assigns, to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself of its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches or any one who uses music in the conduct of his business, or the officers, directors proprietors, managers, owners or representatives thereof, who render or cause to be rendered

permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforcible in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or in-

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strumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

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Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than $50.00 or more than $5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or re-

presentatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of $100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

Exhibit "F"

COlumbus 5-7464

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

THIRTY ROCKEFELLER PLAZA
NEW YORK CITY

January 15, 1936

Isle of Dreams Broadcasting Corporation
Radio Station W.I.O.D.
Miami Beach, Florida

Gentlemen:

It is mutually agreed that the certain license agreement between us, dated Sept. 20, 1932, effective September 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

"7. In case there shall be a substantial diminution in the quantity of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

and Article 8 is amended by striking out therefrom subdivision (a) and (b).

Very truly yours,

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

By..HERMAN.GREENBERG.....

ACCEPTED:

ISLE OF DREAMS BROADCASTING CORPORATION

By..P. READER.....
Title Treasurer

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Dated.....

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Original

No. 1

OPERATOR'S BROADCASTING LICENSE

Call: W.I.O.D.

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (hereinafter styled "SOCIETY"), and ISLE OF DREAMS BROADCASTING CORPORATION (hereinafter styled "LICENSEE"), as follows:

1. SOCIETY grants to LICENSEE, its successors and assigns, and LICENSEE accepts for a period of three (3) years from September 1st, 1932, a license to publicly perform by broadcasting from Radio Station W. I. O. D. located at Miami Beach, Florida non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a place or from a source which SOCIETY does not customarily license), from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from there.

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

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6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, SOCIETY shall refund to LICENSEE pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of ONE THOUSAND AND no/00 Dollars ($1000.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus

(a) For the first year of the term hereof, a sum equal to three percent (3%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities, and,

(b) For the second year of the term hereof, a sum equal to four percent (4%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities; and,

(c) For the third year of the term hereof, a sum equal to five percent (5%) of the net receipts (as hereinafter defined) of the LICENSEE from the sale of its broadcasting facilities.

(d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to LICENSEE for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen percent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by LICENSEE).

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statements all net receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station, which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of account-

ing as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to indemnify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands, or suits that may be made or brought against the LICENSEE with respect to renditions given during the term hereof in accordance with this license of musical compositions contained in SOCIETY'S repertory heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall forthwith give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall co-operate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against LICENSEE on account of the rendition of any musical composition contained in the SOCIETY'S repertory but NOT heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

IN WITNESS WHEREOF, this agreement has been duly subscribed by SOCIETY and LICENSEE this 20th day of September, 1932.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD .....

ISLE OF DREAMS BROADCASTING
CORPORATION

Licensee.

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By JESSE H. JAY, ...
President.

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M.P. Form 9-1934

(THEATRES)

Exhibit "G"

FLA-1-42
M.P.-B

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and MARIANNA THEATRES, INC. (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing November 23rd, 1936 a license to publicly perform at the Ritz Theatre in Panama City, Florida, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Licensee warrants and represents to Society that the statements made in the application dated 11-25-36 for this license are true and correct, upon which warranty and representation the license fee herein is fixed. 810 seats.

5. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "5", there shall be made to the Licensee a pro rata refund of any unearned license fees.

6. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

7. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

8. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

9. Licensee agrees to pay Society for the license herein the sum of One Hundred and Twenty-One Dollars and Fifty Cents ($121.50) annually, payable semi-annually in advance in installments of Sixty Dollars and Seventy-Five Cents ($60.75) each.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 28th day of November, 1936.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

In Triplicate.

By WM. E. ARNAUD .....
Agent and Attorney in Fact

MARIANNA THEATRES, INC.

By A. E. ADAMS .....
V. Pres.

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(GENERAL) FLA-3-3

Exhibit "H"

HOTEL

MEMORANDUM OF AGREEMENT between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "Society"), and THIRTY ONE WEST ADAMS STREET CORPORATION (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one (1) year commencing December 1, 1936 a license to publicly perform at Carling Hotel, Jacksonville, Florida, and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the Society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of Two Hundred Forty and no/100 Dollars ($240.00) annually, payable in quarterly installments of $60.00 each, in advance.

This contract includes musical performances other than by means of master controlled radio receiving sets in hotel guest rooms for which a separate license is issued.

IN WITNESS WHEREOF, this agreement has been duly subscribed and sealed by Society and Licensee this 8th day of January, 1937.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By WM. E. ARNAUD
Agent and Attorney in Fact

THE CARLING HOTEL

By CHAS. B. GRINER, Mgr.

74-76

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[fol. 77] IN UNITED STATES DISTRICT COURT

ORDER CONVENING THREE-JUDGE COURT—Filed February 7, 1938

Having considered the Bill of Complaint and the affidavits of Gene Buck, Walter S. Fischer, Gustave Schirmer, Saul H. Bornstein, Deems Taylor, Anne Paul Nevin and Ella Herbert Bartlett, all duly verified and filed in the above entitled suit, and the motion of the plaintiffs, for a temporary injunction herein, and their request that the same shall be heard and determined by three Judges of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and being fully advised of the law and the facts, and it appearing therefrom to be a proper case therefore, now therefore, it is

Ordered, and this does order:

1. Plaintiffs' application for a temporary injunction filed herein on February 7, 1938, be and the same is hereby set for hearing before the Court at the Courtroom thereof of the Federal Building at New Orleans, La., at the hour of 10 o'clock in the morning of March 3, 1938;

2. That the Honorable Rufus E. Foster, a Judge of the Circuit Court of Appeals for the Fifth Circuit, and the Honorable Louie W. Strum, one of the Judges of the above [fol. 78] entitled Court, be and they are hereby called to my assistance to hear and determine said application for temporary injunction at said time and place; and

3. That written notice of the time and place of the hearing on said application for temporary injunction be given to the Honorable Fred Cone, the Governor of the State of Florida, the Honorable Cary D. Landis, Attorney General of the State of Florida, and to such other persons as may be defendants in the suit, at least five (5) days before the date of said hearing.

Done, February 7, 1938.

A. V. Long, United States District Judge, Northern District of Florida.

[fol. 79] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed March 3, 1938

Come now the Defendants, Cary D. Landis, individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida, O. C. Parker, individually, and as State Attorney for the Second Judicial Circuit of Florida, A. K. Black, individually, and as State Attorney for the Third Judicial Circuit of Florida, William A. Hallowes, III, individually and as State Attorney for the [fol. 80] Fourth Judicial Circuit of Florida, J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida, Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida, Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida, J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida, Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Circuit of Florida, L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida, G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida, Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Florida, J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida, John H. Carter, Jr., individually and as State Attorney for the Fourteenth Judicial Circuit of Florida, Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida, "John Doe" and "Richard Roe", by their undersigned Attorneys, and file this their motion to dismiss the bill of complaint heretofore filed herein for the following reasons, to-wit:

1. That the bill does not state facts sufficient to constitute a cause of action against the Defendants or any of them.

1-a. That there is no equity in the bill.

2. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the jurisdictional amount of $3,000.00, exclusive of interest and costs, is not involved in this suit, in that it

appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers, an unincorporated association; and it does not affirmatively appear that the loss of any member of said society due to the enforcement of Chapter 17807, Laws of Florida, 1937, would amount to the sum of $3,000.00, the necessary jurisdictional amount.

3. That it affirmatively appears from the allegations of the bill of complaint that the bill is fatally ambiguous in failing to show whether the true party in interest is the [fol. 81] American Society of Composers, Authors and Publishers or its members.

4. It affirmatively appears from the allegations of the bill of complaint, and exhibits attached thereto, that this suit is not one arising under the Federal copyright laws, and that since the jurisdictional amount has not been shown to exist in each member of the said society, the Court does not have jurisdiction of the cause.

5. That it affirmatively appears from the allegations of the bill of complaint, and exhibits attached thereto, that the American Society of Composers, Authors and Publishers, an unincorporated association, cannot suffer any loss due to enforcement of Chapter 17807, Laws of Florida, 1937, due to the fact that it is an unincorporated association of composers, authors and publishers, and that all the proceeds which the said society collects from the licensing for public performances for benefit of the works of its members, and affiliated members, is divided between the members and affiliates, and, therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself.

6. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto that the jurisdictional amount of $3,000.00 exclusive of interest and costs, is not involved in this suit, because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would make by the non-enforcement of said law.

7. That it affirmatively appears from the bill of complaint, and the exhibits attached thereto, that the plaintiffs have

been guilty of laches, in that they have waited over nine months before bringing this suit to enjoin the enforcement of Chapter 17807, Laws of Florida, 1937.

8. That the Act in question, Chapter 17807, Laws of Florida, 1937, seeks by Section 1 thereof to prevent activity within the State of Florida of any combination of a substantial number of the owners or competitors of the copyrights of vocal or instrumental musical compositions when one of its objects is to fix prices or to restrain trade and competition in such musical compositions, or to prevent free compe- [fol. 82] tition among the owners or proprietors thereof, and that all of the provisions contained in Section 1 of said Act are within the powers of this State to enact into law.

9. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the plaintiffs and each of them are engaged in interstate commerce, and that they are violating the provisions of Title 15 U. S. C. A. Sec. 1 et seq., commonly known as the Sherman Anti-Trust Act, and that, therefore, they have come into this Court with unclean hands, and equity will not grant them any of the relief prayed for therein.

10. That it affirmatively appears from the allegations of the bill of complaint, and the exhibits attached thereto, that the plaintiffs are engaged in intrastate commerce within the State of Florida, and that by reason of the unlawful combination through which they are operating they are violating the provisions of Section 1 of Chapter 17807, Laws of Florida, Acts of 1937, as well as the provisions of Chapter 6933, Laws of Florida, 1915, as amended by Chapter 10283, Laws of Florida, 1925, Section 7944-7954, inclusive, C. G. L. 1927, the general laws of Florida, prohibiting combinations or monopolies, such as the plaintiffs are engaged in, and that, therefore, the plaintiffs having come into a court of equity with unclean hands, they are not entitled to any of the relief prayed for in the bill of complaint.

11. That it appears from Chapter 17807, Laws of Florida, 1937, that Section 2-A to 2-C, inclusive, in no way conflicts with the provisions of the copyright laws of the United States, (Mar. 4, 1909 c. 320, Sec. 1, 64, 35 Stat. 1075, 1088, Title 17 U. S. C. A.), but assures to the author, composer, publisher or proprietor the protection of the individual

copyright by requiring persons purchasing the works of the authors, composers, publishers or proprietors to be used for public performance for profit, to pay the amount so designated thereon by the owner of said works.

12. That it affirmatively appears that Section 3 of Chapter 17807, Laws of Florida, 1937, which declares unlawful the enforcement within the State of Florida only said contracts of the unlawful combination in reference to copyrighted musical compositions, merely restates the common law and the general statutory law on this ground in force in the State of Florida at the time of the passage of this [fol. 83] Act, as is indicated by Sections 7944-7954, inclusive, C. G. L. 1927, and that it is within the police powers of the Legislature of the State of Florida to so define, prohibit and prevent the enforcement of said illegal contracts.

13. That Sections 4-a, 4-b, 5-a, 5-b, and Section 6 of said Chapter 1708, Laws of Florida, 1937, are nothing more than the exercise of a valid police power by the Legislature of the State of Florida to protect persons, firms and corporations within the State of Florida from unlawful collections or exactions of royalties by the plaintiffs through a monopoly agency or affiliates of a monopoly should the monopoly seek to enforce or compel alleged rights to copyrighted music within this State in violation of the statute.

14. That Sections 7-a, 7-b and Section 8 of said Chapter 17807, Laws of Florida, 1937, do nothing more than define agencies and representation of such unlawful combination declaring the violation of this Act to be a felony and providing the punishment therefor, all of which definitions and requirements are within the right of the Legislature of the State of Florida to enact into law.

14. That Sections 9, 10-a, 10-b, 11-a and 11-b merely provide the procedure of how persons violating the provisions of this Act may be prosecuted, and they guarantee to any such persons the equal protection and due process of law by affording them a fair and impartial hearing before a legally constituted court of this State, and that the provisions contained in said Section are within the legislative powers of the State of Florida to enact into the law.

16. That it affirmatively appears from the bill of complaint, and the exhibits attached thereto, that there is a

misjoinder of parties plaintiff contrary to the provisions of Rule No. 26 as adopted by the Supreme Court of the United States, and as set forth in Title 28, Section 723, U. S. C., for the reason that said bill of complaint alleges no joint cause of action in said plaintiffs.

Cary D. Landis, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Andrew W. Bennett, Lucien H. Boggs, Of Counsel for Defendants.

[fol. 84] In United States District Court in and for the Northern District of Florida, Gainesville Division

Gene Buck, Individually and as President of the American Society of Composers, Authors And Publishers, etc., et al., Complainants,

vs.

Cary D. Landis, Individually and as Attorney General of the State of Florida, et al., Defendants

Memorandum Opinion—Filed April 5, 1938

Per Curiam:

The Complainants, American Society of Composers, Authors and Publishers, an unincorporated association organized and existing under the laws of the State of New York, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others filed their bill of complaint on the 7th day of February 1938 against the Attorney General of the State of Florida and a number of State Attorneys, in which bill it is sought to enjoin the defendants from enforcing the provisions of an Act of the Florida Legislature passed during the Session of 1937, which law declares any combination of persons, (fol. 355) firms, or corporations which determine the amount of money to be paid to it or to its members for the purpose of rendering privately or publicly for profit copyrighted vocal or instrumental musical com-[fol. 85] positions when such combination is composed of a substantial number of all musical composers, copyright owners or their heirs, successors or assigns, to be an un-

lawful monopoly and its purpose would be in restraint of trade. It makes it unlawful for authors, composers, proprietors, publishers or owners of copyrighted musical compositions, when the members, stockholders or interested parties constitute a substantial number of persons, firms or corporations within the United States who own or control copyrighted musical compositions, to form any organization either in Florida or elsewhere if one of the objects of the organization is the determination of license fees required for the use of copyrighted musical compositions for profit in Florida, for the purpose of preventing free competition between different copyright owners. There are penalty provisions applying where any attempt is made to collect license fees by the owners of copyright and requiring authors, composers and publishers to specify on any published musical composition prepared for use in Florida the selling price of such composition. Other provisions seek to limit the rights of copyright owners or licensees to control the sale, reproduction or use of their products in the State of Florida.

The bill alleges that the enforcement of this Act will violate rights granted to them by the copyright Act of Congress; that it is in violation of the Federal Constitution and impairs the terms of certain existing contracts held by these plaintiffs.

The cause is before this Court upon application for interlocutory injunction; upon the bill of complaint, affidavits filed therewith and upon motion to dismiss the bill of complaint.

It is alleged that the defendants have threatened to and will enforce the provisions of this Act to the irreparable injury of plaintiffs unless such injunction order is issued.

It appearing to the Court that plaintiffs have shown that great damage will be inflicted upon them if preliminary injunction is not granted, and that there is grave doubt of the constitutionality of the Act;

It is considered by the Court that an order be entered granting such interlocutory injunction and that the motion to dismiss the bill be denied.

Rufus E. Foster, Circuit Judge. Louie W. Strum, District Judge. A. V. Long, District Judge.

[fol. 86] In United States District Court in and for the Northern District of Florida, Gainesville Division

Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, etc., et al., Complainants,

vs.

Cary D. Landis, Individually and as Attorney General of the State of Florida, et al., Defendants

Order Granting Motion for Interlocutory Injunction, etc.—Filed April 5, 1938

This cause coming on to be heard and the same having been argued by Counsel for the respective parties, and the Court having inspected the record and the briefs filed;

It is ordered:

1st. That the application for interlocutory injunction be and the same is granted.

2nd. That the defendants, Cary D. Landis, individually and as Attorney General for the State of Florida; E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., individually and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, individually and as State Attorney for the Third Judicial Circuit of Florida; Williams A. Hallowes, III, individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida; Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. Adkins, individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Roy D. Stubbs, individually and as State Attorney for the Twelfth Judicial Circuit of Forida; J. Rex Farrior, individually and as State Attorney for the Thirteenth [fol. 87] Judicial Circuit of Florida; John H. Carter, Jr.,

individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Louis F. Maire, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; and each of them individually and in their respective capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained until the further order of this Court from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and other similarly situated, representatives, employees, agents or any of them, and from interferring with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

3rd. That the motion made by the defendants to dismiss the bill of complaint be and the same is denied.

4th. That the defendants be given thirty (30) days from the date hereof to answer.

This order is made conditional upon the plaintiffs filing herein within thirty (30) days a bond in the sum of five thousand ($5,000.00) Dollars conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined by this order; said bonds to be approved by the Clerk of the United States Court for the Northern District of Florida.

Done and ordered this the 4 day of April, A. D. 1938.

Rufus E. Foster, Circuit Judge. Louie W. Strum, District Judge. A. V. Long, District Judge.

[fol. 88] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed May 17, 1938

This suit having been duly commenced on February 7th, 1938, by filing a subpoena and bill of complaint in this [fol. 89] Court, and service of copies thereof having been made upon all the defendants (except "John Doe" and "Richard Roe"), and the complainants having moved for a temporary injunction, and due notice of said motion having been made upon the defendants herein as well as upon the Governor and Attorney General of the State of Florida, and the defendants, State Attorneys, having appeared herein generally (with the exception of the defendants "John Doe" and "Richard Roe"), and the defendants having duly moved to dismiss the complaint and to deny the motion for temporary injunction; and all of said motions having duly come on for argument and having been heard on March 3rd, 1938, at the Federal Courthouse in New Orleans, Louisiana, this Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. At the 1937 Session of the Legislature of Florida there was passed by said Legislature a Bill designated as Chapter 17807, Senate Bill No. 679, and said Bill was signed by the Governor of that State on June 9th, 1937, and made effective immediately. Said statute is referred to as the "State Statute" hereinafter; a copy is hereto annexed.

2. The complainant American Society of Composers, Authors and Publishers (hereinafter referred to throughout these findings as the "Society") was at all the times hereinafter mentioned and still is an unincorporated association duly organized and existing under the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City and State of New York, in the Southern District of New York. The membership of the Society constitutes a substantial number of persons, firms and corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, to-wit: a membership of one thousand, consisting of authors, composers and publishers of musical works; said

Society has contracts now valid and subsisting between it and similar societies situated in the countries of the civilized world, which foreign societies have a membership of approximately forty-four thousand and under which contracts the Society licensed to users of music within the United States, including the State of Florida, until the enactment of the State Statute hereinafter mentioned, the [fol. 90] right to publicly perform for profit all of the copyrighted musical compositions controlled by said foreign societies, as well as by the Society.

3. All of the complainants are citizens of the United States and residents of the State of New York, except complainant, Anne Paul Nevin, who is a resident of the State of Maine; and the defendants are citizens and residents of the State of Florida, and officers of the State of Florida, duly elected, appointed and qualified, empowered, directed and charged by the said state statute with the duty of enforcing the criminal and civil provisions thereof.

4. This action is a suit in equity arising under the Constitution and laws of the United States and the matter in controversy exceeds $3,000 exclusive of interest and costs.

5. Under mutual working arrangements with societies in the foreign countries, the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all the members of said respective foreign societies, and said foreign societies have the exclusive right to, and do license within the territorial limits of their respective countries, the public performances for profit of the musical compositions copyrighted by members of the Society. Under such arrangements between the Society and said foreign societies, the rights vested in such foreign societies with respect to the licensing of their performing rights in the United States are not conditioned upon and are entirely independent from the sale of copies of sheet music and the price fixed therefor. The right to perform the musical compositions embraced in the catalogues of such foreign societies are included in the blanket licenses issued to individual licensees by the Society in the United States. Such foreign societies represent 44,000 members who are scattered throughout the world; they are not required to file copies of their respective musical composi-

tions in order to enjoy copyright protection in the United States under the Treaties, Proclamations and United States Laws aforesaid.

6. Because of the provisions of Section 1 (e) of the Copyright Act of 1909, as amended, under which any manufacturer of parts of instruments serving to reproduce [fol. 91] mechanically a musical work may manufacture such a reproduction of a copyrighted work upon payment to the copyright proprietor of a royalty of two cents on each such part manufactured. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded by manufacturers of phonograph records, music rolls, electrical transcriptions and other parts of instruments serving to reproduce mechanically such copyrighted musical compositions without the express consent of the copyright proprietors, including complainants. The copyright Act does not impose any other duty upon such manufacturers, except the payment of two cents for each record, and complainants have not received any other moneys except the payment of such two cents, and have no right to demand any further sums from such manufacturers; and complainants, and others similarly situated, have no control over the manner of sale and disposition of such phonograph records, music rolls or electrical transcriptions of their said copyrighted musical works, and they cannot compel the manufacturers thereof to affix any price upon said phonograph records, music rolls or electrical transcriptions, or to collect any price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected for the public performance for profit thereof.

7. Complainants will be able to license users of their music in the State of Florida without doing any act in said State, but unless the injunction prayed for is granted, complainants will be unable to issue any licenses from without the State of Florida without incurring the penalties of said State Statute. The copyrighted works of the complainants and of all the other members of the Society and of the affiliated societies are being, and have been constantly performed in the State of Florida and each and every county and district therein, and will continue to be performed therein.

8. Said State Statute is class legislation; it is aimed only at proprietors of musical copyrights and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the laws of the United States but which are protected at common law. A great many forms of copyright and kinds of copyrighted [fol. 92] works are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books, and periodicals, none of which are affected by the said State Statute.

9. Said State Statute attempts to vest in the courts of Florida the rights to determine the ownership of complainants' copyrights without properly securing jurisdiction over complainants, who are not residents or domiciled within the State of Florida, and are not doing business therein, and who have no agency within said State and have no property within said State which has a situs.

10. Said State Statute is in its terms so drastic and the penalties attached to the violation of the terms thereof are so great that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida or even to users of music without such State if the public performance for profit of such music may be reproduced or performed within such State. There are fourteen judicial circuits in the State of Florida, in each of which there are establishments publicly performing for profit the copyrighted musical compositions of members of the Society, and the foreign societies with which the Society has reciprocal arrangements; and if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in said counties they will be subjected to a multiplicity of suits and prosecutions and unless defendants are restrained complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions by means of rebroadcasting or by means of personal performance of artists, singers, musicians, orchestras, bands, actors, loud speakers, radio, sound production or reproduction, apparatus or instrumentalities or electrical transcriptions, or by any other means of rendition whatsoever within the State of Florida from any radio broadcasting, radio receiving or

radio rebroadcasting station, or in any theatre or motion picture house located in such State; complainants and others similarly situated will be unable to enforce any contracts made between them or on their behalf by the Society with residents or citizens of such State; complainants and others [fol. 93] similarly situated, as well as the Society, were compelled from the effective date of the State Statute, until the date of the granting of temporary injunction, herein, to desist from licensing the public performance for profit of their copyrighted musical compositions in such State and were deprived during such period of all sources of revenue therefrom, and were denied the privileges granted to them by the Copyright Act; and the Society was compelled to desist from enforcing collection of payments under existing contracts between it and users during such period and was denied liberty of contract and was compelled to desist from investigating infringements of the copyrights of complainants, and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions; and complainants would continue to suffer as aforesaid but for the granting of the injunction herein; and complainants and the Society and its affiliated societies, were hindered, delayed and impeded in enforcing their rights and remedies under the Copyright Act in the Federal Courts located in the State of Florida for infringements committed by users within such State by means of public performances for profit of the copyrighted musical compositions aforesaid, all because of the drastic provisions of the said State Statute and the numerous penalties, civil and criminal, to which the complainants will be liable in the event of any violation of said State Statute; and complainants and others similarly situated were unable to detect and sue for infringement of their copyrighted musical works within the State of Florida during such period.

11. Complain-ts have no adequate remedy at law and are relievable only in this Court of Equity, and if complainants were not afforded the equitable relief prayed for herein but were required to resist criminal prosecutions and other suits or proceedings instituted under the State Statute, it would result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

Conclusions of Law

I. The bill of complaint states facts sufficient to constitute a cause of action against each and every one of the defendants

[fol. 94] II. The State Statute is not a reasonable exercise of the police power of the State of Florida, and the penalties and confiscatory provisions provided for therein are not reasonably necessary to meet any alleged evil; enactment of the State Statute was not necessary to protect, nor does it serve the public interest of the State of Florida; the object, purpose and effect of the Statute is to take the copyrighted musical compositions of the complainants, and others similarly situated, for a private purpose, to-wit; to benefit the 367 users within the State of Florida; the said State Statute discriminates against, and in fact, confiscates the complainants' copyrighted musical compositions as well as those of others similarly situated; it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

III. The State Statute is an invasion of complainants' constitutional rights in the following respects:

(a) It interferes with and destroys the pattern of the copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure uniformity and certainty in the field of copyright.

(b) It denies to complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein denies to the complainants due process of law.

(c) It impairs obligations of contracts entered into between complainants and 367 users of music within the State of Florida, and contracts between members of the Society and the Society, and between the Society and similar societies operating in foreign countries, and contracts between writers and composers and their respective publishers.

(d) It interferes with complainants' liberty of contract in the State of Florida and elsewhere.

(e) It deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

[fol. 95] IV. The said State Statute is vague, uncertain and indefinite and fails to apprise complainants, and others similarly situated of what acts they may omit or commit which would constitute a crime under said State Statute.

V. The said State Statute subjects complainants to a multiplicity of suits by each of the 367 users within the State of Florida with whom they have contracts, by each of the State Attorneys in the State of Florida, and by the Attorney General of said State.

VI. The penalties, civil and criminal, and the forfeitures provided for in said State Statute are harsh, oppressive and unreasonable, and such penalties and forfeitures are cruel and unusual.

VII. The said State Statute violates Article I. Sections 8-9, and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

VIII. Complainants have no adequate remedy at law and are relievable only in this Court of Equity, and if complainants are not afforded the equitable relief prayed for in the bill of complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said State Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate, and unless an injunctional order is issued complainants will be irreparably damaged.

IX. Complainants are entitled to an injunction enjoining and restraining, until the further order of this Court, the defendants and each of them individually and in their capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them,

and from interfering with all existing contracts entered into by the complainants and others, including the Society [fol. 96] and citizens and residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said Statute in the event such citizen and resident desires to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their respresentatives or agents or any of them or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

X. That a bond in the sum of $5,000 conditioned upon the payment to defendants of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined by this order, will adequately protect defendants against any injury that may be suffered in the event that the injunction pendente lite entered herein shall not be made permanent.

XI. The State Statute constitutes an attempt to restrict and to regulate the right of complainants to the full enjoyment of the exclusive rights granted them by the laws of the United States, generally known as the Copyright Laws.

XII. That the motion to dismiss the complaint be denied.

XIII. That this Court has jurisdiction of this suit.

XIV. That the application for interlocutory injunction be and the same is granted.

Dated at Gainesville, Florida, this May 17, A. D. 1938.

Rufus E. Foster, United States Circuit Judge. Louie W. Strum, United States District Judge. A. V. Long, United States District Judge.

Exhibit "E" (Florida Statute—Senate Bill No. 679) omitted. Printed side page 64, ante.

[fol. 97] SUPREME COURT OF THE UNITED STATES

No. 276—, October Term 1938

ORDER SUBSTITUTING GEORGE COUPER GIBBS, ATTORNEY GENERAL, FOR CARY D. LANDIS, etc., deceased—Filed May 30, 1939

On Consideration of the motion of the appellees to substitute George Couper Gibbs, individually and as Attorney General of the State of Florida, as a party appellant in the place and stead of Cary D. Landis, deceased,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted, and that the cause be so continued and maintained.

October 10, 1938.

A true copy.

Test: Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by /s/ Hugh W. Barr, Deputy. (Seal of the Supreme Court of the United States.)

[fol. 98] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL BILL OF COMPLAINT—Filed May 31, 1939

The complainants, Gene Buck, individually and President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, by their undersigned counsel, bring this their supplemental bill of complaint herein against George Couper Gibbs, individually and as Attorney General of the State of Florida, and the other defendants named in the caption hereinabove, and say:

1. Since the filing of the original bill of complaint herein, certain material facts have occurred, as are hereinafter alleged.

2. The original complaint herein included as a defendant Cary D. Landis, individually and as Attorney General of the State of Florida, who has since departed this life, as will be more fully hereinafter set forth.

3. On the 3rd day of March, 1938, this cause came on for hearing before a Statutory Three-Judge Court, upon the application of the complainants for an interlocutory injunction, and the motion of the defendants to dismiss the bill of complaint. On the 4th day of April, 1938, the Court entered an order granting the application for an interlocutory injunction, enjoining the defendants from enforcing the State Statute described in said bill of complaint, to wit, Chapter 17807, Laws of Florida, 1937, General Laws, Vol. 1, pp. 204-214, inclusive, and denying the motion of [fol. 99] the defendants to dismiss the bill of complaint.

4. On the 25th day of April, 1938, the defendants petitioned for the allowance of an appeal from said order of April 5, 1938, to the Supreme Court of the United States. On August 15, 1938, the defendants, other than George Couper Gibbs, filed their record on appeal and docketed such appeal in the United States Supreme Court, which said appeal was allowed, and is now pending.

5. Thereafter, on the 10th day of May, 1938, the defendant, Cary D. Landis, who was named a party defendant in said action, individually and as Attorney General of the State of Florida, departed this life, and on the 16th day of May, 1938, George Couper Gibbs became, and is now, the duly appointed, qualified and acting Attorney General of the State of Florida. Said George Couper Gibbs is a citizen and resident of the State of Florida.

6. On August 15, 1938, the above named defendants, other than George Couper Gibbs, as appellants, filed in the United States Supreme Court a "Suggestion of Death" of Cary D. Landis, deceased.

7. During the lifetime of Cary D. Landis, deceased, he was represented by Tyrus A. Norwood as his assistant, who at all times acted on his behalf and under his direction. At all times since the appointment of said George Couper Gibbs, the said Tyrus A. Norwood has continued to act under the direction of said George Couper Gibbs,

with the same effect and in the same manner as he acted for the late Cary D. Landis, since the enactment of the said State Statute.

8. The late Cary D. Landis through his said assistant, [fol. 100] Tyrus A. Norwood, threatened to enforce the State Statute and the penalties thereof against complainants if they should violate or attempt to violate any of the provisions thereof, and more particularly threatened to prosecute complainants thereunder should they attempt to sue for infringement of their copyrights in any Federal Court in the State of Florida. Such threat was made in open court on the application for interlocutory injunction, and by the following letter written on March 7, 1938:

"State of Florida
"Office of the Attorney General
"Tallahassee

"March 7, 1938.

"Honorable Rufus E. Foster,
Judge, United States Circuit Court of Appeals,
New Orleans, Louisiana.

"Re: GENE BUCK et al. vs.
STATE OF FLORIDA, et al.

"DEAR JUDGE FOSTER:

"Since returning from New Orleans I have been thinking that a statement I made before you in the argument of the above case to the effect that 'if the plaintiffs in this case sued for an infringement of their copyrights in the Federal Courts within the State of Florida, that the Attorney General and State's Attorneys would not prosecute them', was not absolutely clear.

"In order to be fair to the Court, I would like to state that what I meant by the above remark was that the Attorney General and the State's Attorneys of this State would not prosecute any of the individual complainants if they brought suit in the Federal Courts of this State against persons residing within the State for infringement of copyrights, but if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General

and State's Attorneys would be compelled to prosecute it under the provisions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts.

[fol. 101] "Yours very truly,

"(Signed) Cary D. Landis, Attorney General. By Tyrus A. Norwood, Assistant Attorney General.

"Tan-a

"CC. Hon. A. V. Long, Gainesville, Florida.

"Hon. Louis W. Strum, Jacksonville, Florida.

"Hon. Frank Wideman, West Palm Beach, Florida."

9. Upon information and belief, said Tyrus A. Norwood has been instructed by said George Couper Gibbs to act in his capacity as Assistant Attorney General in appearing for the State's Attorneys in this action; the purpose and object of the appearance of said Tyrus A. Norwood in this action since the death of the late Cary D. Landis, has at all times been to have the interlocutory injunction heretofore entered herein vacated so that the said George Couper Gibbs and the said Tyrus A. Norwood and the said defendant State's Attorneys will be free to enforce the terms and provisions of the State Statute against the complainants herein.

10. Said George Couper Gibbs directly and through his assistant, Tyrus A. Norwood, has adopted and continues and threatens to adopt and continue the action of his predecessor Cary D. Landis, deceased, in enforcing the State Statute, which is in violation of the Constitution of the United States; upon information and belief, said George Couper Gibbs, individually and as an official charged with the duties of enforcing said State Statute will enforce said State Statute in each and all of its terms, and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refused to accept or submit to a system of compulsory licensing; and said George Couper Gibbs will enforce the penal and confiscatory provisions of such [fol. 102] Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida;

or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit the musical compositions of the complainants and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail or refuse to submit to the jurisdiction of the State Courts of Florida; and said George Couper Gibbs has threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute.

11. There is a substantial need for continuing and maintaining this suit against said George Couper Gibbs, as well as against defendant State's Attorneys.

[fol. 103] Wherefore, the complainants pray:

1. That a supplemental writ of subpoena may issue to the said George Couper Gibbs, individually and as Attorney General of the State of Florida, made a party defendant hereto, requiring him to answer the bill of complaint and this supplemental bill of complaint, fully and truthfully, but not on oath, an oath being hereby waived.

2. That said George Couper Gibbs, individually and as Attorney General of the State of Florida, be enjoined and restrained by temporary and permanent order of injunction of this Court, from bringing, directly or indirectly,

and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute, against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with Society or complainants and others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida or elsewhere, and generally, from doing any act or thing to carry out or enforce any of the provisions of said State Statute; and that an order to show cause issue herein upon the application of the complainants, directed to the above named defendants, and each [fol. 104] of them, requiring them to show cause why a temporary injunction against said George Couper Gibbs, individually and as Attorney General of the State of Florida, should not issue as prayed for herein.

3. That said State Statute, and each and every part and section thereof, be declared, as to said George Couper Gibbs, individually and as Attorney General of the State of Florida, to be unconstitutional, illegal and void, and that a perpetual injunction be issued restraining the enforcement of said State Statute, and each and every part and section thereof, by said George Couper Gibbs, individually and as Attorney General of the State of Florida, as hereinabove prayed for.

4. That further and general relief be granted as the nature of the complainants' case may require, or to equity may seem just and proper.

Wideman Wardlaw & Caldwell, Solicitors for Complainants.

Frank J. Wideman, Of Counsel.

[fol. 105] *Duly sworn to by Gene Buck. Jurat omitted in printing.*

[fol. 106] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL AND SUPPLEMENTAL BILL OF COMPLAINT—Filed June 6, 1939

Defendants move the Court to dismiss the bill of complaint and supplemental bill of complaint herein upon the ground that since the institution of this suit Sections 2-A, 2-B, and 6 of Chapter 17807, Laws of Florida, 1937 (the statute attacked by said bill and supplemental bill) have been repealed by House Bill 1103, duly enacted by the Legislature of Florida at the 1939 Session; and that with those sections repealed, said statute is patently within the police power of said State.

(S.) Geo. Couper Gibbs, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boogs, Andrew W. Bennett, Attorneys for the Defendants.

[fol. 107] IN UNITED STATES DISTRICT COURT

ANSWER TO BILL OF COMPLAINT AND SUPPLEMENTAL BILL OF COMPLAINT—Filed June 19, 1939

Defendants, for answer to the original bill of complaint and supplemental bill of complaint herein, jointly and severally say—subject to the motion to strike portions of the original bill of complaint filed co-temporaneously herewith, each paragraph of this answer referring to the correspondingly numbered paragraph of the original bill of complaint or of the supplemental bill of complaint as the case may be.

A. Answer to Original Bill of Complaint:

1. Answering paragraph 1, the defendants admit the allegations thereof to be true.

2. Answering paragraph 2, the defendants are without knowledge as to the allegations thereof.

3. Answering paragraph 3, the defendants admit the allegations thereof to be true.

4. Answering paragraph 4, the defendants admit the allegations thereof to be true.

5. Answering paragraph 5, the defendants allege that since the filing of said bill, to-wit, on May 10, 1938, Cary D. Landis, originally named as a party defendant to this cause, [fol. 108] individually and as Attorney General of the State of Florida, departed this life, and that on May 16, 1938, George Couper Gibbs became and is now the duly appointed, qualified and acting Attorney General of the State of Florida; that there are no such persons as the alleged defendants, John Doe and Richard Roe, who are charged with the enforcement of the statute mentioned in said paragraph. The remaining allegations of said paragraph are admitted to be true.

6. Answering paragraph 6, the defendants deny the allegations thereof.

7. Answering paragraph 7, the defendants are advised that the allegations thereof constitute mere matters of law to which they are not required to make factual reply; but if the Court should determine otherwise, the defendants deny each and every the allegations of said paragraph.

8. Answering paragraph 8, the defendants admit that each of the publisher plaintiffs has secured for its respective corporation the ownership of the copyright in many thousands of musical compositions. As to the remaining allegations of said paragraph, the defendants are without knowledge.

9. Answering paragraph 9, the defendants admit the allegations thereof to be true.

10. Answering paragraph 10, the defendants admit that plaintiff Gene Buck wrote the lyrics of many musical compositions and that from time to time he entered into contracts with various music publishers pursuant to which [fol. 109] such publishers procured copyright in such compositions. As to the remaining allegations of said paragraph the defendants are without knowledge.

11. Answering paragraph 11, the defendants admit that plaintiff Deems Taylor composed the two musical compositions mentioned in the first clause of said paragraph and entered into a contract for the publication thereof, copy of which is attached to the bill as Exhibit A. As to the remaining allegations of said paragraph the defendants are without knowledge.

12. Answering paragraph 12, the defendants admit that the plaintiff Oley Speaks composed the music for many musical compositions and entered into contracts for the publication thereof with the plaintiff G. Schirmer, Inc., a music publisher, and that said publisher secured copyrights in said compositions. As to the remaining allegations of said paragraph the defendants are without knowledge.

13. Answering paragraph 13, the defendants admit that the plaintiff William J. Hill has entered into contracts for the publication of musical compositions composed by him with Shapiro, Bernstein & Co., music publishers, who has secured copyrights of said compositions. As to the remaining allegations of said paragraph the defendants are without knowledge.

14. Answering paragraph 14, the defendants admit that plaintiff Anne Paul Nevin is the widow of Ethelbert Nevin, who wrote and composed the musical compositions mentioned in the first clause of said paragraph; that plaintiff [fol. 110] Ella Herbert Bartlett is the daughter of Victor Herbert, whc wrote and composed musical works alleged to have been composed by him; that plaintiff Jane Sousa is the widow of John Phillip Sousa, who wrote and composed the musical works alleged to have been composed by him. As to the remaining allegations of said paragraph, the defendants are without knowledge.

15. Answering paragraph 15, the defendants are without knowledge as to the allegations thereof; that none of the plaintiffs and none of the respective husbands and fathers of the plaintiffs mentioned in paragraph 14 prior to 1917 received any compensation for the public performance for profit of the musical compositions respectively owned, published, copyrighted, written or composed by them; and are without knowledge as to the allegations that users of musical compositions throughout the country refused to recognize such right in the plaintiffs or to pay any royalties for public performance thereof for profit; and are without knowledge as to the allegation that users of music throughout the country publicly performed for profit such musical compositions without payment of royalties; and are without knowledge as to the allegations to the effect that the users of music were organized into powerful trade associations who employ counsel to defend them against claims of

infringement for unauthorized public performance of the musical works of plaintiffs and others similarly situated, and that such associations offered to defend infringers who were not members of their respective associations. The remaining allegations of said paragraph are denied.

[fol. 111] 16. Answering paragraph 16, the defendants admit that the plaintiff has encountered tremendous opposition on the part of organized groups of users of music throughout the country and allege that such opposition has been primarily due to the monopolistic price-fixing activities of the Society as disclosed in the bill of complaint herein and in this answer. It denies that the Society has licensed establishments throughout the country to publicly perform for profit the musical compositions of its members upon fair and reasonable license fees and alleges that such license fees have been imposed through the monopolistic power of the Society upon an unfair and unreasonable basis. As to the remaining allegations of said paragraph, the defendants are without knowledge.

17. Answering paragraph 17, the defendants admit the allegations thereof to be true.

18. Answering paragraph 18, the defendants admit the allegations thereof to be true.

19. Answering paragraph 19, the defendants admit that the respective business and occupations of the individual plaintiffs are lawful ones, but deny that the business of the plaintiff Society or that of its members in combination is a lawful one, and allege that because of their monopolistic price-fixing activities the business of said Society and that of its members in combination is unlawful and subject to such prohibition as is afforded by the Florida statute complained of in the bill. The remaining allegations of said paragraph are matters of law which the defendants are advised it is unnecessary for them to answer.

[fol. 112] 20. Answering paragraph 20, the defendants deny that the users of music have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of particular musical compositions; deny that the rights granted by the Society are of great value to the users and deny that the system of blanket licenses conferred by the Society performs a useful service for the users; and to the contrary thereof allege that

the price-fixing monopolistic activities of the Society are detrimental to the users of music in the State of Florida. Defendants deny that the individual plaintiffs have not the resources, funds, organization or ability to protect their copyrighted works against infringement by unauthorized performance for profit within the State of Florida in their individual capacity; deny that the plaintiffs have been compelled to unite as they have done in the organization of the Society for the purpose of preventing such infringement, or that their rights cannot be enforced by the individual plaintiffs without such combination. They deny that if the individual plaintiffs created an agency within the State of Florida to protect them against such infringements, the cost thereof to each of such individual plaintiffs would be greatly, or at all, in excess of $10,000. As to the remaining allegations of said paragraph the defendants are without knowledge.

21. Answering paragraph 21, the defendants admit that the radio broadcasting stations in the State of Florida named in said paragraph are members of the National Association of Broadcasters. They deny that said Association has acted or presently acts collectively in dealing with the Society; deny that the State statute was sponsored by [fol. 113] an organized group of radio broadcasters or other users of music, or that it was sponsored at all so that such users of music might have free access to the musical compositions of the plaintiffs without compensation. As to the remaining allegations of said paragraph the defendants are without knowledge.

22. Answering paragraph 22, the defendants admit the allegations thereof to be true.

23. Answering paragraph 23, the defendants admit the allegations thereof to be true, except as follows: They deny that the contracts in force between the Society and the users of music within the State of Florida are for the benefit of such Florida users; they deny that license fees mentioned in said paragraph have been fixed in "negotiations" with the respective users or in negotiations with the trade associations therein referred to, and to the contrary allege that because of the monopolistic power wielded by the Society, no negotiations on the part of the users of such music were had or were at all possible, since such users must comply

with the requirements of the Society under penalty of having their several businesses destroyed by infringement suits, unless rescued from such disaster by the provisions of the Florida statute.

24. Answering paragraph 24, the defendants admit that by virtue of various treaties and proclamations issued pursuant to the copyright act reciprocal rights with respect to copyright protection within the United States are extended to citizens of the foreign countries named in said paragraph whereby the citizens of such foreign countries are extended [fol. 114] copyright protection within the United States upon compliance with the copyright act with respect to their several musical compositions, and admit that the Society under its standard form of license agreements claims to grant licenses to publicly perform for profit copyrights owned in such foreign countries under authority from the owners thereof; but the defendants are without knowledge whether the Society actually has such authority, and if so, as to the terms upon which the same is granted. As to the remaining allegations of said paragraphs the defendants are without knowledge.

25. Answering paragraph 25, the defendants are advised that the allegations of said paragraph constitute solely matters of law to which they are not required to make factual reply; but defendants allege that since the institution of this suit, by House Bill 1103, the Legislature of Florida has enacted legislation which operates to repeal the portions of Chapter 17807, Laws of Florida, 1937, of which complaint is made in said paragraph of the bill, by reason whereof the allegations of said paragraph have become moot.

26. Answering paragraph 26, the defendants deny that under the Florida statute complained of each plaintiff would be required separately to investigate infringements and determine whether payments were made for public performance of their copyrights and deny that the establishment of such an agency would cost each of the plaintiffs many thousands of dollars or would exceed greatly, or at all, the revenue which each of them might hope to collect in the State of Florida; and to the contrary allege that the plaintiffs, if [fol. 115] dissociated from the price-fixing combination in which they are now engaged, might lawfully and could associate themselves together for the purposes aforesaid and

at no greater cost than the like activities of the Society now subject them to. As to the remaining allegations of said paragraph the defendants are without knowledge.

27. Answering paragraph 27, the defendants are without knowledge as to the allegations of said paragraph.

28. Answering paragraph 28, the defendants admit the allegations of said paragraph to be true except that they are without knowledge as to the number of copyrighted works of the plaintiffs and other members of the Society and of its affiliated Societies which are broadcasted without the State and heard on receiving sets within the State of Florida.

29. Answering paragraph 29, the defendants are advised that the allegations thereof constitute mere matters of law to which they are not required to make factual reply; but if the Court should determine otherwise, the defendants deny each and every the allegations of said paragraph.

30. Answering paragraph 30, the defendants admit that copyrighted works such as motion pictures, dramas, newspapers, magazines and periodicals are dealt in, licensed and sold in the State of Florida, none of which are affected by said State statute. The defendants are advised that the remaining allegations of said paragraph constitute mere matters of law to which they are not required to make factual reply.

31. Answering paragraph 31, the defendants are without knowledge as to the allegations of said paragraph.

[fol. 116] 32. Answering paragraph 32, the defendants are advised that the allegations thereof constitute mere matters of law to which they are not required to make factual reply; but if the Court should determine otherwise, the defendants deny each and every the allegations of said paragraph.

33. Answering paragraph 33, the defendants are advised that the allegations thereof constitute mere matters of law to which they are not required to make factual reply; but if the Court should determine otherwise, the defendants deny each and every the allegations of said paragraph.

34. Answering paragraph 34, the defendants deny the allegations thereof.

35. Answering paragraph 35, the defendants are without knowledge as to the number of counties in Florida in which there are establishments publicly performing for profit copyrighted musical compositions of members of the Society and the foreign Societies with which the Society has reciprocal contracts. The remaining allegations of said paragraph are denied.

36. Answering paragraph 36, the defendants are without knowledge as to the allegations of the first paragraph of said paragraph 36. The defendants are advised that the remaining allegations of said paragraph are mere matters of law to which they are not required to make factual reply; but if the Court should determine otherwise, the defendants deny each and every the remaining allegations of said paragraph.

38. Answering paragraph 38 (by clerical misprision numbered 38 instead of 37) the defendants deny the allegations thereof.

[fol. 117] B. Answer to Supplemental Bill of Complaint:

1. Answering paragraph 1, the defendants are advised that the allegations of said paragraph constitute mere conclusions of the pleader to which they are not required to make factual reply.

2. Answering paragraph 2, the defendants admit the allegations thereof to be true.

3. Answering paragraph 3, the defendants admit the allegations thereof to be true.

4. Answering paragraph 4, the defendants admit the allegations thereof to be true except that said appeal is no longer pending, having been returned to the above named Court by mandate of the United States Supreme Court filed herein May 19, 1939.

5. Answering paragraph 5, the defendants admit the allegations thereof to be true.

6. Answering paragraph 6, the defendants admit the allegations thereof to be true.

7. Answering paragraph 7, the defendants admit the allegations thereof to be true.

8. Answering paragraph 8, the defendants admit the writing of the letter copied in said paragraph; but the remaining allegations of said paragraph are denied.

9. Answering paragraph 9, the defendants admit that the said Tyrus A. Norwood has at all times endeavored to have the interlocutory injunction heretofore entered herein vacated. The remaining allegations of said paragraph are denied.

[fol. 118] 10. Answering paragraph 10, the defendants deny that the defendant George Couper Gibbs, either directly or through his assistant, Tyrus A. Norwood, has made any such threats as are alleged in said paragraph. Further answering said paragraph, they say that since the institution of this suit, by House Bill No. 1103, enacted by the Florida Legislature, June 12, 1939, Sections 2-A, 2-B and 6 of Chapter 17808, Laws of Florida, 1937, have been repealed.

11. Answering paragraph 11, the defendants deny the allegations thereof.

C. And further answering said Bill of Complaint and Supplemental Bill, and each and every part thereof, the defendants allege:

1. That the plaintiffs do not come into equity with clean hands because of the matters and things hereinafter set forth.

2. The plaintiffs other than the Society are members of the Society.

3. The members of the Society comprise a substantial number of the owners of copyrighted musical compositions within the United States, approximately 123 music publishers and 1,000 composers and authors of musical compositions.

4. The members of the Society, together with 44,000 foreign publishers, composers and authors, have vested in the Society the exclusive right until December 31, 1940, to license within the United States the public performance for profit of all of their copyrighted works which comprise a very large part—60% or more—of the music actually performed for profit within the United States.

[fol. 119] 5. The Society is organized, maintained and actually operated in the State of Florida for price-fixing purposes and among the powers vested in its Board of Directors is that to fix the rate, time and manner of payment of royalties. No licensee is granted the right to perform for profit any of the musical compositions thus controlled by the Society except upon the basis of a blanket license publicly to perform for profit all of such musical compositions.

6. A very large part of the revenues of the Society are derived from the licensing by blanket licenses as aforesaid by radio broadcasting stations which compose the largest class of users of copyrighted music in the United States and in the State of Florida. Licenses granted to broadcasting stations by the Society in Florida and throughout the United States are based upon a fixed per cent of the gross income of the Station, plus an annual fee. In Florida and throughout the United States licenses are granted by the Society to radio broadcasting stations 51% or more owned by a newspaper upon terms more favorable than those granted to stations not thus owned.

7. The relief sought by the Bill of complaint and supplemental bill of complaint in this cause is directly in aid of the perpetuation of the price-fixing monopoly thus vested in the plaintiff Society, and should be denied.

D. And for a first counter-claim, the defendants allege as follows:

1. They incorporate herein by reference the allegations of paragraphs C-2 to C-6 of this answer.

[fol. 120] 2. The monopolistic and price-fixing activities of the Society as hereinabove set forth are directly in violation of Chapter 17807, Laws of Florida, 1937, the enforcement of which statute is sought to be enjoined by the plaintiffs in this proceeding, and such activities are actually being practiced by the Society and its agents within the State of Florida.

Wherefore, defendants pray that a preliminary and final injunction be issued by this Court against the plaintiffs, and each of them, and those controlled by the plaintiffs, or any of them, restraining them from:

(a) The making of further contracts in this State for the licensing for public performance rights on copyrighted music in the State of Florida, either through the Society or any other combination for price-fixing purposes;

(b) The collection of license fees or the enforcement or attempted enforcement of existing contracts, agreements, or licenses within this State made by any person, firm or corporation with the Society or any other combination made by the plaintiffs for the purpose of fixing prices on such public performance rights of copyright music within the State of Florida.

George Couper Gibbs, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett, Attorneys for the Defendants.

[fol. 121] IN UNITED STATES DISTRICT COURT

ORDER FOR HEARING—Filed October 9, 1939

Having considered the motion and affidavits for leave to file further supplemental complaint, bring in new defendants, substitute certain defendants, and for further temporary injunction, and the proposed further supplemental Bill of Complaint tendered therewith, and the motion of complainants to dismiss the counterclaim of defendants,

It is, Thereupon, Ordered and Adjudged:

1. Plaintiffs' said motions be, and the same are hereby set for hearing before the Court at the Courtroom thereof of the Federal Building at Jacksonville, Florida, at the hour of ten o'clock A. M., on the 19th day of October, 1939.

2. That the Honorable Joseph C. Hutcheson, Jr., a Judge of the Circuit Court of Appeals for the Fifth Circuit, and the Honorable Louie W. Strum, one of the Judges of the United States District Court for the Southern District of Florida, be, and they are hereby called to my assistance to hear and determine said motions at said time and place.

3. That written notice of the time and place of hearing on said motions be given to Honorable Fred P. Cone, the Governor of the State of Florida, the Honorable George Couper Gibbs, Attorney General of the State of Florida,

and to such other persons as may be defendants in this suit, or their attorneys and solicitors of record, at least five days [fol. 122] before the date of said hearing.

Dated in Chambers, this 9 day of October, 1939.

(S.) Augustine V. Long, United States District Judge.

[fol. 123] In United States District Court, Northern District of Florida, Gainesville Division

Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, Complainants,

against

George Couper Gibbs, Individually and as Attorney General of the State of Florida, E. Dixie Beggs, Jr., Individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., Individually, and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, Individually, and as State Attorney for the Third Judicial Circuit of Florida; William A. Hallowes, III, Individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, Individually and as State Attorney for the Fifth Judicial Circuit of Florida; Chester B. McMullen, Individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, Individually and as State Attorney for the Seventh Judicial Circuit of Florida; J. C. Adkins, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, Individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, Individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, Individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Roy D. Stubbs, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, Individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; John H. Carter, Jr., Individually and as State Attorney for the Fourteenth Ju-

dicial Circuit of Florida; Louis F. Maire, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; "John Doe" and "Richard Roe", Defendants,

R. A. Gray, Individually and as Secretary of the State of Florida, J. M. Lee, Individually and as Comptroller of the State of Florida, Added Defendants,

T. E. Duncan, Individually and as State Attorney for the Eighth Judicial Circuit of Florida; L. D. McRae, Individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Phil O'Connell, Individually and as State Attorney for the Fifteenth Judicial Circuit of Florida; Clyde H. Wilson, Individually and as State Attorney for the Twelfth Judicial Circuit of Florida, Substituted Defendants

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Further Supplemental Bill of Complaint—Filed October 19, 1939

The complainants, Gene Buck, individually and as President of the American Society of Composers, Authors and [fol. 124] Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, by their undersigned counsel, bring this their further supplemental bill of complaint herein against George Couper Gibbs, individually and as Attorney General of the State of Florida, and the other defendants named in the caption hereinabove, and say:

1. Since the filing of the original and supplemental bill of complaint herein, certain material facts have occurred as are hereinafter alleged.

2. That on or about the 12th day of June, 1939, the Legislature of the State of Florida enacted a law known as House Bill No. 1103 and Senate Bill No. 635, hereinafter referred to as the "New Law" (a copy of which is annexed hereto and marked Exhibit M). That such law became effective on or about the 12th day of June, 1939, by failure of the Governor of the State of Florida to take any action thereon.

3. Since the enactment of said New Law, the Society has been compelled to refrain from doing any business in the State of Florida and is not at the present time doing any business in that State and is unable to do business in that State for the reasons hereinafter mentioned, unless the injunction prayed for herein is granted.

4. That heretofore and on February 7, 1938, this action was commenced as a result of the enactment by the State of Florida of the Act of June 9, 1937, Florida Laws of 1937, Volume 1, page 204, General Laws of Florida, 1937, c. 17807; which law will be referred to hereinafter as the "Original Law"; on the same day a motion for temporary injunction was filed; thereafter the defendants filed a motion to dismiss the bill, which motion came on to be heard at the same time as the motion for temporary injunction. Defendants' motion to dismiss was denied and temporary injunction was entered by this Court on April 4, 1938; thereafter, one Cary D. Landis, formerly Attorney General of the State of Florida and one of the defendants herein, died, and the defendant George Couper Gibbs was named as his successor; thereafter a motion was made by said George Couper Gibbs and by the other defendants to dismiss the complaint on the ground that the action had abated by reason of the death of said Cary D. Landis; plaintiffs moved for an order substituting said George Couper Gibbs for said Cary D. Landis. Both motions having come on to be heard in this Court were denied. In the meantime, an appeal was taken to the United States Supreme Court from the order granting temporary injunction and denying the motion to dismiss, and a motion was made in the United States Supreme Court by defendants to vacate said decree and to direct the dismissal of the bill of complaint. Defendants countered in that Court with a renewal of its motion to substitute said George Couper Gibbs for said Cary D. Landis, deceased; defendants' motion was denied and plaintiffs' motion was granted, and an order was entered substituting the said George Couper Gibbs in place of Cary D. Landis. The Supreme Court affirmed the order of temporary injunction, the mandate of affirmance having been filed in this Court on the 19th day of May, 1939. A supplemental bill of complaint was heretofore filed by plaintiffs in both the Supreme Court and in this Court.

[fol. 125] 5. During the pendency of said appeal to the Supreme Court, the parties to this action stipulated that

the time of the defendants to answer be extended until 30 days after the determination of the appeal by the United States Supreme Court. Such time expired on June 19, 1939, whereupon defendants filed their answer herein. Simultaneously with the filing of said answer, defendants filed a motion to dismiss the supplemental complaint on the alleged ground that the enactment of the New Law aforesaid repealed Section 2(a), 2(b) and 6 of the Original Law.

6. Said New Law makes it unlawful, among other things, for any persons to license the performing rights of any copyrighted musical or dramatico-musical composition or to collect any compensation on account of such license, unless such person shall do the following:

(a) File with the Comptroller on forms prescribed by the Comptroller, a list describing each such musical composition or dramatico-musical composition intended to be licensed in the State, including the name and title of such composition, the date of the copyright, number or other symbol given thereto in the United States Copyright Office, the name of the author, the name of the publisher, the name of the present owner of the copyright, and the name of the present owner of the performing rights; and to pay a filing fee of two cents for each composition;

(b) To file simultaneously, an affidavit describing the public performance rights to be licensed or sold or otherwise disposed of, setting forth that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights of such composition, setting forth affiant's name, occupation, residence, and if an agent, the name, occupation and residence of his principal.

7. Said New Law imposes upon the Comptroller of the State of Florida the duty to make available said list to all persons for examination and taking of copies and authorizes the Comptroller in his discretion to cause a list of all such copyrighted material filed with him to be published once a year or oftener, in such form and medium as he shall deem suitable. The person furnishing such list is required to obtain from said Comptroller a certified duplicate copy of such list, which certified duplicate must be exhibited

by such person to anyone to whom such person seeks to sell, license or otherwise dispose of such composition.

8(a). The New Law further provides that it shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses (defined in the Statute as "any device whereby public performance for profit is authorized of the combined copyrights of two or more owners"), upon a blanket royalty covering more than one or all of such compositions owned or controlled by the members of such association, unless each individual copyright owner included in such association or such association in behalf of each individual copyright owner also shall make available to each user of such compositions within the State of Florida on the option of the [fol. 126] user, the right to perform publicly for profit each such copyrighted composition at a price established for each separate performance of each such composition.

(b) Under this provision, the users in Florida, a substantial number of whom are combined into powerful trade associations acting in the State of Florida in concert with each other and in concert with national groups of similar users, could and would prevent the Society from issuing more than one license because, upon issuing a single blanket license to a single user, all users in the State of Florida would have the right to perform any and all musical and dramatico-musical compositions owned by members of the Society at a price which it would be necessary for the Society to fix. The new law does not impose any obligation upon the users to pay license fees at any time. The copyright owners are compelled to give an involuntary license to the users in the State of Florida, but the users are not compelled to keep a record of their performances or to file such a record in the office of the Comptroller, or to make payments prior or subsequent to the exercise of the rights claimed by them under the compulsory license granted by the new law. Thus, the practical effect of the new law is to confiscate the copyright musical compositions and dramatico-musical compositions of complainants and others similarly situated for the private benefit of users of music in the State of Florida. There are at the present time 484 contracts in force between the Society and users of music

in the State of Florida. In addition there are in excess of 50 establishments which are publicly performing for profit the musical compositions copyrighted by members of the Society, although the owners of such establishments do not have licenses to give such performances lawfully. If the Society should attempt to grant a blanket license to any of these establishments it will violate the New Law unless it permits all other establishments to enjoy a statutory license without entering into contractual relations of any kind with the copyright owners. The Society and its members including complainants are unwilling to do this.

9(a). The copyright owner is required to file, in addition to the aforesad list, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such composition that the price so stated has been determined by such copyright owner acting for himself and not either, directly or indirectly, in concert or by agreement with the owner or owners of any other copyright. If any classifications are made in said schedule of prices, they must be determined by use and function, or either, of the users of said compositions, with a separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. The prices fixed must remain effective until seven days after a new schedule of prices is filed with the Comptroller. This schedule must be made available by the Comptroller and may be published by the Comptroller.

(b) Said New Law further provides that a copy of each blanket license issued with respect to performance within the State of Florida must be filed with the Comptroller by the person issuing same, who must pay the prescribed fees therefor.

(c) Said New Law makes it unlawful to license performing rights for fees based in whole or in part on any pro- [fol. 127] gram not containing any composition licensed. If the license fee includes the payment of royalties based upon programs not using such compositions, said license agreement is valid only to the extent that it is based and computed upon a program in which a composition is ren-

dered. The licensing of any composition not listed is unlawful.

10. Simultaneously with the filing of the aforesaid list, the owner of said performing rights is required to designate the Secretary of State of the State of Florida as his agent for the purpose of accepting service of process in any action or proceeding under the New Law accompanied by a filing fee of $5.00. No action may be brought with respect to such performing rights or to collect any compensation on account of any sale, license or other disposition thereof in the State of Florida except upon pleading and proving compliance with the New Law.

11. A tax of an amount equal to three per cent (3%) of the gross receipts of all such sales, license or other disposition of performing rights in the State of Florida is levied and shall be collected by the State Comptroller on or before March 15, 1940 for the portion of the calendar year 1939 after the effective date of the New Law and annually thereafter on or before each 15th day of March, and a return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March of every year. If the tax is not paid, the Comptroller is given authority to commence proceedings and to apply for the appointment of a receiver to take over the assets of the delinquent taxpayer within the State of Florida. Violation of the New Law is made a misdemeanor punishable in the manner applicable to misdemeanors in the State of Florida, by Section 7104 as amended of the compiled General Laws of Florida, to wit: A fine not exceeding Two Hundred Dollars or imprisonment not exceeding ninety days or both in the discretion of the Court.

12. The New Law also provides that any person who negotiates or collects or attempts to collect license fees in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to the penalties of the New Law. Any person aggrieved by a violation of the New Law may sue in the State courts of Florida to recover damages suffered or to require specific performance. Broad powers are given to the State Attorneys under the direction of the Attorney General to institute civil or criminal proceedings to enforce the New Law.

13(a). The New Law also provides that all laws or portions thereof relating to the same subject matter as the New Law and which are inconsistent with its provisions are hereby superseded by the provisions of the New Law to the extent that such inconsistency exists.

(b) The New Law also contains a provision that nothing therein shall be construed to repeal, supersede or modify any of the Statutes of the State of Florida pertaining to monopoly or restraining trade including, but without limiting the same, Sections 1, 2(c), 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, and 14 of Chapter 17807 of Laws of Florida, 1937 (the Original Law).

(c) It is also provided that the revenue provision of this Act shall take effect immediately and persons having con- [fol. 128] tracts to sell performing rights in the State of Florida shall file copies of such contracts with the Comptroller within thirty days after the Act becomes a law, and shall within ninety days of such date comply with the other provisions of the Act requiring the filing of any data.

14. Said New Law does not expressly or by implication repeal any sections of the Original Law.

15(a). Simultaneously with the introduction of the New Law as a bill in the Florida Senate by Senator Beacham on May 8, 1939, a combining bill was introduced by the same Senator, known as Senate Bill No. 636; and simultaneously with the introduction of said New Law as a bill in the Florida House by Representative Marchant on May 8, 1939, a combining bill was introduced by said Representative Marchant known as House Bill No. 1110, said House Bill No. 1110 being identical with Senate Bill No. 636. A true copy of said bill is hereto annexed and made a part of this further supplemental bill of complaint and marked Exhibit N.

(b) Said combination bill (House Bill No. 1110 and Senate Bill No. 636) provided for the repeal of Sections 2(a), 2(b) and 6 of the Original Law and for an amendment of Section 8 of the Original Law which had reference to the penalties. Said combination bill failed of passage and was not enacted. By reason of the failure of passage of such repealing bill, the Original Law remains in full force and effect except as amplified and extended in scope by the New Law.

16. Defendant R. A. Gray is the duly elected, appointed, qualified and acting Secretary of State of the State of Florida; defendant J. M. Lee is the duly elected, appointed, qualified and acting Comptroller of the State of Florida. Both of said defendants are charged with the duty of enforcing the provisions of the New Law, and will enforce the same unless restrained by this Court.

17. The value of the matter in dispute between plaintiffs and defendants is in excess of the sum of $3,000.00 inclusive of interest and costs.

18. This further supplemental bill of complaint is brought among other things, to enjoin the enforcement of the New Law; to repress and prevent the deprivation under color of the said New Law of certain rights, privileges and immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of Florida, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted compositions which has been vested in the complainant Society for a limited period as hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article I, Section 8 of the Constitution of the United States and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078, U. S. Code, Title 17); to repress and prevent the deprivation of such rights without due process of law and without the equal protection of the laws; and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the opera-
[fol. 129] tion and enforcement of said New Law; to repress and prevent a compulsory and irrevocable grant of special privileges to the users of complainants' copyrighted musical compositions in the State of Florida in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement of said New Law as a special law granting to corporations, associations and individuals a special privilege and retroactive in its operations; and this further supplemental bill, among other things, involves the question as to whether or not each of the complainants may

combine with one or more other persons as defined in the Statute as a partnership, society, association or corporation (whether a resident or non-resident of the State of Florida), for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Florida; whether or not complainants in combination with one or more other persons, have the right to issue by themselves or through any agent, attorney or representative, the right to users in Florida to publicly perform for profit musical compositions copyrighted and owned by complainants on any basis other than prescribed in said New Law; whether or not complainants acting in combination or collectively have the right to issue to citizens of Florida licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants by means of blanket licenses and fixed fees for the public performance for profit of complainants' copyrighted musical compositions to users within the State of Florida without giving such user an option to pay royalties either on a per piece or program basis; whether the State of Florida has the right to require and compel complainants to file within the State of Florida a list of musical compositions written, composed, copyrighted or owned by the complainants; whether or not the State of Florida may deprive complainants of rights secured under the Copyright Laws of the United States to restrict certain uses of their copyrighted works where they have given a license for a limited use thereof; whether the State of Florida has the right to require or compel complainants to fix a price for their copyrighted musical compositions for the performing rights of each separate performance for profit of each composition belonging to the complainants and to compel complainants to make classifications determined by use and function or either of the users of such compositions with separate price for each classification; whether the State of Florida may fix the terms upon which complainants may license the performance for profit of their respective compositions to users within said State; whether the State of Florida has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Florida and to require them to designate the Secretary of State as a person upon whom process may be served as their agent in the event that complainants or any of them shall attempt to license the public performance for profit of their respective copy-

righted musical compositions or dramatico-musical compositions or to collect any compensation on account of any such sale, license or other disposition in the State of Florida; whether the State of Florida may prevent plaintiffs from engaging an attorney, agent, collector or representative in said State by enacting that any such attorney, agent, collector or representative shall be subject to the [fol. 130] penal provisions of said State Statute; whether the State of Florida has the right to impose a three per cent (3%) tax upon moneys collected by complainants for licenses to publicly perform for profit the copyrighted musical compositions and dramatico-musical compositions within the State of Florida; and whether said tax is discriminatory; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including fine and imprisonment; and whether or not defendants in threatening to enforce the provisions of said New Law against complainants are not depriving complainants of their property and their right to liberty without due process of law; and whether they are not denying the complainants the equal protection of the laws; and whether the State of Florida may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies who have authorized the Society to grant licenses in the United States in their behalf, which conditions are not embraced in but are in conflict with existing treaties, Presidential proclamations and the Copyright Act of the United States. This further supplemental bill is brought to repress and prevent defendants from proceeding under and by virtue of the provisions of said New Law and from illegally and unlawfully threatening complainants and their employees, representatives and agents with fine, arrest, imprisonment and penalties under said New Law.

19. Upon information and belief, that since the filing of the supplemental bill of complaint herein, an organized group of radio broadcasters, headed by the National Association of Broadcasters, and other groups of users of music and other associations of users of music, in an endeavor to destroy the Society, so that they might have for their own selfish aggrandizement free access to all musical compositions without compensation, caused to be presented in various States bills substantially similar to the New Law. Such

bills were introduced late in 1938 and early in 1939 in the following States: Arkansas, New Mexico, Oklahoma, Minnesota, Indiana, Illinois, Oregon, Pennsylvania, Connecticut, Ohio, Michigan, Missouri, North Dakota, Montana, Colorado, Kansas, Washington, and Alaska. Said bills were defeated in each and every State except in the States of North Dakota, Montana and Kansas and the Territory of Alaska. In Montana, the statute that had been passed in 1937 which had been in litigation was repealed and there has been reenacted a bill similar to the New Law; in all, eighteen bills were introduced, of which fourteen were defeated or vetoed or failed to be reported out of committee, and four were enacted, to wit: Alaska, North Dakota, Montana and Kansas.

20. Upon information and belief that the New Law has been sponsored by the National Association of Broadcasters and by the broadcasters of the State of Florida acting in conjunction with such National Association of Broadcasters; that said New Law and its combination bills were introduced in the Legislature of the State of Florida shortly after the United States Supreme Court rendered its decision in this case affirming the temporary injunction, and that the said New Law was enacted for the purpose of enabling the defendants to move to dismiss the supplemental bill of complaint in this case, which motion they have [fol. 131] already made; and said New Law was introduced and sponsored by the National Association of Broadcasters and the broadcasters of the State of Florida for the purpose of attempting to nullify and render void and ineffective the temporary injunction heretofore granted by this Court and the decision of the Supreme Court affirming said temporary injunction.

21. In the State of Tennessee, a similar statute was enacted, sponsored by the National Association of Broadcasters and other organized associations of users, on May 21, 1937; complainant Society and a number of the other complainants hereto brought suit in the District Court of Tennessee to restrain the enforcement of said statute and moved for temporary injunction, which was granted on December 1, 1938; the Tennessee statute contained provisions similar to the New Law with regard to the per piece compulsory system of licensing and the filing of lists; a

copy of said statute (Chapter 212, Tennessee Laws, 1937) is hereto annexed, made part of this further supplemental bill of complaint and marked Exhibit O. A copy of the injunction order entered by Hon. Xenophon Hicks, Circuit Judge, Hon. John J. Gore, District Judge, and Hon. George C. Taylor, District Judge, is hereto annexed and made part of this further supplemental bill of complaint and marked Exhibit P.

22(a). Upon information and belief, compliance with said New Law would require the Society and its members and affiliated foreign societies, to abandon the contracts between them, and would compel each of the complainants as well as other members of the Society similarly situated, to rescind their respective contracts with the Society unless they were willing to have their works used for public performance in Florida upon an arbitrary basis upon a per piece or program system; the complainants and others similarly situated and the foreign societies affiliated with the Society are not willing to permit their musical compositions or dramatico-musical compositions to be performed within the State of Florida publicly for profit upon a per piece basis or program basis or on any basis wherein the fee or compensation would be arbitrarily determined by the provisions of the New Law; complainants believe that such a requirement and compulsory license and price fixing would deprive them of the exclusive rights vouchsafed to them under the Copyright Law; if each complainant would be required to act independently in order to have the right to fix license fees in the State of Florida, each complainant would be required to have an investigator covering each of the places of public entertainment and amusement in said State to determine whether any infringements took place and to determine whether payments were being made in accordance with performances; the establishment of such an agency would cost each of the complainants in excess of $10,000.00 apiece annually and would in fact greatly exceed the revenue which each of them might hope to collect within the State of Florida; all the users of music in the State of Florida have paid an average aggregate amount of $75,000 annually for each of the last three years; the ratio paid for each county for the years subsequent to 1936 is approximately the same as stated in the original bill of complaint for the year 1936; and the amounts collected by the com-

plainant Society from the users of music in the State of Florida in the future will at least approximate the amounts [fol. 132] collected in 1936 unless prevented by the operation of the New Law.

(b) The cost to the Society of attempting to compile the lists and information required to be furnished under the New Law and to pay the filing fee required by the New Law would be far in excess of $200,000.00, of which sum in excess of $20,000.00 would be required to be paid as a filing fee under the New Law for the compositions in the repertoire of the Society which are in excess of 100,000, for the research work with reference to the compilation of such lists which would require a search over the past fifty-six years and would include many compositions which have not been in active use and are not included in the current catalogues of members of the Society; in many cases the ownership of copyrights or performing rights is in dispute both as to the facts and the law, and it would be necessary to file affidavits of experts and to make investigations in most of the countries of the world to attempt to ascertain the ownership of each composition and the performing rights therein; other substantial sums would be required for clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights in musical compositions and dramatico-musical compositions of the members of the Society and of its affiliated societies with the other data required by the New Law.

23(a). Upon information and belief said New Law is class legislation; it is aimed only at proprietors of copyrights in musical compositions and dramatico-musical compositions and no other copyrights, and it exempts the performance of musical works which are not copyrighted under the Laws of the United States but which are protected under common law.

(b) A great many forms of copyright and kinds of copyrighted works are constantly dealt in, licensed and sold and otherwise made available and disposed of within the State of Florida, such as motion pictures, dramas, newspapers, magazines, books and periodicals, none of which are affected by said New Law.

24. Upon information and belief, the New Law is not a reasonable exercise of the police power; it is a pretext under which the State of Florida is attempting to use its power to enact copyright laws delegated by the Constitution of the United States solely to Congress, and said New Law interferes with the copyrights of complainants and others similarly situated under the guise of an exercise of police power of said State, and said New Law in truth and in fact was enacted not in the public interest but rather for the private benefit and gain of users of music including radio broadcasters within the State of Florida in an organized effort to enable such users to have free access to the copyright works of complainants and others similarly situated, and without compensation therefor, and without being compelled to pay damages for infringement as provided for in the Copyright Act. The system of licensing provided for in said New Law would compel complainants to permit others to perform their copyrighted compositions publicly for profit in the State of Florida regardless of whether or not such persons, firms or corporations prop- [fol. 133] erly and honestly accounted for the use of complainants' copyrighted works, and complainants and others similarly situated would be deprived of the right to enter into voluntary contracts licensing the public performance for profit of their copyrighted musical and dramatico-musical works and of the right to determine the conditions under which such works might be performed and of the right to limit the frequency of the performance of such works in order to prevent the destruction of the performing right values thereof; but on the other hand, the New Law would not compel users of the public performance for profit of the works of complainants to account or pay for the use thereof to complainants, and would effect an absolute confiscation of the performing rights for profit of complainants' works in violation of the Copyright Law.

25. The defendants and each of them individually and as respective officials charged with the duties of enforcing said New Law intend to, have threatened to and will enforce such New Law, with each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and

others similarly situated refuse to file a list of their copyrighted musical compositions and dramatico-musical compositions with the Comptroller of the State of Florida and, to accept or submit to a per piece or program system of compensation for involuntary license, and said defendants intend to and will enforce and have threatened to enforce the penal and confiscatory statutes of said New Law against complainants and others similarly situated in the event that complainants and others similarly situated attempt to enforce contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida, or enter into new license agreements with residents of the State of Florida for the giving of the right to publicly perform for profit any of complainants' musical compositions or dramatico-musical compositions, or fail or refuse to submit to the jurisdiction of the State courts of Florida; and defendants intend to will enforce and have threatened to enforce, in the event of the aforesaid contingencies or any of them, the penalties provided for in said New Law and intend to, will proceed to, and threaten to proceed to prosecute complainants and other similarly situated, their employees, agents and representatives, criminally, for alleged violation of said New Law.

26. Said New Law in its terms is so drastic and the penalties attached to the violation of the terms thereof are so great that neither complainants nor others similarly situated may continue to grant licenses to users of music within the State of Florida. There are forty-seven counties in the State of Florida, in each of which there are establishments publicly performing for profit musical compositions of members of the Society, including the other complainants herein, and the foreign societies with which the Society has reciprocal contracts, and if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in said counties, they will be subjected to a multiplicity of suits and prosecutions unless restrained by this Honorable [fol. 134] Court; complainants and others similarly situated will be unable to enforce any contracts made between them or in their behalf by the Society with residents or citizens of the State of Florida; complainants and others similarly situated, as well as the Society, have been compelled since the effective date of the New Law to desist

from licensing within the State of Florida the public performance for profit of their copyrighted musical compositions in said State and have been denied the privileges granted to them by the Copyright Act; and the Society has been compelled to desist from enforcing collection of payments under existing contracts between it and users since the effective date of the New Law and has been compelled to desist from investigating infringements of the copyrights of complainants and other members of the Society and its affiliated societies by means of the public performance for profit of their respective copyrighted musical compositions and dramatico-musical compositions, and complainants will continue to suffer as aforesaid unless this Court grant an injunction as prayed for; unless this Court shall determine the validity and application of said New Law in this proceeding, complainants and others similarly situated will be deprived of the rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Florida, and they will therefore be deprived of their property and liberty without due process of law and denied the equal protection of the laws, and denied privileges and immunities of citizens of the United States, all in contravention of Article I, Sections 8, 9, and 10; Article III, Section 2; Article IV, Section 2; and Article VI, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Sections 1, 8, 11, 12 and 22 of the Declaration of Rights of the Constitution of the State of Florida, and Article III, Section 20, of the Constitution of the State of Florida; and complainants have no adequate remedy at law, and are relievable only in a court of equity, and if complainants are not afforded the equitable relief prayed for herein but are required to resist when criminal prosecutions and other suits or proceedings are instituted under the New Law, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate.

27. Each of the complainants has received from the Society annually since 1936 approximately the same amounts received by each complainant in 1936 as alleged in paragraph "Thirty-sixth" of the bill of complaint herein, and

such complainants will receive such amounts down to December 31, 1940 if their right thereto is not interfered with and destroyed by such New Law.

28. If defendants are not restricted in their threatened and attempted enforcement of such New Law, complainants and others similarly situated will suffer great and irreparable loss, for which they have no adequate remedy at law but are relievable only in a court of equity.

29. Annexed hereto and made part of this further supplemental bill of complaint, and marked Exhibit Q, is a list [fol. 135] of the foreign societies affiliated with the Society by contractual arrangement, as well as a list of the members of the Society divided into groups of publishers, and composers and authors.

30. The defendant, Roy D. Stubbs is no longer the State Attorney for the Twelfth Judicial Circuit of Florida, having been superseded in that office by the defendant, Clyde H. Wilson.

31. The term of office of the defendant, J. C. Adkins as State Attorney for the Eighth Judicial Circuit of Florida will expire on or about July 31, 1939, and he will be succeeded by defendant, T. E. Duncan, who is the State Attorney duly elected or designated for said District, to take office on July 31, 1939.

32. The term of office of the defendant, John H. Carter, Jr., as State Attorney for the Fourteenth Judicial Circuit of Florida will expire on or about July 31, 1939, and he will be succeeded by defendant, L. D. McRae, who is the State Attorney duly elected or designated for said District, to take office on July 31, 1939.

33. The term of office of the defendant, Louis F. Maire as State Attorney for the Fifteenth Judicial Circuit of Florida will expire on or about July 31, 1939, and he will be succeeded by defendant, Phil O'Connell, who is the State Attorney duly elected or designated for said District, to take office on July 31, 1939.

34. There is substantial need for continuing and maintaining this suit against the defendants, T. E. Duncan, L. D. McRae, Phil O'Connell and Clyde H. Wilson, by reason of the fact that said defendants are charged with the enforce-

ment of the New Law in their respective Districts or Circuits, and by reason of the fact that users of the musical compositions and dramatico-musical compositions belonging to complainants reside and are located in each of the respective Districts and Circuits of the aforesaid four defendants and are presently using the musical compositions and dramatico-musical compositions belonging to the complainants, for public performance for profit, as aforesaid, and will continue so to do; and said defendant, Clyde H. Wilson, will enforce and threaten to enforce the Original Law and New Law, and defendants, T. E. Duncan, L. D. McRae and Phil O'Connell will enforce and continue to enforce the Original Law and New Law commencing on July 31, 1939 when they take their respective offices, and will in all respects continue and threaten to continue the action of their predecessors in enforcing both the Original Law and the New Law.

Wherefore, the complainants pray:

1. That a supplemental summons may issue to the said R. A. Gray, Secretary of State, J. M. Lee, Comptroller, T. E. Duncan, L. D. McRae, Phil O'Connell and Clyde H. Wilson, made party defendants hereto, requiring them to answer the bill of complaint and requiring all of the defendants to answer this further supplemental bill of complaint fully and truthfully and not on oath, oath being hereby waived;

2. That defendants and each of them, individually and in their respective capacities as officials of the State of Florida [fol. 136] charged by the Original Law and the New Law with the enforcement of the provisions thereof, be enjoined and restrained by temporary as well as permanent order of injunction of this Court respectively from bringing, directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity for the purpose of respectively enforcing said Original Law or New Law against the complainants and others similarly situated, their respective employees, agents or any of them, and from interfering with all existing contracts entered into between complainants and others, including the Society and citizens and residents of the State of Florida, and from threatening to enforce against any citizens or residents of the State of Florida the penalties of said Original

Law and New Law in event such citizens of Florida desire to carry out the provisions of their contracts with said Society, and from prosecuting criminally the complainants, their respective representatives or agents or any of them, or others similarly situated, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida, and generally, from doing any act or thing to carry out or enforce any of the provisions of said Original Law or New Law; and that an order to show cause issue herein upon the application of the complainants directed to the above named defendants, and each of them, requiring them to show cause why a temporary injunction should not issue as prayed for herein;

3. That said New Law and each and every part and section thereof, be declared to be unconstitutional, illegal and void and that a perpetual injunction be issued restraining the enforcement of said Original Law and New Law, and each and every part and section thereof, as hereinabove prayed for; and

4. That complainants have such other and further relief as to this Court may be just and proper.

Frank J. Wideman, Manley P. Caldwell, Wideman, Wardlaw & Caldwell, Solicitors for Complainants, Office & P. O. Address: 1400 Harvey Building, West Palm Beach, Florida; Frank J. Wideman, of Counsel.

[fol. 137] EXHIBIT "M"

New Florida Law

House Bill 1103 and Senate Bill 635 Effective May, 1939, a Bill to be Entitled:

An Act Relating to Public Performing Rights in Copyrighted Musical Compositions and Dramatico-Musical Compositions; Defining the Same; Regulating Licensing of Same; Prescribing Filing Fees; Making Provisions for a Resident Agent in the State; Levying a Tax on the Gross Receipts From the Licensing of Such Rights Within the State of Florida; Providing for the Enforcement of This

Act; the Promulgation of Rules and Regulations, Governing the Enforcement of This Act; Appropriating the Proceeds of the Tax and Fees Levied Herein and Repealing Certain Laws in Conflict Herewith

Be it Enacted by the Legislature of the State of Florida:

Section 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists [fol. 138] of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a

composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

Section 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, cause a list of all such copyrighted material filed with him to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions

within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any [fol. 139] other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof, and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof.

Section 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for

filing such contracts the same fee allowed clerks of the circuit court for similar services.

Section 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

Section 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any compensation for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

Section 5. At the time of filing the information required in Sections 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service of process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of [fol. 140] process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

Section 6. No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation

on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

Section 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940, with respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth day of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March of every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this Act and may require such persons to appear before him at his office in the Capitol, in the City of Tallahassee, Florida, *which* such records and papers as may be necessary after giving thirty days' notice to such person through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public

performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the [fol. 141] Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested."

Should the Comptroller determine that any person liable for any tax or fees under this Act has made an incorrect return or has made no return at all, or has failed to pay any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent tax payer in the State of Florida.

The Circuit Judge upon the Comptroller's application properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent tax payer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer and from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2% per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership, the receiver shall make a return to the court, which shall order all assets returned to the taxpayer.

Section 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform

for profit, in this state, any such composition, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

Section 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

Section 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

Section 11. Any person in this State aggrieved by reason of any violation of this Act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of the Act or to require specific performance under the provisions of this Act and shall be entitled to recover his costs, including reasonable attorneys' fees to be fixed by the court.

Section 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this [fol. 142] Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this state, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party,

then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted, the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

Section 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists.

Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937. Provided further, the revenue provisions of this Act shall take effect immediately it becomes a law and persons having contracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this Act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any date.

Section 16. Any section in this Act, or any part of any section that shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 17. This Act shall take effect immediately upon its becoming a law.

[fol. 143] EXHIBIT "N"

A Bill to be Entitled

An Act to Amend Chapter 17807, Laws of Florida, Acts of 1937 being, "An Act Declaring to be an Unlawful Monopoly and its Purposes to be in Restraint of Trade, Any Combination of Persons, Firms or Corporations which Determine the Amount of Money to be Paid to it or to its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Compositions, when Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare that any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made with any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Nonenforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Protection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement, Radio Broadcasting and Radio Receiving and Radio Rebroadcasting Stations Affiliated with Other Persons, Firms or Corporations Outside of the State of Florida, Against the Collection of License Fees or Other Exactions by Such Out of the State Affiliates for or on Account of any Combination herein Declared Unlawful; to Provide All Liability for any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription or Sound Producing Apparatus,

or by Personal Performance Coming Outside of the State [fol. 144] of Florida and Used Herein to Rest Exclusively on the Out of the State Person, Firm or Corporation Originally Sending the Same into this State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, under the Direction of the Attorney General, upon the Complaint of any Party Aggrieved by any Violation Hereof to Proceed to Enforce the Penalties Hereof Against Such Combination and any of its Members, Agents or Representatives; to Empower any Party Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide that the Terms of This Act Shall be Cumulative; to Provide that any Part of This Act Declared Illegal Shall Not Affect the Validity of the Remaining Parts Hereof." By Repealing Sections 2A and 2B and 6; and Amending Section 8 by Reducing the Penalties Provided Herein.

Be it Enacted by the Legislature of the State of Florida:

Section 1. That Section 2A of Chapter 17807, Laws of Florida, Acts of 1937 be and the same is hereby repealed.

Section 2. That Section 2B of Chapter 17807, Laws of Florida, Acts of 1937 be and the same is hereby repealed.

Section 3. That Section 6 of Chapter 17807, Laws of Florida, Acts of 1937 be and the same is hereby repealed.

Section 4. That Section 8 of Chapter 17807, Laws of Florida, Acts of 1937 be and the same is herein and hereby amended to read as follows: "Section 8: Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than $50.00 or more than $5,000.00 and by imprisonment in the penitentiary not less than 90 days or more than ten years, or by either such fine or imprisonment."

Section 5. Any section in this Act or any part of any section shall be declared invalid or unconstitutional; such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 6. All laws and parts of laws in conflict herewith are hereby repealed.

Section 7. This Act shall take effect upon its becoming a law.

[fol. 145] EXHIBIT "O"

Tennessee Statute

Senate Bill No. 1020

By

Sprouse Akin

An Act Entitled an Act in Aid of the Federal Copyright Laws, to Assist in Effectuating Their True Intent and Their Enforcement in the State of Tennessee by Removing and Declaring Illegal Certain Monopolistic Abuses and Activities Wrongfully Practiced under the Guise of Copyrights within the State by Price Fixing Combinations Monopolies, and Pools; to Enforce the Laws of the State of Tennessee Prohibiting Price Fixing Monopolies and Combinations in Restraint of Commerce and Trade; Providing Penalties for Combining Rights Granted by the Copyright Laws Where the Effect of Such Combination Results in the Use of Copyright Privileges as Instrumentalities of Oppression and Extortion within the State in Violation of Law; and Encouraging the Rendition, Creation and Production of Copyrighted Works Among the School Children and Citizens of the State of Tennessee; Encouraging the Marketing and Acceptance of Copyrighted Works, Created by the Citizens of this State; Defining the Jurisdiction and Duties of Courts of Record, the Duties of the District Attorneys, Receivers, the State Treasurer and the Secretary of State; Providing for the Appointment of a Receiver in Certain Instances; Defining Certain Terms; Providing for Service of Process on Non-Residents; Prohibiting Certain Acts; and Providing Penalties for Violation Hereof

Be it Enacted by the General Assembly of the State of Tennessee:

Section 1. It shall be unlawful for any person without the consent of the owner thereof, to cause to be publicly performed for profit any dramatic composition, or dramatic Musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or to knowingly sell a substantial copy of any substantial part thereof.

Section 2. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the State, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand [fol. 146] any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group of persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: Provided, further, Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right

to further restrict the use of said copyrighted work or works.

Section 3. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the Secretary of State of the State of Tennessee, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or associations, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The Secretary of State shall require two copies of said list, one of which he shall keep on file, the other shall be filed in the offices of the state treasurer.

Section 4. The foregoing list of names and titles provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a news-

paper of general circulation in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 5. No person, corporation, or association, domestic or foreign, whether doing business in this state as [fol. 147] hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or group, or association of persons, as prohibited by this act, need not file any such list.

Section 6. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government,

and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this Act, and the administration thereof, shall at all times effectuate the enforcement, the true intent and meaning of the United States copyright laws within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, the legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended [fol. 148] to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Tennessee.

Section 7. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the de-

tection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Tennessee by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider or abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Tennessee to be his or their true and lawful attorney upon whom may be served all summonses and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the State of Tennessee. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2.00) with the secretary of the State of Tennessee, or in his office, and such service shall be sufficient and valid personal service upon any such non-

resident defendant, copyright holder or owner, persons, or defendants, combinations, entity, or organization, as afore-[fol. 149] said: Provided, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendant's return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof; Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals entitles, firms, or corporations violating this act.

Section 8. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the district attorney of any county where complaint is made of any violation shall institute injunction proceedings against said persons in the proper court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons from violating any provisions of the act and the constitutional provisions prohibiting price fixing, monopolies, and combinations; and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents shall be enjoined by the court from aiding and furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are

without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint a receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all [fol. 150] sums due on contracts and licenses, and hold licenses or contracts with any defendant combination or entity, shall the same subject to the order of the court; and all persons holding pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's direction or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided, further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then determine the question of the establishment of license rates for the use those copyrighted works con-

trolled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and price-fixing, and preventing violations of this act, the court shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, after determining such rate, the court shall immediately advise the receiver of the findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the district attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted [fol. 151] works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Tennessee and by subject thereafter to administration by the state in the same manner as all other personal property belonging

to the State of Tennessee; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, further, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Tennessee, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all of the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.: and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Tennessee who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund; Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 9. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright

owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants [fol. 152] as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool or monopoly of their rights or property without full and complete due process of law.

Section 10. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hun-

dred dollars ($500.00), or imprisonment in the county jail for not more than six months or both such fine and imprisonment.

Section 11. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 12. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective courts hearing the causes may issue orders against said defendants in the county, but in the event any of the various county proceedings enter in the state of receivership, as herein provided, then the judges hearing the respective cause shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

Section 13. Be it Further Enacted, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed May 18, 1937.

Byron Pape, Speaker of the Senate. Walter M. Haynes, Speaker of the House of Representatives. Gordon Browning, Governor.

Approved 5-21-37.

[fol. 153]

Exhibit P

Tennessee Decree

Entered Dec. 1, 1938

United States District Court, Middle District of Tennessee, at Nashville

Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants

against

Grover Keaton, as State Treasurer of Tennessee, et al., Defendants

This cause coming on to be heard, and upon the consent of the attorneys for the respective parties herein, and the Court having inspected the record, and it appearing to the satisfaction of the Court that there is grave doubt as to the constitutionality of Chapter 212 of the Laws of 1937 of the State of Tennessee, and that complainants will be irreparably damaged unless an injunctional order is granted herein, and a bond having been filed and approved in the sum of $2,000.00 conditioned upon the payment to the defendant of such costs and damages as might be incurred or suffered by any party who might be found to have been wrongfully enjoined by this order;

It is ordered:

First: That the application for interlocutory injunction be and the same is granted.

Second: That the defendants Grover Keaton, individually and as State Treasurer of Tennessee; A. B. Broadbent, individually and as Secretary of the State of Tennessee; Roy Beeler, individually and as Attorney-General for the State of Tennessee, J. L. Grayson, individually and as District Attorney-General of the First Circuit of Tennessee; J. W. Wolfenbarger, individually and as District Attorney-General of the Second Circuit of Tennessee; J. Fred Bibb, individually and as District Attorney-General of the Third Circuit of Tennessee; R. B. Witt, individually and as District Attorney General of the Fourth Circuit of Tennessee; N. B. Key, individually and as District Attor-

ney-General of the Fifth Circuit of Tennessee; Peabody Howard, individually and as District Attorney-General of the Sixth Circuit of Tennessee; C. D. Lamb, individually and as District Attorney-General of the Seventh Circuit of Tennessee; W. B. Knott, individually and as District Attorney-General of the Eighth Circuit of Tennessee; W. C. Howell, individually and as District Attorney-General of the Ninth Circuit of Tennessee; J. Carlton Loser, individually and as District Attorney-General of the Tenth Circuit of Tennessee; C. L. Boyd, individually and as District Attorney-General of the Eleventh Circuit of Tennessee; David P. Murray, individually and as District Attorney-General of the Twelfth Circuit of Tennessee; L. L. Harrell, individually and as District Attorney-General of the Thirteenth Circuit of Tennessee; J. M. Drane, individually and as District Attorney-General of the Fourteenth Circuit of Tennessee; Joseph Hanover, Marion S. [fol. 154] Boyd, Lawrence Monteverde, and W. T. McLain, individually and as District Attorneys-General of the Fifteenth Circuit of Tennessee; G. C. Watkins, individually and as District Attorney-General of the Sixteenth Circuit of Tennessee; John H. Henderson, individually and as District Attorney-General of the Seventeenth Circuit of Tennessee; A. T. Stewart, individually and as District Attorney-General of the Eighteenth Circuit of Tennessee; Howard H. Baker, individually and as District Attorney-General of the Nineteenth Circuit of Tennessee; Walter Gray, individually and as District Attorney-General of the Twentieth Circuit of Tennessee; M. G. Lyle, individually and as District Attorney-General for Montgomery County, Tennessee; and each of them individually and in their respective capacity as officials of the State of Tennessee, charged by said State Statute with the enforcement of the provisions thereof, be enjoined and restrained until the further order of this Court from bringing, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing said State Statute against the complainants and others similarly situated, representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the complainants and others, including the Society and citizens and residents of the State of Tennessee, and from threatening to enforce against any citizen or resident of the State of Tennessee the penalties of said Statute in the event such citizen and resident desires

to carry out their contracts with the American Society of Composers, Authors and Publishers, or complainants, or others similarly situated, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated for doing any act or thing to detect infringements and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Tennessee, or else where, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statute.

Third: The bond filed by the complainants herein, be and the same hereby is approved.

Done and entered this 1st day of Dec., A. D. 1938.

Xen. Hicks, Circuit Judge. John J. Gore, District Judge. Geo. C. Taylor, District Judge.

The undersigned, waiving findings of fact and conclusions of law, hereby consents to the entry of the above order and admit due and timely service of notice of hearing of the motion for temporary injunction.

Roy H. Beeler, Attorney-General of the State of Tennessee, appearing on behalf of himself individually and as Attorney-General of the State of Tennessee, and on behalf of the Governor of the State of Tennessee, and on behalf of all other defendants herein.

[fol. 155] EXHIBIT Q

Affiliated Societies

Sociedad Argentina de Autores y Compositores de Musica, Buenos Aires, Argentina.

Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, Vienna, Germany.

Nationale Vereniging Voor Auteursrecht, Brussels, Belgium.

Sociedade Brasileira de Autores Theatraes, Rio de Janeiro, Brazil.

Association Cooperative Bulgare pour la Protection des Droits d'Auteurs, Sofia, Bulgaria.

Ochranne Sdruzeni Autorske, csl. Skladatelu Spisovatelu a Nakladatelu Hudebnich, Prague, Czecho Slovakia.

Internationalt Forbund Til Beskyttelse af Komponistrettigheder i Danmark, Copenhagen, Denmark.

The Performing Right Society, Ltd., London, England.

Saveltajain Tekijanoikeustoimisto Teosto, Helsinki, Finland.

Societe des Auteurs, Compositeurs et Editeurs de Musique, Paris, France.

Stagma—Staatlich Genehmigte Gesellschaft zur Verwertung Musikalischer Urheberrechte, Berlin, Germany.

Magyar Szovegirok, Zeneszerzok, es Zenemukiadok Szovetkezete, Budapest, Hungary.

Societa Italiana Degli Autori ed Editori, Rome, Italy.

Udruzenje Jugoslavenskih Muzickih Autora, Zagreb, Jugoslavia.

Norsk Komponistforenings Internasjonale Musikkbyra, Oslo, Norway.

Sociedade de Escritores e Compositores Teatrais Portugeuses, Lisbon, Portugal.

Societatea Compozitorilor Romani, Bucharest, Rumania.

Sociedad General de Autores de Espana, Madrid, Spain.

Foreningen Svenska Tonsattares Internationella Musikbyra, Stockholm, Sweden.

Schweizerische Gesellschaft Fur Auffuhrungsrechte, Zurich, Switzerland.

[fol. 156] List of Members of the American Society of Composers, Authors and Publishers

Publishers

A B C Music Corporation
A B C Standard Music Publications, Inc.
Berlin, Irv., Standard Mus. Corp.
Abrahams, Maurice, Inc.
Ager, Yellen & Bornstein, Inc.
Algred Music Co., Inc.
Feature Music Syndicate
Lowe-Goulston, Inc.
Manus Music Co., Inc.
Piantadosi, Al., Music Publisher
Rosey, Geo., Band & Orch. Catalog
Song Creators
Allen, Thornton W., Co.
Amsco Mus. Sales Co., Inc.
Ascher, Emil, Inc.
Brooks & Denton
Empire Music Co.
Royal Music Co.

Barnhouse, C. L., Inc.
Baron, M., Inc.
Belwin, Inc.
Berg, S. M.

Publishers—Continued

Cinema Music Co.
Berlin, Irving, Inc.
Birchard, C. C., & Co.
Bond, Carrie Jacobs, & Son
Boston Music Company
  Hatch Music Company
  Peate Music Co.
  Thompson, C. W., Co.
Briegel, Geo. F., Inc.
  Dillon, Carl Music Co.
Broadway Music Corporation
  Artmusic, Inc.
  Empire Music Co., Inc.
  York Music Co., The
Brooks Music Pub. Co.
Browne, Ted, Music Co.

Caesar, Irving
  Caesar, Irving, Inc.
Century Music Pub. Co.
Chappell & Co., Inc.
  Chappell-Harms, Inc.
Church, John, Co., The
Circle Music Publications, Inc.
Coleman, Robert H.
Composers' Music Corp.
Crawford Music Corporation
  DeSylva, Brown & Henderson, Inc.
  Green & Stept
  Yellen, Jack, Inc.
Curtis, L. B., Music Pub.
  Van Alstyne & Curtis

Davis, Joe, Inc.
  Aloha Music Co.
  Georgia Music Co.
  Triangle Mus. Pub. Co., Inc.

Denton & Haskins Corp.
Ditson, Oliver, Co., Inc.
Donaldson, Douglas & Gumble, Inc.

Elkan-Vogel Co., Inc
Evans Music Company
Exclusive Publications, Inc.
  Bloom, Harry, Inc.
  Lawrence Music Publishers, Inc.
  Milsons Mus. Pub. Corp.

Famous Music Corporation
Feist, Leo, Inc.
  Brown, Nacio Herb, Inc.
Fillmore Music House
Fischer, Carl, Inc.
  Oxford University Press
Fischer, J., & Bro.
Fisher, Fred, Music Co., Inc.
Fitzsimons, H. T., Company
Flammer, Harold, Inc.
  Luckhardt & Belder
Foley, Charles
Forster Music Publisher, Inc.
Fox, Sam, Publishing Co.
  Pallma Music Publishers, Inc.

Galaxy Music Corp.
Gamble Hinged Music Co.
  Wulschner Music Co.
Gem Music Corporation
  Conrad, Con, Music Pub., Ltd.
Georgeoff, Evan, Mus. Pub. Co.
Gershwin Pub. Corp.
Gilbert, L. Wolfe, Music Publishing Company

Publishers—Continued

Goodman Music Co., Inc.
Handman & Goodman, Inc.
Handman, Kent & Goodman, Inc.
Universal Music Co., Ltd.
Gordon, Hamilton S., Inc.
Gray, H. W., Company
Green & White, Inc.

Hall-Mack Company
Geibel, Adam, Music Co.
Handy Bros. Music Co., Inc.
Harms, Inc.
Harms, T. B., Company
Harris, Charles K., Music Pub.
Homeyer, Chas. W., & Co., Inc.
Hope Publishing Company
Bigelow-Main-Excell Co.
Excell, E. O., Co.
Tabernacle Pub. Co.
Huntzinger, R. L., Inc.

Italian Book Co.

Jacobs, Walter, Inc.
Abt, Valentine
Bates & Bendix
Bendix, Theodore
Eby, Walter M.
Farrand, Van L.
Gay, Mace, Catalog
Jaques, Percy
Musiclovers Co.
Partee, C. L., Music Co.
Shattuck, B. E.
Virtuoso Music School
Williams, Ernest S.
Jenkins Music Company
Jones, Isham, Music Corp.
Jungnickel, Ross, Inc.

Kalmar & Ruby Music Corp.
Kay & Kay Music Pub. Corp.
Franklin, John, Music Co.
Keane, Michael, Inc.
Kendis Music Corporation

Leslie, Edgar, Inc.
Lewis Music Pub. Co., Inc.
Lincoln Music Corp.
Capano, Frank, Music Pub.
Lorenz Publishing Co.
Tullar-Meredith Co., Inc.
Ludwig Mus. Pub. Co.

Marks, Edw. B., Music Corp.
Bergstrom Mus. Co., Ltd.
Berliner, Leo E., Pub. Co.
Chilton, Forrest S.
Dresser, Paul, Pub. Co.
Evans (George Honeyboy Evans)
Fassio, A.
Globe Music Publishing Co.
Halle, R. L.
Jordan, Julian, Mus. Co.
King, Chas. E.
Lecuona Music Co.—Cuba
Lyceum Music Co.
Metropolitan Music Co.
Metz, Theodore, Music Co.
Miller, Roy M.
Musin, Ovide
Penn, Wm. H.
Petrie, H. W., Catalog
Prelude Mus. Co.
Primrose & West Mus. Co.

Publishers—Continued

Recker, Robert, Music Co.
Reed, Bert, Catalog
Reed & Keller Catalog
Seitz, R. F.
Shields, Ren
Stern, Jos. W., & Co.
Vandersloot Music Publishing Co.
Wagner & Levien
Willis-Woodward Mus. Co.
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Marlo Music Corp.
Melo-Art Music Publishers
Melrose Bros. Mus. Co., Inc.
Miller, Bob, Inc.
Streamline Editions
Miller Music, Inc.
Sherman, Clay & Co.
Mills Music, Inc.
American Composers, Inc.
Beck, Mort
Clark, Frank, Mus. Co.
Daly, Joseph, Mus. Pub. Co.
Edwards, Gus, Mus. Pub. Co.
Gordon & Rich, Inc.
Gotham Attucks Mus. Co.
Gotham Mus. Serv., Inc.
Jerome, M. K.
Jerome & Schwartz Pub. Co.
Kalmar, Puck & Abrahams Consolidated
Keit Music Corp.
Kornheiser, Phil, Inc.
Morse, Theodore, Music Co.
Nelson, Jack, Mus. Co.
Stark & Cowan, Inc.
Stept & Powers, Inc.
Sterling Songs, Inc.
Sunlight Mus. Co., Inc.
Waterson, Berlin & Snyder Co.
Waterson, Henry, Inc.
Williams, Harry, Mus. Co.
Morris, Joe, Music Co.
Movietone Music Corp.

Nazarene Publishing House
Bilhorn Bros. Mus. Co.
Lillenas Pub. Co.
New World Music Corp.

Olman Music Corporation
Down Home Music Co.

Paramount Music Corp.
Popular Melodies, Inc.
Spier & Coslow, Inc.
Paull-Pioneer Music Corp.
Rossiter, Harold, Mus. Co.
Photo Play Music Co., Inc.
Luz Brothers Mus. Pubs.
Music Buyers Corp.
Piedmont Mus. Co., Inc.
Pond, Wm. A., & Company
Ellis, Robin
Presser, Theodore, Company

Quincke, W. A., & Company

Red Star Songs, Inc.
Allen & Harrison Mus. Co.
Remick Music Corp.
Ricordi, G., & Co., Inc., (of N. Y.)
Ringle, Dave
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Krey, Geo. M., Music Co.

Publishers—Continued

Madison Music Co.
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Victory Music Co.
World Music Co.
York & King Music Co.
Robbins Music Corporation
Mayfair Mus. Corp.
Metro-Goldwyn-Mayer Corp.
Sonnemann Mus. Co., Inc.
Whiteman, Paul, Publications
Wiedoeft, Rudy, Mus. Pub. Co.
Rodeheaver Co., The
Rossiter, Will
Roy Music Co., Inc.
Rubank, Inc.
Carlson, M. L.
Finder & Urbanek
Victor Music Co.

Santly-Joy-Select, Inc.
Santly Bros.-Joy, Inc.
Select Music Publications, Inc.
Saunders Publications
Schirmer, G., Inc.
Heffelfinger, R. W.
Sanders-Weiss, Inc.
Schroeder & Gunther, Inc.
Schuster & Miller, Inc.
Kornheiser-Gottler, Inc.
Kornheiser-Schuster, Inc.
Shapiro, Bernstein & Co., Inc.
Skidmore Music Co., Inc.
Southern Music Pub. Co., Inc.
Acme Music Pub. Co.
Bleyer, Archie, Inc.
Blues Music Co.
Bradford, Perry, Inc.
Bradford, Perry, Music Co.
Palmer, Robert, Music Pub. Co.
Spier, Larry, Inc.
Helf & Hager Co.
McKinley Music Co.
Root, Frank K., & Co.
Sprague-Coleman
Stasny Music Corp.
Bibo-Lang, Inc.
Stasny-Lang, Inc.
Summy, Clayton F., Co.
Superior Music, Inc.

Tesio, P., & Sons
Burke Doyle Music Co.
Major Music, Inc.
Tesio-Major

Victoria Publishing Co.
Villa Moret, Inc.
Vogel, Jerry, Music Co., Inc.
Crumit, Frank, Songs Co.
Haviland, F. B., Pub. Co.
Worth, Geo. T., & Co.
Volkwein Bros., Inc.
Bellfield Pub. Co.
Von Tilzer, Harry, Music Pub. Co.

Weil, Milton, Mus. Co., Inc.
White-Smith Mus. Pub. Co.
Williams, Clarence, Music Pub. Co., Inc.
Willis Music Company
Witmark, M., & Sons
Wood, B. F., Music Co.
Words & Music, Inc.
Davis, Coots & Engel, Inc.
Engel, Harry, Inc.
Keit-Engel, Inc.

[fol. 158] List of Members, Composers and Authors

Aarons, Alfred E., Est. of
Aborn, Morris
Abrahams, Maurice, Est. of
Achron, Joseph
Ackley, B. D.
Adams, A. J.
Adams, Frank R.
Adams, Stanley
Adamson, Harold
Adlam, Basil G.
Adlam, George B.
Ager, Milton
Ahlert, Fred E.
Akimenko, Ivan
Akst, Harry
Allan, D. B.
Allen, Ben D.
Allen, Francis J.
Allen, Thornton W.
Allison, Robert
Alter, Louis
Altman, Arthur
Ambel, Albert
Ambrosio, W. F.
Ames, Francis
Anderson, Frank H., Jr.
Anderson, Lily Strickland
Anderson, Maxwell
Anderson, R. Alex
Andrews, Maggie
Andrews, Mark
Archer, Harry
Arlen, Harold
Armour, Kathleen
Armstrong, Harry
Arndt, Felix, Est. of
Arnheim, Gus
Arthur, Mack
Ascher, Emil, Est. of
Atherton, Brainard
Atteridge, Harold, Est. of
Auer, Leopold, Est. of
Austin, Gene
Austin, Robert E.
Autry, Gene
Axt, William
Ayres, Frederic, Est. of

Baer, Abel
Bainbridge, Katharine
Baker, Phil
Balikov, S.
Ball, Ernest R., Est. of
Ballard, Francis Drake
Ballard, Pat
Balogh, Erno
Banks, Arnold
Barber, Beth
Barnett, Alice
Baron, Maurice
Barr, G. A.
Barrett, Mort
Barris, Harry
Barron, Ted
Bartholomae, Philip H.
Bartholomew, Marshall
Barton, Leslie
Baskette, Billy
Bassett, Karolyn Wells, Est. of
Bateman, Richard
Baum, Arthur T.
Baxter, Lionel
Baxter, Phil
Bayha, Charles A.
Beach, Mrs. H. H. A.
Beans, Gus
Beatrice, F.
Bedell, Robert Leech
Belden, George T.
Belledna, Alex
Bennard, George
Bennett, Frederick Douglas
Bennett, George J.

List of Members, Composers and Authors—Continued

Bennett, Harold
Bennett, Robert Russell
Benson, Margaret
Benter, Charles
Berg, David
Berg, Harold
Berger, Leon
Bergh, Arthur
Bergthal, Hugo
Berlin, Irving
Bernard, Al
Bernard, Felix
Bernie, Ben
Bernier, Buddy
Bibo, Irving
Bickford, Herbert
Billings, Hal
Bilotti, Anton
Black, Ben
Black, Frank J.
Blake, Eubie
Blake, James W., Est. of
Blaufuss, Walter
Blitzstein, Marc
Bloch, Ernest
Bloom, Marty
Bloom, Rube
Blossom, Henry, Est. of
Blue, Gil B.
Boger, Robert C.
Boland, Clay A.
Bond, Carrie Jacobs
Borissoff, Josef
Bornschein, Franz C.
Botsford, George
Bourdon, Rosario
Boutelje, Phil
Bowers, Frederick V.
Bowers, Robert Hood
Bowman, Brooks, Est. of
Bradford, Bessie
Bradford, James C.
Bratton, John W.
Breau, Lew., Est. of
Branscombe, Gena
Brashear, Charles
Brennan, James A.
Brennan, J. Keirn
Breuer, Ernest
Bridges, Ethel
Britt, Addy, Est. of
Brockman, James
Brockton, Lester
Brook, Roger
Brooks, Harry
Brooks, Shelton
Brown, Al. W., Est. of
Brown, A. Seymour
Brown, Barnetta, Est. of
Brown, Bertrand
Brown, Billy
Brown, George
Brown, George Murray
Brown, Keith Crosby
Brown, Lew
Brown, Nacio Herb
Browne, J. Lewis, Est. of
Browne, Raymond A., Est. of
Browning, Mortimer
Bruhns, George F. W.
Bruno, William
Bryan, Alfred
Brymn, J. Tim
Buchanan, Annabel Morris
Bucharoff, Simon
Buck, Gene
Buck, Richard Henry
Bucks, Arnold
Bullock, Walter
Bunch, Boyd
Burgheim, C. S.
Burke, Johnny
Burke, Joseph A.

List of Members, Composers and Authors—Continued

Burleigh, Harry T.
Burnett, Ernie
Burns, Annelu
Burnside, R. H.
Burt, Benj. Hapgood
Burtnett, Earl, Est. of
Burton, Nat
Burton, Val
Burwell, W.
Buzzi-Peccia, A.
Byrnes, James A., Est. of
Byron, Richard

Caddigan, Jack J.
Cadman, Charles Wakefield
Caesar, Irving
Cahn, Sammy
Caldwell, Anne
Calhoun, George
Callahan, J. Will
Camdon, Dal
Campbell, Elmer
Campbell, Florence
Capano, Frank
Cariljo, Jose Fernandez
Carle, Glen
Carleton, Bruce
Carlo, Monte
Carmichael, Hoagy
Carpenter, John Alden
Carroll, Earl
Carroll, Harry
Carter, Elbert F.
Carter, Sidney
Cassel, Irwin M.
Cavanaugh J. Anthony
Cavanaugh, James
Chapin, Betty
Chaplin, Saul
Charig, Philip
Charles, Ernest
Charles, Jean
Charles, Kenneth
Chase, Newell
Chasins, Abram
Chattaway, Thurland
Chenoweth, Wilbur
Christie, George
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Churchill, Frank E.
Clafflin, Donald
Clare, Sidney
Clark, Amy Ashmore
Clark, Elizabeth
Clarke, Grant, Est. of
Clarke, Herbert L.
Clarkson, Geoffrey
Clarkson, Harry F.
Claypoole, Edward B.
Cleary, Michael H.
Clifford, Gordon
Clinton, Larry
Clique, Henri
Cobb, Lotta
Cobb, Will D., Est. of
Coburn, Richard
Cohan, George M.
Cohen, Charles
Cohn, Chester
Colby, Elmer
Cole, Bob
Cole, Martin
Coleman, Byron
Collins, Will
Confrey, Edw. E.
Confrey, Zez
Conley, Larry
Conn, Chester
Conne, Bernice
Connor, Pierre
Conrad, Con, Est. of
Cook, Philip D.
Cook, W. Mercer
Cook, Will Marion

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Cooke, James Francis
Cool, Harold
Coombs, C. Whitney
Cooper, Bud
Cooper, Joe
Coots, J. Fred
Corinne, J.
Coslow, Sam
Costello, Bartley
Cowan, Rubey
Cox, Ralph
Creamer, Henry, Est. of
Creighton, Robert L.
Creswell, John D.
Crist, Bainbridge
Crosby, Bing
Cross, Daniel
Crumit, Frank
Cugat, Xavier
Cunningham, Paul
Curran, Pearl G.
Curtis, Billy
Curtis, Loyal
Curtis, Virginia
Cushing, Catherine C.
Czerwonky, Richard

Dabney, Ford
Dale, Norwood
Daly, Joseph M.
Damrosch, Walter
D'Angelo, Carlo
Daniels, Charles N.
Daniels, Mabel
Danmark, Ribe
D'Arese, Roscoe
Darnell, Shelby
David, Benj.
David, Lee
David, M.
David, Mack
Davidson, Morey
Davies, Mary Carolyn
Davis, Benny
Davis, John Carlyle
Davis, Lou
Dawson, Eli
De Berton, Roland
De Brant, Cyr
De Castro, Arturo
De Costa, Harry
Deems, Will
Deer, Eva D.
De Francesco, L. E.
De Koven, Reginald, Est. of
DeLamarter, Eric
De Lange, Edgar
De Leath, Vaughn
De Leone, Francesco B.
Delf, Harry
Delille, Francis
De Longpre, Michael
Denni, Lucien
Denniker, Paul
Deppen, Jessie L.
De Rose, Peter
De Sylva, Bud
De Sylva, B. G.
De Sylva, George Gard
Dett, R. Nathaniel
Deutsch, Emery
De Ville, Paul
De Voll, Cal
Dewey, W. L.
Dick, Dorothy
Dietz, Howard
Dillon, Fannie C.
Dillon, Will
Dimes, Dinny
Divina, Elli
Dixon, Mort
Dober, Con
Donaldson, Walter
Donaldson, Will
Donnelly, Andrew
Donnelly, Dorothy, Est. of

List of Members, Composers and Authors—Continued

Dougherty, Dan
Douglas, Jessie
Dowling, Eddie
Drake, Milton
Drew, Don
Dreyer, Dave
Drumm, George
Dubensky, Arcady
Dubin, Al
Du Bynne, Alfred
Duke, Vernon
Duncan, Wm. C.
Dungan, Olive
Dunkley, Ferdinand
Dunn, James P., Est. of
Dunn, Joe
Dunning, Martin
Dupont, Paul
Durham, Wesley
Duryea, Jeanette
Duval, Carlos
Dyson, Hal

Earl, Mary
East, Milford
Eaton, Jimmy
Eberhart, Nelle Richmond
Edelheit, Harry
Edmonds, Shepard N.
Edwards, Broughton
Edwards, Clara
Edwards, George
Edwards, Gus
Edwards, J. V.
Edwards, Leo
Egan, Jack
Egan, John C.
Egan, Raymond B.
Egner, Philip
Ehrlich, Sam, Est. of
Elie, Justin, Est. of
Eliscu, Edward
Ellington, Duke
Ellis, Lee
Elman, Mischa
Elwood, Fred
Emmerich, Bob
Emmerich, Robert D.
Enders, Harvey
Engel, Carl
English, Granville
Erdman, Ernie
Esrom, D. A.
Evart, Elmond

Fain, Sammy
Fairman, George
Fairfield, Frank
Fall, Albert
Farley, Roland, Est. of
Farrar, Geraldine
Fay, Stephen
Fazioli, Billy, Est. of
Federlein, Gottfried H.
Feinberg, Sam
Fenstock, Belle
Ferguson, Bob
Fields, Arthur
Fields, Buddy
Fields, Dorothy
Filene, Morton
Fillmore, Henry
Finley, Lorraine N.
Finn, Father
Finn, William J.
Fiorito, Ted
Fisher, Fred
Fisher, Mark
Fisher, William Arms
Fitzgerald, Joan
Fitzgerald, Malcolm
Flagler, Robert S., Est. of
Flatow, Leon
Fleeson, Neville
Fletcher, Archie
Floyd, S. J.

List of Members, Composers and Authors—Continued

Flynn, Allan
Ford, Tom
Foresio, D.
Forrest, Chet
Forster, Dorothy
Forsyth, Cecil
Foster, Fay
Fowler, B. Sherman
Fox, J. Bertram
Fox, Oscar J.
Francis, Arthur
Francis, Herbert
Francois
Franklin, Dave
Franklin, Howard
Franklyn, Blanche
Franko, Nahan, Est. of
Frazzini, Al
Fredal, J.
Fredericks, Alfred
Freed, Arthur
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Freed, Isadore
Freed, Ralph
Freer, Eleanor Everest
Frendenthal, Joe
Frey, Hugo
Fried, Martin
Friedland, Anatole, Est. of
Friend, Cliff
Friml, Rudolf
Frisch, Billy
Fullerton, H.

Gabriel, Mercedes
Gahm, Joseph, Est. of
Gaines, Samuel Richard
Galloway, Tod B., Est. of
Gardner, Samuel
Gardner, William H., Est. of
Garrett, Lloyd Fry
Gasbrit, Obie
Gaskill, Clarence
Gaul, Harvey B.
Gault, Elmer
Gay, Byron
Geer, Leonore
Gensler, Lewis E.
Gerard, Richard Hirsch
Gerber, Alex
Gershwin, George, Est. of
Gershwin, Ira
Giannini, Vittorio
Gibb, Robert W.
Gibbs, Arthur H.
Giddings, Clarice
Giesler, Carl
Gifford, H. Eugene
Gilbert, L. Wolfe
Gillespie, Haven
Gillespie, Marian E.
Ginsberg, Sol.
Glick, Jesse G. M.
Glogan, Jack
Glynn, Rowena
Godowsky, Leopold, Est. of
Goering, Al
Goetz, E. Ray
Gold, Joe
Golden, Ernie
Golden, John
Goldman, Edwin Franko
Goldsworthy, W. A.
Good, Bart
Goodman, Alfred
Goodhart, Al
Goodman, Frank
Goodman, Lillian Rosedale
Goodwin, Joe
Goold, Sam, Est. of
Gordon, Curtis
Gordon, Mack
Gorney, Jay
Gottler, Archie
Goudon, Pierre
Gould, Albert

List of Members, Composers and Authors—Continued

Gould, Morton
Graff, George
Grainger, Percy Aldridge
Granados, Felipe
Grant, Bert
Grant, Cal
Grant, Charles N., Est. of
Grau, Franz
Gray, Alfred
Gray, Simeon
Green, Bud
Green, John W. (Johnny)
Greenberg, Abner
Greer, Jesse
Grenet, Eliseo
Greve, Francois
Grever, Maria
Grey, Clifford
Grey, Frank H.
Grey, Laverne
Grey, Vivian
Grier, Jimmie
Griffin, Gerald
Griffis, Elliot
Griselle, Thomas
Grofe, Ferde
Grossman, Bernie
Grosvenor, Ralph L.
Gruenberg, Louis
Grunberg, Jacques
Grunn, Homer
Guion, David W.
Gulesian, Grace Warner
Gulesian, Mrs. M. H.
Gumble, Albert
Gunsky, Maurice J.
Gurewich, Jascha, Est. of
Gusman, Meyer
Gwynn, Francis

Hadler, Rosemary
Hadley, Henry, Est. of
Haenschen, Walter G.
Hageman, Richard
Hagen, Milt
Hager, Clyde
Hann, Carl, Est. of
Haid, Billy
Haig, Bernhard
Hainsworth, Richard
Hajos, Karl
Hale, Donald
Hall, Fred
Hall, Ray
Hall, Wendell
Hall, Wendell W.
Hall, Wendell Woods
Halley, Bill
Hamblen, Bernard
Hamilton, Arthur
Hammerstein, Oscar, 2nd
Hampton, Roxanne
Hancock, John
Handman, Lou
Handy, Will
Handy, William C.
Hanighen, Bernard D.
Hanley, James F.
Hanlon, Bert
Hanna, Jack
Hanson, Howard
Harbach, Otto A.
Harburg, E. Y.
Hare, Leslie
Harling, W. Franke
Harper, Marjorie
Harris, Charles K., Est. of
Harris, Edward
Harris, Harry
Harris, Roy
Harris, Victor
Harris, Will J.
Harrison, Charles F.
Hart, Lorenz
Hartley, Harry
Hartman, Don

List of Members, Composers and Authors—Continued

Hartmann, Arthur
Hastings, Paul
Hathaway, Jane
Haubiel, Charles
Haus, Johann
Havlin, Will
Hawley, C. B., Est. of
Hawthorne, Kathryn
Hayes, Al
Hazzard, John E., Est. of
Heagney, William H.
Heifetz, Jascha
Hein, Silvio, Est. of
Henderson, Charles E.
Henderson, Ray
Henri, F.
Henry, Clare Kummer
Henry, S. R.
Herbert, Charles K.
Herbert, Jean
Herbert, Victor, Est. of
Herman, Pinky
Herscher, Louis
Herson, Frank E.
Hess, Cliff
Heyman, Edward
Heyward, Du Bose
Heyward, Nancy
Heywood, Donald
Higginson, J. Vincent
Higginson, Richard
Hill, Alexander, Est. of
Hill, Billy
Hill, Charlie
Hill, William J.
Hilliard, Harry
Hills, Frank
Hirsch, Louis A., Est. of
Hirsch, Walter
Hobart, George V., Est. of
Hoffman, Al
Hoffman, Maurice
Holden, Sidney
Holiner, Mann
Hollander, Frederick
Hollingsworth, Thekla
Holzer, Lou
Holzmann, Abraham, Est. of
Homer, Sidney
Hooker, Brian
Hoover, Joe
Horne, Abel
Hoschna, Karl, Est. of
Hosmer, Lucius, Est. of
Hough, Will M.
Howard, Dick
Howard, John Tasker
Howard, Joseph E.
Howell, Frank
Hubbell, Raymond
Hucklenutt, Inky
Hudson, Roberta
Hudson, Will
Huerter, Charles
Hueston, Billy
Hughes, Langston
Hughes, Rob
Hughes, Rupert
Huhn, Bruno
Hupfeld, Herman
Hyde, Alex

Ingraham, Roy
Irwin, Will
Irwin, William C. K.
Irving, Washington William
Ivers, Harold

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Jackson, F.
Jacobi, Frederick
Jacobs, Al
Jaffe, Moe
James, Billy
James, Philip
James, S. Walter

List of Members, Composers and Authors—Continued

James, Theodore
Janis, Elsie
Janssen, Werner
Jasmyn, Joan
Jason, Will
Jenkins, Gordon
Jentes, Harry
Jerome, Jerome
Jerome, Larry
Jerome, Lawrence
Jerome, M. K.
Jerome, Richard
Jerome, William, Est. of
Jessel, George
Johns, George
Johnson, Arnold
Johnson, Edward T.
Johnson, George
Johnson, Horace
Johnson, Howard E.
Johnson, J. C.
Johnson, James P.
Johnson, J. Rosamond
Johnson, James Weldon, Est. of
Johnston, Arthur
Johnstone, Gordon, Est. of
Johnstone, Thomas A.
Johnstone, Will B.
Jolson, Al
Jonas, Julius
Jones, Chris
Jones, Gregory
Jones, Isham
Jones, Jocko
Jones, Stephen
Jones, Tom
Juan y Dlorah

Kackley, Bob
Kahal, Irving
Kahn, Grace Le Roy
Kahn, Gus
Kalani, Malie
Kalman, Erno
Kalmar, Bert
Kaplan, Saul
Karoly, Gondov
Kassel, Art
Katscher, Robert
Kaufman, Mel B., Est. of
Kawelo, Icane
Keiser, R.
Keithley, E. Clinton
Kempinski, Leo A.
Kenbrovin, Jean
Kendall, Don
Kendis, James
Kennedy, Bruce
Kennedy, H.
Kenny, C. Francis
Kenny, Charles F.
Kenny, Nick A.
Kent, Richard
Kent, Walter
Kerker, Gustave, Est. of
Kern, Jerome
Kernell, Wm. B.
Kernochan, Marshall
Kerr, Harry D.
Kiehl, Heinrich
Kilenyi, Edward
King, Al
King, Jack
King, Joe
King, Robert
King, Robert A., Est. of
King, Wayne
Kingsford, Charles
Kingsley, Robie
Kingsley, Rutherford
Kisco, Chas. W.
Kisco, Charley
Klages, Raymond W.
Klein, David
Klein, Lou

List of Members, Composers and Authors—Continued

Klemm, Gustav
Klenner, John
Klickmann, F. Henri
Kline, Dick
Knox, Helen
Koehler, Ted
Kogen, Harry
Kortlander, Max
Kountz, Richard
Kramer, A. Walter
Kraushaar, Charles
Kreisler, Fritz
Krouse, H. Sylvester
Kummer, Clare
Kurtz, Manny

Lada, Anton
Lada, Raymond Anton
La Forge, Frank
La Frenier, Emma P.
Lakay, Rudy
Lake, Mayhew Lester
La Marr, Glen
Lamont, Arthur
Lamont, A. B.
Lampe, J. Bodewalt, Est. of
Lane, Burton
Lane, Eastwood
Lange, Arthur
Lange, Henry W.
Lannin, Paul
Lardner, Ring, Est. of
La Rocca, D. James
Laska, Edward
Lauver, David
Lawlor, Chas. B., Est. of
Lawnhurst, Vee
Lawrence, Fred
Lawrence, Jack
Layton, Turner
Leazer, Louis
Le Baron, William
Lee, Annabelle
Lee, Dorothy
Lee, Mandy
Lee, Marvin
Lee, Nancy
Lee, Norah
Leigh, Norman
Leith, Leonore
Lemare, Jules
Lenikov, Ivan
Lennell, Dodd
Leonard, Eddie
Leonard, Emil
Lerner, Sammy
Le Roy, Margaret
Leslie, Edgar
Lesser, S.
Lester, Ida
Levant, Oscar
Leveen, Raymond
Levenson, Boris
Levey, Harold
Levinson, Jerry
Lewis, Al
Lewis, Alan
Lewis, Bobby
Lewis, Harold
Lewis, Roger
Lewis, Samuel M.
Lewis—Williams
Ley, Benton
Lief, Max
Lief, Nathaniel
Lieurance, Thurlow
Lillenas, Haldor
Lind, Peter
Link, Harry
Little, George A.
Little, Jack
Livingston, Bill
Livingston, Jerry
Livingstone, Mabel
Lloyd, Lewellyn
Locke, Harold

List of Members, Composers and Authors—Continued

Lockhart, Eugene
Loeb, John Jacob
Loesser, Frank
Logan, Fred'k Knight, Est. of
Logan, Virginia K.
Loman, Jules
Lombardo, Carmen
Lorenz, Edmund S.
Lorenz, Ellen Jane
Lounsbury, Walter
Lovell, Richard
Lowell, J. Edgar
Lyman, Abe
Lyons, Frank

MacBoyle, Darl
MacDermid, James G.
MacDonald, Ballard, Est. of
MacDonough, Glen, Est. of
Mac Dowell, Edward, Est. of
Mac Fadyen, Alexander, Est. of
MacGimsey, Robert
Mack, Cecil
Mack, Jay
Mack, Jerry
Madden, Edward
Madison, Nat
Maduro, Charles
Maganini, Quinto
Magidson, Herbert
Magine, Frank
Mahoney, Jack
Maley, Florence Turner
Malneck, Matt
Malotte, Albert Hay
Maltin, Bernard
Mana-Zucca, Mme.
Manholz, A.
Manney, Charles F.
Manning, Kathleen L.
Mapleson, Anna
March, Russell
Marion, George, Jr.
Marion, Will
Marks, Gerald
Marsden, Philip
Marshall, Henry I.
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Martel, John
Martens, Fred'k H., Est. of
Martin, Bob
Martin, Lem
Mason, Daniel Gregory
Mathis, Jules
Matteson, John Somers
Mathews, H. Alexander
Maxfield, Stanley
May, H. I.
McCarron, Chas., Est. of
McCarthy, Charles J.
McCarthy, Joseph
McConnell, George B.
McCree, Junie, Est. of
McDonald, Harl
McHugh, Jimmie
McKee, Frank W.
McKenna, William
McKinley, Elwood
McLaughlin, John
McPhail, Lindsay
McPherson, R. C.
Media, Jay
Melrose, Walter
Melville, E. B.
Melville, Paul
Mencher, Murray
Mendelsohn, Jacques
Mendelsohn, J. Arko
Mendoza, David
Menges, Eliz.
Menler, Karl
Mercer, John
Meredith, I. H.
Merle, George

List of Members, Composers and Authors—Continued

Merrill, Blanche
Meskill, Jack
Metz, Theo. A., Est. of
Meyer, George W.
Meyer, Joseph
Meyers, Billy
Miles, C. Austin
Miles, Nat
Miles, Walter E.
Millay, Edna St. Vincent
Miller, Bob
Miller, Ned
Mills, F. A.
Mills, Irving
Mills, Kerry
Milne, R. L.
Mistowski, Mischa
Mitchell, Humphrey
Mitchell, Sidney D.
Mizzy, Vic
Moll, Billy
Monaco, James V.
Monday, Arthur
Monroe, Jack
Montaine, R. A.
Montani, Nicola A.
Montmorency, Percival
Mooney, Harold
Moore, Arthur
Moore, Douglas
Moore, Elizabeth Evelyn
Moore, Francis
Moore, Hartley
Moore, Joe
Moore, John
Moore, Leslie F.
Moore, McElbert
Moran, Edward P.
Morelli, Pietro
Moret, Neil
Morey, Larry
Morgan, Bern
Morgan, Carey
Morgan, J. P.
Morgan, Robert
Morgan, Russ
Moritz, Edvard
Morris, Edward
Morris, Melville
Morrison, R. L.
Morse, Arthur Cleveland
Morse, Dolly
Morse, Dorothy
Morse, Theodora
Morse, Theodore, Est. of
Moskowitz, R. A.
Motzan, Otto, Est. of
Mozenaiko, D.
Muller, Rudi
Murchison, Kenneth M., Est. of
Murphy, Owen
Murphy, Stanley, Est. of
Murray, Frank
Murray, Jack
Murray, John
Myers, Richard
Mysels, Sammy

Neiburg, Al. J.
Neil, Harrison
Nelson, Ed. G.
Nemo, Henry
Neuman, M.
Nevin, Arthur
Nevin, Ethelbert, Est. of
Nevin, George B., Est. of
Nevin, Gordon Balch
Newell, Roy
Newman, Alfred
Newman, Charles
Nichols, Alberta
Nichols, Ken
Nield, Ernest
Noble, David
Noble, John Avery

List of Members, Composers and Authors—Continued

Nolte, Roy E.
Nomis, Adrian
Norman, Edward W.
Norman, Pierre
Northey, Carrie
Norworth, Jack
Nuffert, Oscar T.
Nyles, W. A.

Oakland, Ben
O'Dea, A. Caldwell, Est. of
O'Flynn, Charles
O'Hara, Geoffrey
Ohman, Phil
O'Keefe, James
O'Keefe, Lester
Olcott, Chauncey, Est. of
Olman, Abe
Olmstead, Clarence
Oppenheim, David
Orlob, Harold
Osborne, Nat
Osgood, H. O., Est. of
Otvos, A. Dorian
Owens, Harry
Oyett, Dayne

Page, Horace
Paley, Herman
Palmer, Jack
Pardette, Neil
Parenteau, Zoel
Paridon, Roxana
Parish, Mitchell
Parker, Dan
Parker, Horatio, Est. of
Pascoe, Richard, W.
Paskman, Dailey
Pasternack, Josef
Paul, Stuart
Pauil, E. T., Est. of
Pease, Harry
Peck, Gerald
Peck, Raymond W.
Peery, Rob Roy
Penn, Arthur A.
Pennington, John
Perkins, Frank S.
Perkins, Henry
Perkins, Ray
Perkins, Wilton
Perrin, Jacques
Perry, Sam A., Est. of
Peters, Wm. Frederick, Est. of
Petkere, Bernice
Phillips, Fred
Piantadosi, Al.
Piastro, Josef
Pickett, Robert E.
Pierce, A.
Pincus, Herman
Pinkard, Maceo
Pinkert, Herb
Pirani, Eugenio Di, Est. of
Pochon, Alfred
Polla, W. C.
Pollack, Lew
Pollock, Muriel
Ponce, Phil
Porter, Cole
Porter, Lew
Porter, Paul
Powell, John
Powell, Teddy
Powell, W. C.
Price, Georgie
Price, Sybil Yvonne
Prior, H. R.
Prival, Max
Prokoff, Alexine
Prokoff, Ivan
Pryor, Arthur
Purcell, Gilbert

Rachmaninoff, Sergei

List of Members, Composers and Authors—Continued

Rafael, Walter
Rainger, Ralph
Rand, Harry
Randolph, John Carroll
Rapaport, Ruth, Est. of
Rapee, Erno
Rasbach, Oscar
Raskin, William
Raymond, Harold
Raymond, Lester
Razaf, Andy
Reddick, William
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Reed, David
Reginald, Lawrence
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Retlaw, S. C.
Revel, Harry
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Reynolds, Herbert
Rezlit, Albert
Rice, Gitz
Rich, Gladys
Rich, Max
Richman, Harry
Richmond, M.
Riesenfeld, Hugo
Ringle, Dave
Roaming Ranger, The
Robbins, Harry
Robe, Harold
Roberto, Carlos
Roberts, A.
Roberts, Allan
Roberts C. Luckey
Roberts, Charles J.
Roberts, K.
Roberts, K. A.
Roberts, Kathleen A.
Roberts, Lee S.
Roberts, Steve L.
Robin, Leo
Robinson, J. Russel
Robison, Carson J.
Robison, Willard
Robyn, Alfred G., Est. of
Roder, Milan
Rodgers, Jimmie, Est. of
Rodgers, Richard
Rogers, James H.
Rogers, John
Roland, Frank
Rolfe, Walter
Roma, Caro, Est. of
Romberg, Sigmund
Rome, Harold J.
Ronell, Ann
Roosevelt, T.
Rose, Billy
Rose, Ed, Est. of
Rose, Fred
Rose, K. Fred
Rose, Vincent
Rosemont, Walter L.
Rosenberg, G. M.
Rosenstock, L.
Rosenthal, M. L.
Rosey, George, Est. of
Rosey, Joe
Rosoff, Charles
Rothberg, Bob, Est. of
Rourke, M. E., Est. of
Rowe, Sidney
Rubens, Maurie
Ruby, Harry
Ruby, Herman
Rudd, Lee
Rupp, Carl

List of Members, Composers and Authors—Continued

Russell, Alexander
Russell, Benee
Russell, Joseph
Russell, S. King
Russell, Sydney King
Russo, Dan
Ryan, Ben
Ryder, Sturkow, Mme.

Saar, Louis Victor, Est. of
Saenger, Gustav, Est. of
St. Clair, Floyd J.
St. Minnesota, Paul
Salta, Menotti
Salter, Mary Turner, Est. of
Saminsky, Lazare
Samuels, Frank
Samuels, Walter G.
Sanders, Alma M.
Sanders, Joe L.
Sanford, Dick
Santly, Henry W., Est. of
Santly, Joseph H.
Santly, Lester
Savino, Domenico
Schad, Walter C.
Schaeffer, Mary
Schafer, Bob
Schertzinger, Victor
Schmid, Adolf
Schmid, Johann C.
Schmidt, Erwin R.
Schoebel, Elmer
Scholl, Jack
Schonberg, Chris
Schonberger, John
Schuster, Ira
Schuster, Joseph
Schwartz, Arthur
Schwartz, Bernie
Schwartz, Jean
Schwartz, Nat
Schwarzwald, Milton
Scott, John Prindle, Est. of
Scott, Raymond
Sen, Yama
Seng, Ofar
Sessions, Roger
Severn, Edmund
Seymour, S.
Seymour, Tot
Shade, William
Shadwell, William B.
Shand, Terry
Shane, Tom
Shannon, James Royce
Shapiro, Ted
Shay, Larry
Shelley, Harry Rowe
Sherman, Al
Sherman, Tobe
Sherwin, Sterling
Shick, Hans
Shields, Ren., Est. of
Shilkret, Jack
Shilkret, Nathaniel
Shuman, Francis K.
Siegel, Al
Siegel, Monty
Sigler, Maurice
Sigler, Mose
Signorelli, Frank
Silberta, Rhea
Silver, Abner
Silver, Frank
Silverman, Al
Silvers, Louis
Silvers, Sid
Silvio, Alberto
Simon, Edward G., Est. of
Simon, Nat
Simon, Robert A.
Simon, Walter C.
Simone, Nato
Simons, Seymour B.
Simpson, George

List of Members, Composers and Authors—Continued

Singer, Dolph
Singer, Joe
Siras, John
Sirmay, Albert
Sissle, Noble
Sizemore, Arthur L.
Skidmore, Will E.
Skilton, Charles S.
Sloane, A. Baldwin, Est. of
Smith, Chris
Smith, Clay, Est. of
Smith, Edgar, Est. of
Smith, Harry B., Est. of
Smith, H. Wakefield
Smith, Joseph
Smith, Robert B.
Smith, Sol
Smith, Walter Wallace
Snow, Henry
Snyder, Ted
Sodero, Cesare
Solman, Alfred, Est. of
Sosnik, Harry
Sousa, John Philip, Est. of
Sowerby, Leo
Spaeth, Sigmund
Spalding, Albert
Speaks, Oley
Spencer, Fleta Jan Brown, Est. of
Spencer, Herbert
Spencer, Otis
Spencer, Robert E.
Speroy, Robert
Spier, Harry R.
Spier, Larry
Spina, Harold
Spitalny, Maurice
Spross, Charles Gilbert
Squires, Harry D.
Stamper, Dave
Stanley, F.
Stanley, Jack, Est. of
Stanley, Thornton
Stanton, Francis
Stanton, Frank L., Est. of
Stearns, Herbert
Steiger, Jimmy, Est. of
Stein, Jules K.
Steiner, Max
Stephens, Cliff
Stephens, Ward—
Stept, Sam H.
Sterling, Andrew B.
Stern, G. Radcliffe
Stern, Henry, R.
Stern, Jack
Stevens, Alfred
Stevens, David
Stevens, Robert L.
Stewart, Daniel
Stickles, William
Still, William Grant
Stillman, Al
Stock, Larry
Stocking, Elaine
Stoddard, George E.
Stoessel, Albert
Stone, Billy, Est. of
Stone, Harold
Stothart, Herbert
Straight, Charley
Strebor, J. C.
Stride, Harry
Stringfield, Lamar
Strong, Jesse
Strong, Julian
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Stuart, Allan
Stults, R. M., Est. of
Sturm, Murray
Styne, Jule
Suede, Vasca
Suesse, Dana
Sullivan, Alexander C.
Sullivan, Henry

List of Members, Composers and Authors—Continued

Sunshine, Marion
Swanstrom, Arthur
Sweatman, Wilbur C.
Swift, Kay
Sykes, Abner
Symes, Marty

Talbot, Maurice
Taylor, Deems
Taylor, Irving
Taylor, Otis
Tchervanow, Ivor
Ted & Josh
Terker, Arthur
Terris, Dorothy
Terry, Robert Huntington
Thompson, Harlan
Thornton, James, Est. of
Tierney, Harry
Tinturin, Peter
Tobias, Charles
Tobias, Harry
Tobias, Henry H.
Tobini, H.
Toch, Ernest
Tomlin, Pinky
Toresio, D.
Tracey, Wm. G.
Travis, June
Tremblay, Al
Trent, Jo
Trinkaus, George J.
Tscherinoff, Feodor
Tucker, John Aloyseus
Turk, Roy, Est. of
Turner, Anthony
Turner, John
Twohig, Daniel S.
Tyers, Wm. H., Est. of

Valber, Eugene
Valdez, Jose
Vallee, Rudy
Van Alstyne, Egbert
Van Breit, Carl
Vanderpool, Frederick W.
Van Heusen, Jimmy
Van Holland, Dick
Vann, Al
Van Norman, Frederic
Vecsei, Desider Josef
Vene, Ruggero
Verges, Joe
Vete, Albert
Vicars, Harold, Est. of
Victor, G.
Vincent, Nathaniel H.
Vincent, Paul
Von Der Goltz, Eric, Jr.
Von der Lieth, Leonore
Von Tilzer, Albert
Von Tilzer, Harry

Wadsworth, Henry
Waite, Jack
Walker, James J.
Walker, Rene
Walker, Ronald
Wallace, Mildred White
Wallace, Paul
Wallace, Walter
Waller, Fats
Waller, Thomas
Walsh, J. Brandon
Ward, Burt
Ward, Edward
Ward, Sam
Ware, Harriet
Warford, Claude
Waring, Tom
Warren, Cecil
Warren, Elinor Remick
Warren, Harry
Warren, P. C.
Washington, Ned
Watts, Wintter

List of Members, Composers and Authors—Continued

Wayne, Mabel
Webb, Kenneth S.
Webb, Roy
Webster, Paul Francis
Weeks, Harold
Weeks, Wilbur
Weidt, A. J.
Weill, Irving
Weinberg, Chas.
Weinberg, Jacob
Weldon, Frank
Wellesley, Grant
Wells, John Barnes, Est. of
Wendling, Pete
Wenrich, Percy
Weslyn, Louis, Est. of
West, Eugene
West, George
Westbrook, Arthur
Westphal, Frank C.
Wever, Ned
Whitcup, Leonard
White, Alice
White, Clarence Cameron
White, Joseph M.
Whitemore, Will
Whithorne, Emerson
Whiting, George
Whiting, Richard A., Est. of
Whitmore, Robert
Wiedoeft, Rudy
Wiegand, Henry
Williams, Clarence
Williams, Joe
Williams, Sam
Williams, Spencer
Williams, W. R.
Wilmans, Wilman
Wilson, Al
Wilson, Buck
Wilson, Duane
Wilson, Ira B.
Wilson, Irving M., Est. of
Wilson, Lawrence
Wilson, Mortimer, Est. of
Winne, Jesse M.
Winternitz, Felix
Winters, Ferne
Wolf, Daniel
Wolfe, Jacques
Wood, Cyrus D.
Wood, L. Fred
Wood, Leo, Est. of
Woodin, William H., Est. of
Woodman, R. Huntington
Woods, Harry M.
Wright, Bob
Wright, Frank A.
Wrubel, Allie
Wynn, Charles
Wynn, Ed
Yellen, Jack
Yoell, Larry
Yoelson, Asa
Yon, Pietro A.
Youmans, Vincent
Young, Joseph
Young Rida Johnson, Est. of
Young, Victor (Standard)
Young, Victor (Popular)
Zamecnik, J. S.
Zamora, Julio
Zeno, Norman
Zimbalist, Efrem
Zuera, Ramon

HONORARY

Bitner, E. F. (deceased)
Burkan, Nathan (deceased)
Witmark, Jay

: 168] IN UNITED STATES DISTRICT COURT

No. 12

ENDANTS' MOTION TO DISMISS "FURTHER SUPPLEMENTAL BILL OF COMPLAINT"—Filed October 19, 1939

he defendants, subject to the objections which they have rposed to the filing of the "Further Supplemental Bill Complaint" which plaintiffs have asked leave to file, move Court to dismiss said Further Supplemental Bill upon following grounds, viz:

There is no equity in said Further Supplemental Bill Complaint.

Said Further Supplemental Bill discloses no occasion injunctive interference with the operation of the statute plained of.

It plainly appears that the statute complained of con- utes a legitimate exercise of the police power of the te of Florida.

It is not made to appear that the statute complained nterferes with any right granted to the plaintiffs or any hem by the Constitution, laws or treaties of the United tes, including the provisions thereof dealing with copy- hts, or granted to them by the Constitution of the State Florida.

No irreparable injury is shown such as to require nctive relief.

s. 169-289] 6. The facts disclosed in the original bill omplaint show that the plaintiffs do not come into equity h clean hands in that they seek an injunction for the pur- e of perpetuating their monopolistic price fixing activi- , to which activities a Court of equity should lend no aid.

(S.) Geo. Couper Gibbs, Attorney General of Florida; Tyrus A. Norwood, Assistant Attorney General of Florida; Lucien H. Bogs, Jacksonville, Florida; Andrew W. Bennett, Washington, D. C., Attorneys for Defendants.

[fol. 290] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO FILE FURTHER SUPPLEMENTAL BILL, ETC.—Filed October 31, 1939

This cause coming on to be heard, and the same having been argued by counsel for the respective parties, and the Court having inspected the record and the briefs filed;

It is Ordered;

1. That complainants' motion for leave to file a further supplemental Bill of Complaint be, and the same hereby is, granted.

2. That R. A. Gray, individually and as Secretary of State of the State of Florida, and J. M. Lee, individually and as Comptroller of the State of Florida, be, and they hereby are, added as defendants in this cause.

3. That T. E. Duncan, individually and as State Attorney for the Eighth Judicial Circuit, Clyde H. Wilson, individually and as State Attorney for the Twelfth Judicial Circuit, L. D. McRae, individually and as State Attorney for the Fourteenth Judicial Circuit, Phil O'Connell, individually and as State Attorney for the Fifteenth Judicial Circuit, be, and they hereby are substituted as defendants in place and stead of J. C. Adkins, Roy D. Stubbs, John H. Carter, Jr., and Louis F. Maire, respectively, in this cause.

~~4. That the motions of the defendants, (a) to dismiss Bill and Supplemental Bill of Complaint; (b) to dismiss Further Supplemental Bill of Complaint; (c) to strike portions of Further Supplemental Bill of Complaint; (d) to strike all and parts of affidavit of Gene Buck, be and the same hereby are, severally in all respects denied.~~

[fol. 291] 5. That the defendants, George Couper Gibbs, individually and as Attorney General for the State of Florida; E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., individually and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, individually and as State Attorney for the Third Judicial Circuit of Florida; William A. Hallowes, III, individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, individually and as State Attorney for the Fifth

Circuit of Florida, Chester B. McMullen, indi-
and as State Attorney for the Sixth Judicial Cir-
Florida; Murray Sams, individually and as State
y for the Seventh Judicial Circuit of Florida; T. E.
individually and as State Attorney for the Eighth
of Florida; Murray W. Overstreet, individually
State Attorney for the Ninth Judicial Circuit of
; L. Grady Burton, individually and as State At-
for the Tenth Judicial Circuit of Florida; G. A.
individually and as State Attorney for the Eleventh
Circuit of Florida; Clyde H. Wilson, individually
State Attorney for the Twelfth Judicial Circuit of
; J. Rex Farrior, individually and as State Attorney
Thirteenth Judicial Circuit of Florida; L. D. Mc-
ividually and as State Attorney for the Fourteenth
Circuit of Florida; Phil O'Connell, individually and
Attorney for the Fifteenth Judicial Circuit of
; R. A. Gray, individually and as Secretary of State
tate of Florida, and J. M. Lee, individually and as
oller of the State of Florida; and each of them indi-
and in their respective capacity as officials of the
Florida, charged by Chapter 17807, of the Laws of
d Chapter 19653, of the Laws of 1939, with the en-
] forcement of the provisions thereof, be enjoined
trained until the further order of this Court from
directly or indirectly any proceeding at law or in
for the purpose of enforcing said State Statutes
the complainants and other similarly situated, their
ntatives, employees, agents or any of them, and from
ring with all existing contracts entered into by the
nants and others, including the Society and citizens
idents of the State of Florida, and from threaten-
nforce against any citizen or resident of the State of
the penalties of said Statutes in the event such
nd resident desires to carry out their contracts with
erican Society of Composers, Authors and Pub-
or complainants, or others similarly situated, and
osecuting criminally the complainants, their repre-
es or agents or any of them or others similarly situ-
doing any act or thing to detect infringements and
ce their respective rights under the copyright Act in
eral Courts of the State of Florida or elsewhere, and
y from doing any act or thing to carry out or en-
y of the provisions of said State Statutes.

6. That defendants be given thirty (30) days from the date hereof to answer.

7. This order is made conditional upon complainants filing herein, within thirty (30) days, a bond in the sum of Five Thousand Dollars ($5,000.00), conditioned upon the payment to the defendants of such costs and damages as may be incurred and suffered by any party who may be found to have been wrongfully enjoined by this order; said bond to be approved by the Clerk of the United States District Court for the Northern District of Florida. Findings of fact and conclusions of law to be filed later.

Done and Ordered this 30 day of October, A. D. 1939.

(S.) J. C. Hutcheson, Jr., Circuit Judge; Lonie W. Strum, District Judge; Augustine V. Long, District Judge.

[fol. 293] IN UNITED STATES DISTRICT COURT

No. 12

Supplemental Findings of Fact and Conclusions of Law—Filed November 2, 1939

This Court having entered an interlocutory injunction in the above entitled action on April 5, 1938, restraining enforcement of Chapter 17807, Laws of Florida, 1937, and the complainants having filed (1) a Further Supplemental Bill of Complaint pursuant to leave granted by this Court praying for a supplemental interlocutory injunction restraining enforcement of Chapter 19653, Laws of Florida, 1939; and (2) having moved for order granting such interlocutory injunction upon said Further Supplemental Bill and certain affidavits tendered; and (3) having moved to dismiss defendants' counterclaim in their answer to the Original and Supplemental Bills of Complaint; and the defendants (1) having tendered their offer to limit the issues in the case by submitting without condition to a permanent injunction covering Sections 2-A, 2-B and 6 of Chapter 17807, Laws of Florida, 1937; and (2) having moved to dismiss the Original and Supplemental Bills of Complaint; and (3) having moved to dismiss the Further Supplemental

Bill of Complaint; and (4) having moved to strike portions of the Further Supplemental Bill of Complaint; and (5) having moved to strike the affidavit of Gene Buck; and all of said motions having duly come on for argument and having been heard October 19, 1939, at the Federal Court House in Jacksonville, Florida, this Court hereby makes the following findings of fact and conclusions of law:

[fol. 294] FINDINGS OF FACT

1. At the 1939 session of the Legislature of Florida, there was enacted a Bill designated as Chapter 19653, Laws of Florida, 1939, which became a law of Florida June 12, 1939. Said statute is referred to hereinafter as the "New Law."

2. Said "New Law" was enacted for the purpose of supplementing said Chapter 17807, Laws of Florida, 1937, hereinafter referred to as the "Old Law".

3. The defendant George Couper Gibbs has succeeded the former defendant Cary D. Landis, deceased, as Attorney General of the State of Florida. The defendant R. A. Gray is the Secretary of State of the State of Florida, and the defendant J. M. Lee is the Comptroller of the State of Florida. The defendants T. E. Duncan, Clyde H. Wilson, L. D. McRae and Phil O'Connell are State Attorneys for the Eighth, Twelfth, Fourteenth and Fifteenth Judicial Circuits respectively and have succeeded to the respective offices formerly held by the defendants J. O. Adkins, Roy D. Stubbs, John H. Carter, Jr., and Louis F. Maire.

4. The defendants are citizens and residents of the State of Florida, duly elected, appointed and qualified, empowered, directed and charged by the "New Law" with the duty of enforcing the criminal and civil provisions thereof.

5. The value of the matter in controversy exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

6. In view of the existing interlocutory injunction of April 5, 1939, covering the "Old Law", but little, if any, public inconvenience or injury will be occasioned by extending that interlocutory injunction so as to include the "New Law", while to refuse to do so may cause serious injury to the plaintiffs; and the balance of convenience will best be

served by determining the constitutionality of both laws at the final hearing.

[fol. 295] CONCLUSIONS OF LAW

1. The "Old Law" and the "New Law" are primarily directed to the same object, namely, imposing limitations upon the licensing of the right to perform publicly for profit copyrighted music within the State of Florida, and the two statutes involve closely related legal problems.

2. There is grave doubt as to the constitutionality of the "New Law" in that: it may result in depriving owners of musical copyrights of the full enjoyment of rights granted them by the copyright laws and treaties of the United States, and may deprive them of the equal protection of the laws.

3. The interlocutory injunction of April 5, 1938, covering the "Old Law" should be extended so as to include the "New Law" and the additional and substituted defendants included within its provisions in order to prevent possible loss and injury to the plaintiffs pending final determination by this Court of the constitutionality of the various provisions of both the "Old Law" and the "New Law".

4. The speedy disposition of the case will best be served by deferring until final hearing decision on the following: (1) plaintiffs' motion to dismiss defendants' counterclaim; (2) defendants' offer to limit issues; (3) defendants' motion to dismiss Original and Supplemental Bills; (4) defendants' motion to dismiss Further Supplemental Bill; (5) defendants' motion to strike portions of the Further Supplemental Bill; and (6) defendants' motion to strike the affidavit of Gene Buck.

5. A bond in the sum of Five Thousand Dollars ($5,000.00) conditioned upon the payment to the defendants of such costs and damages as may be incurred or suffered by any party found to be wrongfully enjoined by the order entered herein, and conditioned upon the payment to any new licensees of plaintiffs licensed after the entering of the order herein against any injury that may be suffered by [fol. 296] said new licensees, or any of them in the event that the interlocutory injunction entered herein shall not be made permanent.

6. This Court has jurisdiction of this suit, as supplemented by the Further Supplemental Bill of Complaint.

Dated this 2d day of November, A. D. 1939.

(S.) J. C. Hutcheson, Jr., Circuit Judge; Louis W. Strum, District Judge; Augustine V. Long, District Judge.

[fol. 297] IN UNITED STATES DISTRICT COURT

DEFENDANTS' ANSWER TO FURTHER SUPPLEMENTAL BILL OF COMPLAINT—Filed November 17, 1939

Defendants, for answer to the Further Supplemental Bill of Complaint filed herein October 19, 1939, according to the several numbered paragraphs thereof, jointly and severally say:

1. Answering paragraph 1, the defendants admit that since the filing of the original and supplemental bills of complaint herein certain material facts have occurred, but deny that those facts are as averred in said Further Supplemental Bill, and aver that such facts are correctly set forth in this Answer, responsively to the subsequent averments of said Further Supplemental Bill.

2. Answering paragraph 2, the defendants admit the averments thereof to be true.

3. Answering paragraph 3, the defendants deny that since the enactment of the New Law the Society has been compelled to refrain from doing any business in the State of Florida; deny that the Society is not at the present time doing any business in that State or that it is unable to do business in that State, either for the reasons mentioned in said Further Supplemental Bill or otherwise. They aver the truth to be that the Society continues to operate in the State of Florida under its present license contracts with users of music in said State, and is not prevented therefrom by the operation of the New Law.

4. Answering paragraph 4, the defendants admit the averments thereof to be true.

[fol. 298] 5. Answering paragraph 5, the defendants admit the averments thereof to be true, except that the motion

filed by the defendants referred to in the last sentence of the last paragraph was a motion to dismiss both the original and supplemental bills of complaint.

6. Answering paragraph 6, the defendants admit the averments thereof to be true.

7. Answering paragraph 7, the defendants admit the averments thereof to be true.

8. (a) Answering paragraph 8 (a), the defendants admit the averments thereof to be true.

8. (b) Answering paragraph 8 (b), the defendants are without knowledge or information sufficient to form a belief as the truth of the averment concerning the number of contracts in force between the Society and users of music in the State of Florida, or the averment concerning the number of establishments, if any, publicly performing for profit the musical compositions copyrighted by members of the Society without licenses from the owners. All of the remaining averments of said paragraph are denied.

9 to 14, inclusive. Answering paragraphs 9 to 14, inclusive, the defendants are advised that all of the averments thereof are matters of law, and they refer to the statute itself for accurate ascertainment of its requirements.

15 (a) Answering paragraph 15 (a), the defendants admit the averments thereof to be true.

15 (b) Answering paragraphs 15 (b), the defendants admit the averments thereof to be true except they deny that by reason of the failure of passage of such combination bill, or otherwise, the Original Law remains in full force and effect.

[fol. 299] 16. Answering paragraph 16, the defendants admit the averments thereof to be true.

17. Answering paragraph 17, the defendants deny the averments thereof to be true.

18. Answering paragraph 18, the defendants are advised that the averments of this paragraph comprise merely argumentative assertions by plaintiffs of their position upon various legal questions, and that it is unnecessary for the defendants to answer the same.

19, 20, 21. Answering paragraphs 19, 20 and 21, the defendants are advised that the averments of these paragraphs are entirely redundant, immaterial, impertinent and scandalous, and that is is unnecessary for them to answer the same.

22 (a). Answering paragraph 22 (a), the defendants are without knowledge or information sufficient to form a belief as to the averment concerning the average aggregate amount paid annually by all users of music in the State of Florida for each of the last three years, or the averment that the ratio paid for each county for the years subsequent to 1936 is approximately the same as stated in the original bill of complaint for the year 1936. They deny each and every the remaining averments of said paragraph.

22 (b). Answering paragraph 22 (b), the defendants deny that the cost to the Society of compiling the lists and information required to be furnished under the New Law and of paying the filing fee required thereby would be far or at all in excess of $200,000, and deny that a sum in excess of $20,000 would be required as a filing fee under the New Law. They admit that the compositions in the repertoire [fol. 300] of the Society are in excess of 100,000 in number. Upon information and belief, they aver that the aggregate cost in filing fees to all members of the plaintiff Society would not exceed $10,000. Except as hereinabove denied or qualified, the averments of said paragraph are denied.

23 (a). Answering paragraph 23 (a), the defendants are advised that the averments thereof are matters of law, and they refer to the statute itself for accurate ascertainment of its provisions and effect.

23 (b). Answering paragraph 23 (b), the defendants admit the averments thereof to be true.

24. Answering paragraph 24, the defendants deny each and every the averments of said paragraph.

25. Answering paragraph 25, the defendants admit that they will perform all duties imposed upon them by the New Law. Except as hereinabove admitted or qualified, the averments of said paragraph are denied.

26. Answering paragraph 26, the defendants are without knowledge or information sufficient to form a belief as to the

truth of the averments concerning the number of counties in the State of Florida in which there are establishments publicly performing for profit musical compositions of members of the Society and foreign societies with which the Society has reciprocal contracts. The remaining averments of said paragraph are denied.

27. Answering paragraph 27, the defendants are without knowledge or information sufficient to form a belief as to the truth of the averments thereof, or any of them.

[fol. 301] 28. Answering paragraph 28, the defendants deny each and every the averments of said paragraph.

29. Answering paragraph 29, the defendants are without knowledge or information sufficient to form a belief as to the truth of the averments thereof, or any of them.

30 to 33, inclusive. Answering paragraphs 30 to 33, inclusive, the defendants admit the allegations thereof to be true.

34. Answering paragraph 34, the defendants admit that the defendants therein named are charged with the enforcement of the New Law in their respective circuits. The remaining allegations of said paragraph are denied.

And for a First Affirmative Defense to Said Further Supplemental Bill,

35. The defendants incorporate herein by reference each and every the averments of paragraphs C-1 to C-6, inclusive, of their answer to the original bill of complaint and supplemental bill of complaint herein.

36. The defendants aver that the relief sought by said Further Supplemental Bill is directly in aid of the perpetuation of the price-fixing monopoly thus vested in the plaintiff Society and its members acting collectively and should be denied.

And for a First Counterclaim,

37. The defendants incorporate herein by reference the averments of paragraphs C-2 to C-6, inclusive, of their answer to the original Bill of Complaint and Supplemental Bill of Complaint herein.

[fol. 302] 38. The monopolistic and price-fixing activities of the Society as hereinabove set forth are directly in violation of Chapter 17807, Laws of Florida, 1937, and of Chapter 19653, Laws of Florida, 1939, the enforcement of which statutes is sought to be enjoined by plaintiffs in this proceeding, and such activities are actually being practiced by the Society and its agents within the State of Florida.

Wherefore, defendants demand:

(1) That the plaintiff, American Society of Composers, Authors and Publishers, be declared (a) to constitute a combination having as one of its objects the fixing of prices or license fees for the combined public performance rights in the separate copyrighted musical compositions owned or controlled by the individual members of such Society or by affiliated organizations; and (b) to be a combination operating in the State of Florida in violation of the provisions of Section 1 of Chapter 17807, Laws of Florida, 1937.

(2) That a permanent and final injunction be issued against the plaintiffs and each of them and those controlled by the plaintiffs and against each and every member of the American Society of Authors, Composers and Publishers, or any of them, enjoining and restraining them from:

(a) The making of contracts in this state for the licensing with right for public performance and profit of copyrighted music in the State of Florida, either through the Society or any other combination which constitutes a substantial number of the persons, firms or corporations within [fols. 303-305] the United States owning or controlling copyrighted musical compositions, when the prices or license fees are fixed and determined by such combination; and

(b) The collection of license fees or the enforcement or attempted enforcement within this state of contracts, agreements or licenses made by the Society with any person, firm or corporation within this state where the prices or license fees were fixed and determined by the Society for the combined public performance rights within the State of Florida in copyrighted music owned or controlled by any of its individual members or affiliated organizations;

(c) In the alternative, from selling, licensing or in any manner disposing of in the State of Florida, the performing

rights in or to any musical composition or dramatico-musical composition copyrighted under the laws of the United States, or collecting any compensation on account of any such sale, license or other disposition, without complying with the requirements of Chapter 19653, Laws of Florida, 1939.

(3) Such other and further relief as may be just and proper.

(S.) George Couper Gibbs, Attorney General, (S.) Tyrus A. Norwood, Assistant Attorney General, (S.) Lucien H. Boggs, Jacksonville, Florida, (S.) Andrew W. Bennett, Washington, D. C., Attorneys for the Defendants.

[fol. 306] IN UNITED STATES DISTRICT COURT

NOTICE OF TRIAL AND FINAL HEARING—Filed March 15, 1940

To: Hon. George Couper Gibbs, Attorney General of the State of Florida; Hon. Thomas J. Ellis, Assistant Attorney General; Lucien H. Boggs, Esq., and Andrew W. Bennett, Esq., Attorneys for the defendants:

You, and each of you, are hereby notified that the Court has set the above styled cause for trial and final hearing before Hon. Joseph C. Hutcheson, Jr., Circuit Judge, Hon. Augustine V. Long and Hon. Louie W. Strum, District Judges, on Monday, April 15, 1940, at 10:00 o'clock, A. M., in the Court Room of this Court at Gainesville, Florida, and at that time and place, evidence will be taken, and the undersigned attorneys for the plaintiffs will move the Court for the entry of a final decree, granting to the plaintiffs the relief sought by them in this cause.

(S.) Frank J. Wideman, Manley P. Caldwell, Attorneys for Plaintiffs.

[fol. 307] STATE OF FLORIDA,
County of Palm Beach, ss:

This day personally appeared before me, a Notary Public duly authorized to administer oath, Manley P. Caldwell, who being first duly sworn, deposes and says that he is one of the attorneys for the plaintiffs in the above styled cause; that on March 14th, 1940, he served true copies of the above and foregoing notice upon the attorneys for the

defendants herein, by depositing such true copies in the United States mail, in envelopes securely sealed, and with sufficient postage thereunto attached, addressed respectively as follows:

Hon. George Couper Gibbs, Attorney General of the State of Florida, Tallahassee, Florida; Hon. Thomas J. Ellis, Assistant Attorney General, Tallahassee, Florida; Lucien H. Boggs, Esq., 924 Investment Building, Washington, D. C.; Andrew W. Bennett, Esq., Attorney at Law, Washington, D. C.

(S.) Manley P. Caldwell.

Subscribed and sworn to before me this 14th day of March, A. D. 1940. Ruth E. Akerley, Notary Public, State of Florida at Large. My commission expires June 30, 1943. (Seal.)

[fol. 308] In United States District Court, Northern District of Florida, Gainesville Division

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

against

George Couper Gibbs, individually and as Attorney General of the State of Florida, et al., Defendants

Depositions of Witnesses

taken pursuant to notices dated respectively January 6, 1940, and January 15, 1940, and all subsequent stipulations thereto, at the Offices of Messrs. Schwartz & Frohlich, No. 1450 Broadway, Borough of Manhattan, City of New York, N. Y., commencing on February 6, 1940, at 10:30 o'clock a. m., and ending on February 9, 1940.

[fol. 309] Appearances:

For the Complainants: Messrs. Schwartz & Frohlich, by Louis D. Frohlich, Esq., Herman Finkelstein, Esq., and Frank J. Wideman, Esq., of Counsel.

For the Defendants: Lucien H. Boggs, Esq., Special Assistant Attorney General of the State of Florida, and Andrew W. Bennett, Esq., of Counsel.

It is stipulated that the witnesses whose depositions will be taken herein be not required to return to sign under oath affirming the truth or falsity of the statements contained in said depositions.

It is stipulated that the following objection, with respect to all questions propounded by plaintiffs' counsel dealing with the requirements of sections 2A and 2B of the Florida statute of 1937, be deemed made by the defendants and noted to like extent as though reiterated to each such question, viz: That the question is immaterial and irrelevant, in that it deals with the contents of sections 2A and 2B of [fol. 310] the Florida statute of 1937, which sections have been repealed by Act of the Florida Legislature in 1939, and which sections the Attorney General of Florida as disclaimed any intention to enforce.

It is stipulated that the depositions may be filed with the Clerk of the Court on or before February 26, 1940.

Mr. Boggs: The defendants request that the witnesses should be put under the rule.

Mr. Frohlich: I do not think it makes much difference. I think I will let the witnesses stay in the room next to the office.

Irving Caesar, called as a witness in behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?

A. Irving Caesar, and I live at the Park Central Hotel, [fol. 311] 56th Street and Seventh Avenue.

Q. What City?

A. New York City.

Q. What is your occupation?

A. I am an author, composer and publisher.

Q. How long have you been engaged in those occupations?

A. I have been an author and composer for about twenty-three to twenty-four years and I have been a publisher for about seven years.

Q. Do you write the music or the words?

A. Mostly the words, but sometimes I write music too.

Q. Now, I show you a list of compositions and ask you whether this accurately represents a list of the compositions that you have written or composed over the years.

A. I am acquainted with this list; yes. There may be some omissions.

Q. But it is substantially correct?

A. Yes, it is substantially correct.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(List of compositions received in evidence and marked Plaintiffs' Exhibit 1, of this date.)

[fol. 312] Q. Now, you have had your compositions published by various publishers from time to time, haven't you?

A. Yes.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. How long have you been a member of that organization?

A. About twenty years, twenty or twenty-one years; I think I joined in 1920; I am not sure.

Q. Now, when did you make your last contract with the American Society of Composers, Authors and Publishers?

A. I signed a new contract a few months ago; four months ago.

Q. Before the contract——

A. Before the contract that expired, yes. The 18th of July, 1935.

Q. And I show you this paper and ask you whether you recognize the signatures.

A. Yes, sir.

Q. Whose signatures are they?

A. Mine and Joe Young's.

Q. He is now the head?

[fol. 313] A. Yes, he is now the head.

Mr. Frohlich: I offer this in evidence.

Mr. Boggs: No objection.

(Contract received in evidence and marked Plaintiffs' Exhibit 2 of this date.)

It is Stipulated that a photostatic copy may be substituted in place of the original, marking same in place of the original.

(Photostatic copy of contract marked Plaintiffs' Exhibit 2.)

Q. Does this Plaintiffs' Exhibit No. 2, Mr. Caesar, represent one of a series of contracts that you had executed with the American Society of Composers, Authors and Publishers since your first membership?

A. Yes.

Q. Now, prior to the time you joined the Society had you ever received any money for the public performance for profit of any of your compositions?

Mr. Boggs: The question is objected to on the ground that it is irrelevant and immaterial.

Q. You may answer.

A. No, sir.

Mr. Frohlich: These rulings are all reserved for the trial.

[fol. 314] Mr. Boggs: Yes, sir.

Q. After you joined this Society did you receive any money for the public performance for profit of any of your compositions?

Mr. Boggs: The same objection.

Mr. Frohlich: You may answer.

A. Yes, I did.

Q. Can you recall when you received for the first time any money for the public performance for profit of any of your compositions?

A. Well, I think I was in the Society for a year or two before we had a free distribution; I am not sure. That is going back twenty years. I could look it up in my books; it is a matter of record.

Q. And ever since you received the first money for the public performance for profit for your compositions, have you been in receipt from the Society of further moneys from that same source?

A. I have.

Q. And have those moneys come to you in periodic payments?

A. Uninterruptedly, in quarterly payments for the last fourteen years; I am not sure.

Q. And they have come through the American Society of [fol. 315] Authors, Composers and Publishers?

A. Yes.

Q. Will you please look at this list of compositions. Plaintiffs' Exhibit No. 1, and tell us whether any of those compositions attained any popularity?

A. Yes, "Animal Crackers in My Soup," that was in Shirley Temple's picture,—I haven't seen this list—"Donna Clara", with Jolson; "Crazy Rhythm"; that was in a show of mine; "Dust Off the Old Piano"; it is a popular song; "Elizabeth"; that was in the Jolson show; "I Want To Be Happy"; "No, No, Nanette", was the name of the show; "If I Forget You"; "Sometimes I am Happy"; "Just a Gigolo"; "Lady, Play Your Mandolin"; "My Blackbirds are Bluebirds Now". Listen—I can keep you going for a long time.

Q. I just want the more popular pieces?

A. "Tea for Two"; "Is It True What They Say About Dixie"; "Suwanee"; "My Song Book,- "Sing A Song Of Safety"—some twelve million children are singing them. Then to go from the sublime to the ridiculous: "South American Joe"; and "Sixty Seconds Every Minute".

Q. Is "Suwanee" on that list?

A. Yes, "Suwanee" is here.

Q. Is that a popular piece?

[fol. 316] A. It was my first hit. George Gershwin and I wrote this hit. "That's What I Want for Christmas," Shirley Temple's Christmas song. "Saskatchewan."

Well, various songs from the "White Horse Inn," a show that I did.

Q. That will be about enough, Mr. Caesar. Can you tell us which of the compositions that you have just mentioned as being popular compositions sold as many as a million copies of sheet music?

A. Well, offhand I would say songs like "Suwanee," "Tea for Two," "I want to be Happy," have sold immense copies. I couldn't tell you without looking at my records. I know "Suwanee" alone sold a million of just phonograph records; that's when the record business was very high. It ran, I think, into several million.

Q. Well, can you give us an approximate figure as to whether any of them sold over 500,000?

A. Well, "Tea for Two"; "Suwanee"; "I Want to be Happy"; "Just a Gigolo."

Q. Did any songs written or composed by you within the past ten years sell as much as 500,000 copies of sheet music?

A. No, unfortunately; the hit I had, "Is It True What They Say About Dixie," I was the publisher as well, that [fol. 317] sold about 200,000 copies; that was a very big hit.

Q. Do you know generally what goes on in the publishing business?

A. I consider that I do, yes.

Q. Have you had experience publishing compositions other than those of your own?

A. Yes, yes.

Q. Well, now, do you know of your own knowledge whether any popular compositions within the last ten years have sold as many as a million copies?

A. I would be almost sure that no popular composition did. For that matter, no composition has sold a million copies in the last ten years.

Q. Prior to 1923, is it the fact that popular compositions sold around a million and more copies?

A. Well, there were songs that sold four and five million copies; there were songs that sold way over a million copies. That song published by the Berlin firm; it was written by Irving Berlin, "Tuck Me to Sleep in My Old Kentucky Home," I think sold seven million. There was "The Vamp"; "Peggy O'Neill." But there were many songs that sold 'way over a million.

Q. Has there been a change in the amount of copies of popular songs that have been sold prior to 1923 and subse- [fol. 318] quent to 1923?

A. Yes.

Q. What has that change been?

A. Well, definitely downward trend for the last ten years. I would say that sheet music, the sale of a song, has been cut about, oh, 50 to 75 per cent, I would say.

Q. What was the life of a popular song prior to 1923, on the average?

A. Anywhere from six months to a year; perhaps fifteen months.

Q. What is the life of a popular song today?

A. Four to five weeks; six weeks.

Q. To what do you attribute that change, in the period of life of a popular song and also in the amount of copies sold?

Mr. Boggs: That is objected to as calling for a conclusion, and on the further ground that the witness has not been qualified to answer such a question.

Mr. Frohlich: He is an expert.

The Witness: Do you want me to answer?

Mr. Frohlich: Yes, you can answer. The Court will rule at the time of the trial.

A. Well, it is obvious that it is due to the fact that there are some 75,000,000, I think, or 60,000,000 radios in use in the [fol. 319] country, some such fantastic figure; and it is an old geometric principle that an object cannot occupy two spots at the same time. Therefore, you can't be sitting at the piano and at the radio both at the same time, unless we develop an ambidextrous race. And so pianos, as is evident from the piano business, painful to look into, or the sheet music business. The piano business for the last 15 years has been bad; it is having a little renaissance now, they have these new models. There is no sense in buying sheet music; they don't have to, when all they have to do is turn on the radio. You can learn it at the end of an evening, it is drummed into your head so often. There is really no necessity for buying sheet music.

Then the life of a song is killed because it is overexploited, for one thing; or, in case it isn't overexploited, it is due to new material coming along to distract you: you don't get a chance to become acquainted with the old song, assuming that you like the old song. And so you're between the devil and the blue sea. If you don't like it, it is drummed into your ears; if you do like it, they don't give you a chance to get any pleasure out of it because they come along with something else. The furnace consumes it all. That [fol. 320] is about the only way that I can explain it.

Q. Now, going back once more to compositions written and composed by you over the years, have you renewed any of those compositions?

A. My copyright?

Q. Copy right, yes.

A. I am not that old, no.

Q. Do you propose to renew copyrights as they expire?

A. What is that?

Q. Do you expect to make arrangements with publishers for the publication of your renewal copyrights from time to time, as your renewals come along?

A. I would like to answer that this way: I really consider this very important; I really consider that my life work, my investments, my savings, are represented in those future copyrights, those future songs of mine that have become valuable, that have proved their value, and that is my nest egg. For instance, I would not sell the copyright for "Tea for Two" to the present publisher for at less than ten to twenty thousand dollars,—I have not made up my mind, but I know it is worth a fortune to him. Because "Tea for Two," though written in 1924, has as many performances today as it had last year or ten years ago; therefore it is a [fol. 321] standard now, it is becoming an important copyright. That is one of the things that I have built for in my lifetime.

It is like a man buying a piece of land and tilling it properly, until it really becomes suitable to bear fruit. Just so, a copyright renewal proposition is very important to me.

Q. Do you expect to receive royalties, either by way of advance royalties, or some other arrangement, on your compositions when you renew them?

A. Yes, of course.

Q. And do you expect that such royalties will be substantial?

A. I hope so, sure.

Q. Well, now, what do you expect to receive by way of royalties from the renewals of your copyrights, as an aggregate gross amount?

A. By way of royalties from sheet music, or do you mean my net income from these things, or what?

Q. I mean the revenue that you expect to receive from the publishers who will publish your renewal copyrights, from the sale of sheet music and records.

A. Applying myself to sheet music and records, from the sale of my renewed copyrights, well, we will take "Tea for [fol. 322] Two,"—I will take the important ones——

Q. No, take them all. I want you to take them all and tell us what you expect to receive as an aggregate total for the renewal of all of your copyrights, if you live long enough.

Mr. Boggs: The question is objected to as calling for a mere conjectural or speculative answer on the part of the witness.

The Witness: Can I answer it now?

Mr. Frohlich: You may answer it.

A. Well, I would say with an average break in luck, I mean with an average, with the normal longevity given to me, songs which at the moment seem to show vitality and seem to be living, I would say that I expect for the rest of my life from sheet music, from royalties on sheet music and mechanicals, from all of my combined pieces, to average about $7,500 to $10,000 a year. That has nothing to do with my ASCAP, you know.

Q. I haven't asked you about ASCAP. Take a composition like "Suwanee": when the renewal period comes along do you intend to apply for renewal of the copyright of that song?

A. Yes, sir; I intend to apply for a renewal of the copyright of that number. As a matter of fact, I just instituted [fol. 323] a system in the songwriters' group, where we have advised songwriters a year before their copyrights run out that their song will come up for renewal. We offer them that protection; we do all the mechanics for them if they want us to.

Q. Now, what advance royalty do you intend to charge the publisher for the publication of "Suwanee"?

Mr. Boggs: The question is objected to as calling for a mere speculation on the part of the witness.

Mr. Frohlich: You may answer.

A. Well, the point is this: A song like "Suwanee" we call a great catalogue song, a standard song; as a matter of fact, it is going to be revived, I think, in a few months by the publisher. I would want at least for the renewal rights—in other words, in order for the publisher to continue publishing it after my renewal assignment ends—I would want on "Suwanee" not less than $2500.

Q. What would you want for the renewal rights on the song "Tea for Two"?

Mr. Boggs: I make the same objection.

A. $5,000.

Q. What would you ask for the renewal rights for "Chinatown, My Chinatown"?

[fol. 324] A. It is not my song. That is Gene Schwartz's song. I think it has been renewed, hasn't it?

Mr. Frohlich: I will withdraw that; I thought that was your song.

Q. What are you going to ask for "I Want to be Happy"?

A. About $5,000.

Q. What are you going to ask for "Just a Gigolo"?

A. "Just a Gigolo," well, I think "Just a Gigolo" will be out of fashion by that time. Maybe $1500 or $2,000.

Q. What are you going to ask for the renewal rights on "Crazy Rhythm"?

A. About $2500.

Q. What are you going to ask for the renewal rights on "Lady, Play your Mandolin"?

A. $1500.

Q. What are you going to ask for the renewal rights on "Is It True What They Say About Dixie"?

A. $5,000.

Q. What are you going to ask for the renewal rights on "That is What I want for Christmas"?

A. $5000. Some of those songs that you mention I own and I am the publisher; so I won't say $5,000. I will ask $5,000 if a good publisher comes to me and says, "Will you [fol. 325] turn this copyright renewal over to me?" In the case of "That is What I Want for Christmas" and "Is It True What They Say About Dixie," I own them and published them.

Q. You are generally familiar with the customs in the music business?

A. I am.

Q. Do you know whether the publishers today give advance royalties to writers when they make arrangements to publish renewal copyrights?

A. And how. They give substantially.

Q. What in figures do they give on the average popular song?

A. You mean that is renewed, like "Chinatown, My Chinatown"?

Q. I mean renewals.

A. Well, that would be a conjecture on my part because the boys haven't told me. But I know they have received as high as $3,000 and $5,000, and in many cases they make this arrangement—You take Gene Schwartz, who owns "Chinatown, My Chinatown," I believe he could answer that better than I could, I believe he got a contract for a year and a drawing account, a regular drawing account of so much a week—$100 a week or something of that kind—and it was [fol. 326] all part of one deal. In return for that he gave

the publisher the renewal on "Chinatown, My Chinatown," and he was signed up for two or three years, and he had an assured income. You see, these copyrights—well, you know, renewal rights are very valuable if you have a song of any value. Naturally, millions of songs are written.

Q. Now, on the songs that you have had published by other publishers that is, publishers other than your own firm, did they pay you any money at any time for the public performance for profit of your compositions?

A. No.

Q. Where did you receive money from that source?

A. From the American Society of Composers, Authors and Publishers.

Q. Did the publishers with whom you contracted for the publication of your compositions pay you anything for the mechanical rendition of your songs on records and music rolls?

A. Yes.

Q. And what has that royalty been?

A. Well, that royalty is usual; in my case it is 50 per cent of the fee per record received by the publisher; in other words, they never receive more than two cents a side, but sometimes they receive only 1¼ cents a side on the cheaper [fol. 327] records. They should not do that, because we are entitled to two cents, and so is the publisher entitled to two cents. I don't say that the publisher won't take advantage, but I haven't always proved myself to be the best business man. So I receive fifty per cent, and of course that is shared with my collaborator.

Q. Is that 50 per cent the usual and customary remuneration given by publishers to writers for mechanical reproduction?

A. Yes. I would say it was; and from now on it will be; because I am the President of SPA, the songwriters of America, and I just put through this standard contract, which calls for 50 per cent right down the line.

Q. If you were not in combination with any other member of ASCAP—if you were acting alone—could you determine and fix a price to be charged for the use or rendition of your musical compositions, your copyrighted musical compositions, sold in the State of Florida, to all uses and purposes?

A. No, I could not.

Q. Could you determine and fix the price to be charged for the public performance for profit of any of your compositions within the State of Florida?

Mr. Boggs: I object to that as calling for a mere conclu-
[fol. 328] sion on the part of the witness, and a speculative answer is called for by the question.

Mr. Frohlich: You may answer.

A. No, I could not.

Q. Now, if you were to fix and determine a price to be charged for the public performance for profit of any of your compositions in the State of Florida, would you have to take into consideration the various elements that were germane to that problem?

Mr. Boggs: That question is objected to on the same ground, and on the further ground that it is leading.

The Witness: Well, can I answer it now?

Mr. Frohlich: Yes.

A. In order to determine a price for public performance for profit, I would have to become a one-man Gallup survey. I would have to find out for what purpose it was going to be used, whether it was going to be used in a hotel or a cabaret; in other words, I would have to become a one-man survey. It would be almost impossible.

Q. Would you take into consideration the size establishment which was playing your music?

A. I would make a thorough survey of the establishment, the nature of the entertainment, whether they had high-
[fol. 329] priced artists or medium-priced artists or low-priced artists, whether they had a named band or nameless band. In other words, we would have to make arrangements for a trip to Florida to find out how important my particular selections were to the operation.

Q. Now, assuming that there are about 367 places of entertainment in the State of Florida, in which copyrighted musical compositions were used, how would you go about determining and fixing a price for those establishments for the public performance for profit of your music, you acting alone?

Mr. Boggs: The question is objected to on the ground that it is immaterial and irrelevant and calls for a mere speculation on the part of the witness.

Q. You may answer.

A. Well, I would have to,—in the first place I would have to visit them; in the second place I would have to hire somebody to see that they would pay, assuming that I made a deal, I would have to have somebody run around there before they closed the establishment,—those Florida places open and close pretty fast.

Q. Now, are you financially able to employ an investigator?

A. No.

[fol. 330] Q. To investigate in the State of Florida and ascertain the nature of the establishments where your music is being used?

A. No.

Mr. Boggs: The question is objected to as immaterial and irrelevant, there being no prohibition in the Florida statute against the employment of assistants to gauge the value of public performance for profit rights.

Q. Are you financially able to employ attorneys in the State of Florida to protect you against infringements of your compositions in that State?

Mr. Boggs: I make the same objection.

A. Well, it would be to the businessman quite an uneconomic procedure; it would not justify itself.

Q. Now, take those 367 establishments: how many men do you think you would require to go down there to Florida to investigate the nature of those performances, for the purpose of fixing a price for the public performance for profit of your compositions?

Mr. Boggs: The question is objected to as calling for a mere speculation and because no proper foundation has been laid to qualify the witness to establish such figures.

[fol. 331] The Witness: Can I answer that?

Mr. Frohlich: Yes.

A. That depends on how much time I would have. If a man were to continue for a year, I suppose one man could judge one place a day, so we could do it in about a year's time. He could come back and tell me what the survey revealed. If I had to do it in a month's time, I would have to have twelve men; I had to do it in two months' time, perhaps six men could cover it.

Q. How much would you have to pay those men?

A. I would have to give them $40 to $50 a week, and automobiles, gasoline, and so forth; I don't know.

Q. And you would have to pay their hotel bills too?

A. Well, naturally.

Q. And would those men have to be skilled?

A. They would have to be showmen; they would have to know something about show business.

Q. How much would you have to pay a lawyer to look after your interests down in that State to protect you against infringements?

Mr. Boggs: The question is objected to on the ground that it is incompetent, immaterial and irrelevant, and because the witness has not been qualified to answer the same.

[fol. 332] A. Well, I don't know what lawyers get in Florida, but I suppose I would have to pay $1200 to $1500 a year to look after my business, my legal business.

Q. Suppose you could fix and determine the price to be charged and you had all the available information, would you be able to do that with reference to all uses and purposes on your compositions?

A. No, sir; I could not.

Q. Will you explain why you could not do that.

A. Well, for instance, let's say that there is a dance time at the Roney-Plaza, and they have developed a wonderful dance to the swing of "Tea for Two,"—now, they probably spent a year in developing that dance and they have played all over the country, and finally they get this Florida opportunity at the Roney-Plaza. Still I might say, "If that dance time is valuable to the Roney-Plaza, then the song "Tea for Two," being such an integral part of their entertainment, it is also valuable to the Roney-Plaza, and therefore I want for that week for the use of "Tea for Two" $50.

Q. Is there a difference in the value of your compositions from time to time, depending upon the nature of the use?

A. Well, definitely.

[fol. 333] Q. Does the value fluctuate constantly among all of your compositions?

A. Among all of my compositions, certainly.

Q. Now, could you determine at the present time, and have you any information or any data that would help you to determine what you could charge or what price you could

fix upon your compositions for use in television in the State of Florida?

A. For television?

Q. Television.

A. No, I have not; nor has anyone else.

Q. Now, have you any control or are you able to dictate to the manufacturers of mechanical records or music rolls of any of your compositions the amount or price that he is to pay for your compositions for the public performance for profit in the State of Florida?

Mr. Boggs: The question is objected to as not being the best evidence, no proper foundation having been laid for the question.

Mr. Frohlich: You may answer.

A. The question is, have I any rights or privileges in the way of dictating to the manufacturer of a music roll or phonograph record?

Q. That is right.

[fol. 334] A. What price he is to place on his record when it is played for public performance for profit?

Q. Yes, sir; in Florida.

A. In Florida?

Q. Yes.

A. (No answer.)

Mr. *Googs*: Your question is objected to on the ground that the statute does not require any such action on the part of the witness or of those with whom he deals.

A. I have to have this a little more specific. Are you referring to coin operated machines?

Q. No, sir. I am referring to any manufacturer of music rolls or records of your compositions. Can you tell him what price to place on his record when he sells that record in the State of Florida?

A. No, of course not, nor anywhere else.

Q. And if he did put any such price on the record, would there be any way in which you could compel him to give you that money for the public performance for profit on that record?

A. No; the present statute is confiscatory, as far as I am concerned; it limits him to a maximum royalty to me of

two cents for the record, to be divided between the publisher [fol. 335] and writer.

Q. You just have the royalty on the record?

A. Yes.

Q. There is nothing in your contract, or any contract between your publishers and the manufacturers of rolls or records, which provides for the public performance for profit for those records, is there?

A. No, nothing.

Q. And there never has been?

A. No.

Q. Are you willing to have any manufacturer of music rolls or records act in your interest or behalf in fixing and determining the price to be charged for the public performance for profit of your records in the State of Florida?

Mr. Boggs: The question is objected to, because the willingness or unwillingness of the witness is immaterial and irrelevant.

A. Well, the whole question of manufacturers chiseling in on this public performance for profit is coming to a head. I mean, definitely, I think the copyright owner should have the full right to the administration of his copyright, whether it is music or art, or whatever it is. But there has been some movement afoot lately by some manufacturers [fol. 336] of records and rolls who would like to be able to charge performance fees for their records, and that, of course, I, as President of the SPA, intend to fight tooth and nail, because they have no right in the picture at all.

Q. Now, as a writer or publisher, have you any control over the manufacturer of records and rolls of your compositions under the present copyright act?

A. Well, only this right: that I can keep it from being recorded, but once I have permitted it to be recorded by one company, any company, regardless of its credit rating, regardless of its efficiency, regardless of its standing, can come along and reproduce a song on a disc, provided the manufacturer pays me the statutory fee of two cents a record.

Q. Beyond that have you any control?

A. No control.

Q. You have no control in the manufacture of those records and rolls?

A. At this moment, I have no control at all.

Q. How does the Society pay out the money it collects for the public performance for profit on the compositions of its members, do you know?

A. Yes.

[fol. 337] Q. By the way, you are a member of the Board of Directors of that Society?

A. I am.

Q. How long have you been such a member?

A. Well, it is a matter of record; I guess ten years or so.

Q. And as a member of the Board of Directors are you familiar with the operations of the Society?

A. I would say I am.

Q. And do you attend the meetings regularly?

A. Yes.

Q. And you know how it divides up the money that is collected from time to time?

A. Yes.

Q. Now, take the writers, of which you are one: what is the method by which the Society pays out royalties or moneys received from the public performance for profit to those writers?

A. Well, the moneys are first divided fifty-fifty, fifty per cent to the publisher and fifty per cent to the writer.

Q. When you say the writer, you mean the writer of lyrics as well as the composer?

A. Yes, sir; fifty per cent for the composer. The writers include lyric writers, those who write the words and supply [fol. 338] the ideas, and the melody writers, those who supply the music. Now, of the fifty per cent that the writers as a unit receive, one-half is divided—fifty per cent of what the writers of music receive. All writers are classified, whether authors or composers, they are classified in seven important divisions, the top being AA, and then A, BB, B, CC, C, I believe DD, D; and then there are what we call four numerical divisions, going down the scale, class 1, class 2, class 3 and class 4.

Now, the writer's classification depends on, A, the number and quality of his work in the past, B, his current activity, C, his contribution in general to the fund of musical works and music, as represented in the reservoir of the American Society's repertoire.

That, without going into a lot of detail, is the approximate classification.

Q. What classification have you been in?

A. AA.

Q. How long have you been in that classification?

A. Again, it is a matter of record; I don't know exactly.

Q. Well, give us an approximate period. It does not have to be exact.

A. Let's say seven or eight years.

Q. What have you been drawing on the average from the [fol. 339] Society for the public performance for profit as a member of that classification?

A. Well, I believe the average in the last four years would be a good enough average to take. The last four years?

Q. Yes.

A. I would say it would run to about $15,000.

Q. $15,000 a year?

A. Per year, yes.

Q. And does that hold good for 1939 too?

A. Yes; I think in 1939, the total for 1939—I just received a statement for income tax purposes—a little over that—because I always receive some funds from England and France, and also for small performing rights.

Q. Do you desire to continue to act in combination with other writers and composers and publishers for the purpose of licensing the performance for profit of your compositions in the State of Florida?

A. I do.

Q. And does the Society now, and has it since its inception, been licensing those public performance rights for profit upon a system of blanket licenses?

A. Yes.

Q. And is that the manner in which the Society licenses [fol. 340] its users in the State of Florida at the present time?

A. Yes.

Q. Just what do you mean by blanket licenses?

A. Well, blanket license means that a cafe or restaurant or road station for X dollars receives the right to play any of the compositions in the reservoir of material of the American Society of Composers, Authors and Publishers, and that, of course, takes in my own.

Q. Are you willing to affix a price to the compositions that are written and published by you for the State of Florida, which would include a price for public performance for Public profit?

Mr. Boggs: The question is objected to as irrelevant and immaterial.

Q. Are you willing to affix that price to your sheet music?
A. (No answer.)

Mr. Boggs: The same objection, and on the further ground that the statute makes no such requirement.

A. No, I am not willing to affix a price.
Q. Are you willing to file any list which would make available to the user in Florida your compositions upon fixing a [fol. 341] price for public performance for profit?

Mr. Boggs: The same objection.

Q. Are you willing to do that?
A. No, I am not willing. It is impractical; I mean it is not a question of willingness; it is impractical, it just won't work. It is fantastic. It is not a question of willingness.
Q. Would the filing of any list of prices for the public performance for profit of your compositions in the State of Florida interfere with your exclusive right given to you by the Copyright Act in your compositions?

Mr. Boggs: The question is objected to on the ground that the witness is not competent to answer the same; it calls for a question of law.
Mr. Frohlich: You may answer it.
The Witness: I would like to have the question repeated.

(Pending question read by the reporter.)

A. It would.
Q. In addition to having written and published musical compositions, have you also written and published dramatic music works?
A. Yes, sir.
Q. Just what is a dramatic musical work?
[fol. 342] A. A dramatic musical work is a work that takes its origin from a stage performance; it is words and music that first see the light of day as part of a plot of a play, of a musical play or a revue. It starts out as a stage work.
Q. Can you give us the names of some of the important stage works you have written?
A. My most important happens to coincide with my most important song. "No, No, Nannette," "Tea for Two," "I

Want to be Happy." Then I had some Greenwich Village Follies; then I had "Nina Rosa," "White Horse Inn" at the Center Theatre, and George White's Scandals.

Q. That will be sufficient. Now, Mr. Caesar, did you at any time publish those compositions to restrict their public performance for profit? I am speaking of those dramatic musical works.

A. Well, I haven't been the publisher of my important dramatic musical works.

Q. Well, do you know whether the publishers of your dramatic musical works ever restricted any of your dramatic musical works with respect to public performance for profit, even though they were published?

A. Well, it is part of the contract; it is part of the agreement. I think a dramatic guild manager or owner of a show, [fol. 343] who invests usually anywhere from $80,000 to $380,000 in a musical show, wants to control to a certain extent the use of the material of that show, especially where songs are concerned, because he would like it to keep its freshness long enough for him to get his investment back in case the show happens to be a hit. In other words, it would be very easy to take the edge off a show by over-exploiting the music. You can make any show seem as though it was the most common thing in the world in six weeks' time if it is over-exploited.

Q. Is it your testimony that the producer of a stage show must restrict the musical compositions of that show with respect to public performance for profit during the time that that show is being produced on the stage?

A. Well, I think it is only fair that he should do that. It is only fair that he should have some rights in that connection, because he makes it possible, he makes it possible for those songs to be projected on his stage by his vast investment.

Q. Is that customarily done, to your knowledge of the business?

A. Well, yes. I mean, there are restrictions, so that the songs of the show are played in such a way as at least not to be detrimental to the show. In other words, let us assume [fol. 344] that there is a very fine song and a very fine show at ths moment, and some little fly-by-night singer decides to take advantage of the song and begins yodeling it over the air and does a very poor job: it would just scare away

maybe ten to twenty thousand people this morning from wanting to see that show tonight.

You know, I have had that experience with my book "Sing a Song of Safety." I have that request all the time. I have to make a very careful decision as to whom to permit to sing the song, and whom not to permit.

Q. Does the broadcasting of musical compositions that are contained in dramatic musical works interfere with the presentation of that stage work?

A. Well, a fair answer to that is, judiciously administered it might help; I mean with the bars down it could easily destroy.

Q. By the bars down, do you mean indiscriminate broadcasting?

A. Promiscuous broadcasting will destroy anything.

Q. Does that interference between stage and promiscuous broadcasting necessitate restrictions that are frequently placed upon the public performance for profit of your stage works?

A. Yes, sir.

[fol. 345] Q. Now, do you desire to have——

A. In other words, let's say——

Q. Please do not volunteer. Now, do you desire to continue to have the right to restrict your dramatic musical works with respect to public performance for profit in the State of Florida?

A. Yes.

Q. Do your publishers and do you print up what is known as professional copies of your musical compositions?

A. Unfortunately, I do.

Q. And are these given away gratis to the trade, to the actors, actresses and performers?

A. Yes. Sometimes I think they use it for wallpaper, they take so much.

Q. Is it neces-ary to distribute those professional copies?

A. Yes, it is one of the necessary evils; it is the only way they can be made acquainted with what you've got.

Q. These are published as sheet music of your compositions, aren't they?

A. That's right.

Q. Do you desire to continue to have the right to publish those musical compositions in the form of professional copies and distribute them in the State of Florida?

[fol. 346] A. Yes, surely.

Q. And the right to distribute them in other States as well?

A. Yes.

Q. In other words, when you publish a musical composition in the State of Florida as well as in other States, do you wish to reserve to yourself the right of public performance for profit for a future day?

A. Yes, definitely.

Q. Now, a great many of your compositions published by you over the years have been sold to dealers and jobbers throughout the United States, haven't they?

A. Yes.

Q. And a great many of those compositions are now in the hands of such dealers and jobbers?

A. Yes, sir.

Q. And have you any control over those compositions?

A. No.

Q. Has your publisher any control over those compositions?

A. No.

Q. Are you or your publisher able to compel the jobber to affix on the musical compositions in their possession any price for public performance for profit in the State of [fol. 347] Florida?

Mr. Boggs: The question is objected to on the ground that the section of the statute referred to has been repealed; on the further ground that the State of Florida has disclaimed any effort to enforce the provisions of Section 2A and 2B of the 1937 statute.

Mr. Frohlich: You may answer that.

A. There would be no method by which I could get jobbers or dealers with copies of my music on hand to pay any attention to price or regulation or limitation.

Q. Now, take the compositions of yours that have been published by various other publishers: would you be willing to permit such publishers to fix and determine the price for the public performance of your copyrighted musical compositions?

Mr. Boggs: I make the same objection.

Mr. Frohlich: You may answer.

A. I just got through with a three year battle where they would not, without calling in the songwriter to decide what to charge.

(Last question and answer read by reporter.)

Mr. Frohlich: You may cross-examine.

[fol. 348] Cross-examination.

By Mr. Bennett:

Q. Mr. Caesar, I notice on Plaintiffs' Exhibit 1, the list of compositions wherein you have either composed the music or written the lyrics; under the column of Publisher, a great many different music publishing houses under the contract which you have made with those publishers. Who owns the copyright?

A. The publisher.

Q. You have sold the copyright to them?

A. No, it is not a sale. It was not in the form of a sale. It was in the form of a contract whereby I turned the copyright over to them. As a matter of fact, whereby they took the copyright as my manager, having accepted my song. They sent my manuscript to Washington, had it copyrighted in my name; I was given credit. Their rights were as to terms.

Q. What are the usual terms under these contracts?

A. Unfortunately, they vary through the years; it all depended on the strength of the writer, his standing as a writer; his courage when he walked into the publisher, and how anxious he was to have the song published. You have no idea what a songwriter with a song in his pocket will do to get it published—poor fellow, he was afraid; but he [fol. 349] won't be from now on, because my organization advises me that we have the most wonderful contract manageable.

Q. I don't mean the exact number of dollars you receive from that. It is a fact that the compensation you receive from these publishers is a certain number of cents for a sheet of music and a percentage of the royalty on the phonograph records?

A. That is right.

Q. And the copyright itself is owned by the publisher?

A. The copyright is owned by the publisher, with the exception that the copyright law, regardless of any contract

you have entered into with the publisher, unless you were an employee of his, returns the copyright to you after 28 years.

Q. I think you testified that you were President of the Songwriters Protective Association?

A. Yes.

Q. And you stated that the Songwriters Protective Association was advising composers and authors a year in advance of the expiration of their existing copyrights?

A. Yes.

Q. Calling their attention to the date when that renewal should be made?

[fol. 350] A. That's right.

Q. How do you know when the renewal date arrives?

A. The records in Washington, of the copyright office, have that; then the New York Public Library has it too.

Q. How do you know the owner?

A. The composer or author of the number.

Q. Do you maintain records for that?

A. No, we don't maintain records, but the copyright office does. We have to employ somebody who just keeps digging for that all the time, digs it out, goes through the list and sees a familiar name of someone who wrote a song 28 years ago, that would be 1911 or 1912. He says, "Well, I think he is a member of the SPA, so I think I will send him a card telling him his song will come up for renewal a year from today."

Q. All that information is available to you, isn't it?

A. Yes, it is available. You have to burrow for it; it is not hanging on a wall. You have to dig for it.

Q. Do members of the SPA furnish the SPA with lists of their compositions?

A. Well, they do now, because—not a list of their compositions, but we are trying to get them interested to show us a duplicate copy of their contract.

[fol. 351] Q. Would you say that each one of them has in their possession some kind of information, a list similar to this exhibit?

A. No. As a matter of fact, I was surprised when this list was compiled. I must get myself a copy of it; I didn't know I had so many works.

Q. Mr. Caesar, in your publishing business, how do you determine the price of sheet music?

A. Well, there is a standard price for it; I mean, usually you sell it to the jobber, say, for 18 cents; and if you are anxious for him to help you exploit it, he may have you sell it to him for 17 cents; or if you think the piece is going to be a hit regardless of whether he pushes it or not over the music counter, you ask him 20 cents, or you might ask him for 22 cents. It is just a matter of common sense business instinct. There is no way of regulating the thing.

Q. Do you consider the sheet music of every song worth the same price?

A. Oh, no, no.

Q. Would you consider the sheet music of "Tea for Two" more valuable than sheet music for the "The Umbrella Man"?

A. I am glad you mentioned it. I don't know, as a matter of fact, but I am sure that the wholesale price on "Tea [fol. 352] for Two," the wholesale price must be three or four cents over any current popular song. You see, "Tea for Two," no such song—it embarrasses me mentioning my own song—but no such song, having established itself over the years, it becomes a real piece of merchandise.

Q. You can fix a price, then, on sheet music of what you are willing to accept for it?

A. It would vary. Let's say "Suwanee"—we mentioned "Suwanee" before, which is a song of mine—I can deal more familiarly with it—now, "Suwanee" probably in sheet music form, I don't know how much has been selling each year; it probably has been selling for 22 or 24 cents wholesale. Now, let's say the publisher decides to reinvigorate it, give it new life, he is liable to put on a special for 30 days or for 60 days at a price of 20 cents, and at the end of 60 days send a postcard out or a blazer and say that this offer is off for such and such a date.

Q. That is a question of the law of supply and demand?

A. That's right; it is a question of pure business.

Q. Purely the business of fixing a price?

A. Supply and demand.

Q. Now, in your publishing business, I am eliminating those compositions which other publishers are publish- [fol. 353] ing——

A. You are talking of my own?

Q. Where your own publishing office owns the copyright: are any of those ever incorporated in sound motion picture films?

A. Oh, sure, sure.

Q. Do you sell recording rights to various motion picture companies?

A. You mean the synchronization rights?

Q. Yes, the synchronization right.

A. Yes.

Q. How do you determine the price that they pay for that right? Let's take "Suwanee" as an illustration. How would you determine that price?

A. This is the way. If it is going to be used as background music—in other words, if two people are talking and just in the background you hear strains of "Suwanee" being played, I would consider that relation in my right. And so for that I might ask $150 or $200, as background. Now, if it is visual background—not visual background, visual use, visual instrumental use, we'll say that a band is coming down the street playing "Suwanee, How I Love You," then I'd say, well, that band coming down the street playing "Suwanee" is very important, so I might say $750. [fol. 354] I have had an experience of that kind with "Is It True What They Say About Dixie" a year ago. All that the band did was walk down the street playing "Is It True What They Say About Dixie," so I charged them, when the first application came in, I charged them $500. Then I learned the day before the picture opened, I learned that they played it four times. That band never stopped coming back but seemed to keep parading all day long in that picture. Everytime they came down the street—well, I could have charged them then, if I wanted to, if I wanted to be unfair, because each use is a separate use, I could have said, "Gentlemen, I didn't know you were going to play it four times, and I want so much more for it, and because evidently this is a very important song to your picture," which they must tell you about in advance. You understand, they must give you some inkling of its use. But I was very lenient with them, and to show that I was not going to hold them up, I just charged them $1500.

Q. Now, if your price is higher than they wanted to pay, they would not have acquired a recording right from you, would they?

A. That all depends on what they want to pay; how important it is to them.

Q. That is another question of supply and demand?

[fol. 355] A. Well, no. Let's say "Tea for Two." If it was a picture where a boy and a girl were going to fall in love over a teacup, and that was the genesis of the entire story and of the entire romance, would I be asking too much if I said, "I want $10,000 or $15,000 for 'Tea for Two' "?

Q. I don't know. But would they pay it necessarily?

A. Oh, sure, they have paid $15,000 for one song.

Q. It is a question of the value of that song.

A. Yes, how important it is to them.

Q. Do you make the same charge for the licensing rights on all of your songs?

A. No, I apply the same principle but not the same charge; I apply the same principle.

Q. Why isn't the charge for one of the poorer songs that you publish the same as the charge you would make for "Tea for Two"?

A. Well, obviously, "Tea for Two" is so important—Let's say that you have cultivated an orange grove on some acreage, you have developed the most wonderful oranges in the world; it just happens that you own the most marvelous oranges, and the seeds of those oranges are invaluable in the State of Florida. On some other acreage that was frostbitten through the years the seeds are not so valuable. [fol. 356] Which seeds are you going to get? And I have applied the same principle with songs; it's only fair.

Q. But you are able to vary your prices and determine what your compositions are worth to you.

A. Yes, if the factors are known, I can use my judgment, that's all; then it becomes a matter of business judgment.

Q. You put a price on it but it is a question of whether the motion picture producer will pay the price that you are asking?

A. That's right, the same as it would be with anything. Suppose there was a client in Florida that needed a brief written. Now, if he was a man with a little $4,000 business and you thought that he should be helped, and so forth, you will say "Well, you can have this brief for $100." But if it were a big public utility corporation in the State of Florida that needed your particular time, you would say $10,000. That's the same with doctors. Doctors operate for nothing on some fellows, but those who can, pay. I know Bentley Squire charged a friend of mine $15,000 for one operation.

Q. You said you were a member of the Board of Directors of ASCAP?

A. Yes, sir.

[fol. 357] Q. Are you a member of the Membership Committee?

A. No, I am not a member of the Membership Committee. The Membership Committee suggests the names that they have passed on, then we ask them questions if there is any doubt in our minds.

Q. Are you a member of the Rate Committee?

A. I am a member of the Administration Committee, which has a broad enough function—if there is any question you want to ask me.

Q. Are you familiar with the manner in which prices charged by ASCAP are determined by ASCAP?

A. More or less I am, yes.

Q. You sit in on the meetings?

A. Oh, yes, sure, on some of them.

Q. Do you as a member of ASCAP—not as a Director—but as a member of ASCAP, have any control over the price charged by ASCAP for public performance for profit rights?

A. Have I any control?

Q. Yes.

A. Just the control I have over the general policy of the Society.

Q. Who determines the price to be charged for ASCAP?

A. Well, the management in collaboration with field [fol. 358] workers who do research work.

Mr. Finkelstein: I just want to determine what your question meant. Let's get the meaning of it.

The Witness: There is no such thing as a theoretical rate; it is only a rate in relation to an operation. Do you understand what I mean?

For instance, the International Casino—we'll take that example—the International Casino was in operation with a $100,000 or $200,000 investment, and they had 60 girls in the show, two orchestras, a big bar downstairs and all kinds of ballyhoo. Well, the International Casino, I don't know precisely what their rate was, but it must have been about $3,500 a year or $5,000 a year, which I don't think was excessive for that kind of operation. I don't know if you know the place,—It is one of the outstanding places,—and they widely use music. They are powerless without

music. Now, the International Casino has gone broke and it has been turned into a poolroom, a 40 cent poolroom. Well, for a 40 cent poolroom the International Casino does not size up, being a new operation. It is not any different than a saloon down the street, or maybe a dance hall down [fol. 359] on 42nd Street where you have to learn how to dance. So instead of paying $5,000 I suppose they will have to pay $2,000.

Q. Take a specific instance in Florida. You mentioned the Roney-Plaza Hotel.

A. Yes, sir.

Q. Who determines the price to be charged for the Roney-Plaza?

A. The management does.

Q. In so far as the Society has the power to determine the prices?

A. The management does.

Q. You mean the Board of Directors?

A. Not the Board of Directors; it would be impossible for the Board of Directors to go through every individual operation.

Q. When you refer to the management, are you referring to Mr. Payne or Mr. Meyers?

A. Mr. Payne, Mr. Meyers, Mr. Buck; sometimes I sit in; sometimes our field men who cover that part of the country sit in, or they write in and say what the operation consists of. They might say that the Roney-Plaza just at the moment is having dinner dances or, on the other hand, they might wire us or write us about the Miami-Biltmore, be- [fol. 360] cause they have now gone into extravagant vaudeville shows as part of their operation.

Q. Are you familiar with the Rate Committee of ASCAP?

A. Yes, for a while I was on the Rate Committee. We went through every item when I was on it.

Q. Is it the Rate Committee of ASCAP which fixes the prices to be charged?

A. Yes, the Rate Committee fixes the prices to be charged. We have 30,000 licensees; well, we cannot go through each so we classify them in groups, whether it is a hotel, whether it is a restaurant; whether it is a hotel that has a four-piece band, which is one group. If it is a restaurant that would not get a corporal's guard unless it had a big stage show, that is another group,—and so forth.

Redirect examination.

By Mr. Frohlich:

Q. Mr. Bennett asked you something about synchronization rights that you occasionally give to motion picture producers when you give those rights. Do you know at that time in how many theatres the picture is going to be performed?

A. No.

[fol. 361] Q. Is that information furnished to you by the motion picture producer at that time?

A. No.

Q. Or any other time?

A. No.

Q. Does your synchronization right have anything to do with the public performance for profit of your composition?

A. No.

Q. It is separate and distinct?

A. Yes.

Q. And is limited strictly to putting a musical composition on the disc for sound records of the film itself?

A. That's right.

Q. And the price that you receive for it is limited solely to that right to put it on the sound track?

A. Yes.

Mr. Frohlich: That is all.

Mr. Bennett: That is all.

(Witness excused.)

[fol. 362] Deems Taylor, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and residence, Mr. Taylor?

A. Joseph Deems Taylor.

Q. And you reside where?

A. My residence is Haviland Road, Stamford, Connecticut.

Q. What is your occupation?
A. Composer of music, writer, and radio speaker.
Q. How long have you composed music?
A. About 35 years.
Q. I show you a list of works which purports to set forth the musical compositions composed by you and ask you if this fairly accurately lists your compositions.
A. I have seen that list. It is reasonably accurate, reasonably complete.

Mr. Frohlich: I offer it in evidence.
Mr. Boggs: No objection.

(List received in evidence and marked Complainants' Exhibit 3 of this date.)

Q. Do you belong to the American Society of Composers, Authors and Publishers?
[fol. 363] A. I do.
Q. How long have you been a member of that organization?
A. Since 1930.
Q. I show you this document and ask you whether this represents a contract entered into between you and the organization on June 26, 1935. Look at the signatures, please, and see if you recognize those signatures.
A. I recognize my own and that of Joseph Young.

Mr. Frohlich: I offer it in evidence.
Mr. Boggs: No objection.

(Contract received in evidence and marked Complainants' Exhibit 4 of this date.)

Mr. Frohlich: It is stipulated that we can substitute a photostatic copy of the contract in place of the original and mark the photostat in place of the original.

(Photostatic copy marked Complainants' Exhibit 4 of this date, in place of the original.).

Q. Now, prior to the time that you joined the American Society of Composers, Authors and Publishers, had you ever received any money for the public performance for profit of any of your compositions?

Mr. Boggs: The question is objected to as being imma-
[fol. 364] terial and irrelevant.
Mr. Frohlich: You may answer.

A. Yes, I had.

Q. Will you please state in what way?

A. As royalties on performances of musical dramatic works and as performance fees for the performance in public of symphonic works.

Q. Symphonic works and musical dramatic works. Have you ever written any simple musical compositions?

A. Songs?

Q. Songs.

A. Oh, yes.

Q. Did you ever receive any money for the public performance for profit on any of those songs before you became a member of the Society?

A. No.

Mr. Boggs: Same objection.

Q. When for the first time did you receive any money for the public performance for profit on your musical compositions?

A. I don't quite understand the question.

Q. Well, I mean when for the first time did you ever receive money that was paid for the right to publicly perform for profit musical compositions as distinguished from your [fol. 365] dramatic or symphonic works?

A. After I joined the American Society of Composers, Authors and Publishers.

Q. And have you been receiving moneys from the American Society of Composers, Authors and Publishers ever since?

A. Yes.

Q. Have you been receiving that money in periodic payments?

A. Every quarter.

Q. Can you look over this list of your compositions and mention a few of the outstanding compositions that are contained in it?

A. There is a song called "Captain Stratton;" a fantasy symphonic entitled "Circus Day"; a popular number entitled "The Course of True Love"; a Cantata for Chorus and orchestra, called "The Highwayman"; a pantomime called "A Kiss"; "Anadu"; a song called "May Day Choral"; the suite for orchestra entitled "Through the Looking Glass," and two operas entitled respectively "The King's Henchmen" and "Peter Ibbetson."

Q. Now, you have never written, Mr. Taylor, any so-called popular music, which is written for dance purposes?
[fol. 366] A. No, only musical dramatic works, such as musical comedies.

Q. Of course, those songs in musical comedies are, strictly speaking, not popular music, but they are dramatic and musical works?

A. That's right.

Q. Now, you do not sell any large quantities of your sheet music of any of the compositions, do you?

A. No. The sheet sales are infinitesimal, as compared with those of popular production music.

Q. Now, what is the greatest source of revenue you receive from the writing of your works?

A. My royalties from ASCAP.

Q. How much do those royalties average for the past five or six years from ASCAP?

A. Per year?

Q. Per year.

A. For the past five or six years they have averaged in excess of $9,000.

Q. So that if it were not for the moneys you receive from the public performance for profit of your compositions your revenue from the sale of sheet music would be very small?

A. It would be cut to approximately one-sixth of what it is now.

[fol. 367] Q. Now, these compositions that you have written, have any of them been renewed?

A. Yes.

Q. Can you just name those that have been renewed.

A. Yes. "Clothes Make the Soldier Man," which is a production number. "In the Course of True Love." This is apparently the complete score of the comedy called "Echo": "Jolly the Boarder Along"; "Mountain Maiden"; "Poor Old Solomon"; "The Things you Think are not the Things You Say," and to be continued.

Q. Do you propose to renew from time to time your copyrighted works as the original term of the copyright expires?

A. I do, yes.

Q. And when you renew these works, do you make new arrangements with the publishers for the continued publication of the renewed copyright?

A. Oh, yes.

Q. Have you in any instance where you renewed your copyright received any advance royalty from the publishers when you made your arrangement for the publication of the renewals?

A. No.

Q. Have the renewal rights in your composition a value [fol. 368] to you?

A. Yes, they have.

Q. On what do you base the value primarily?

A. On what do I base the value of renewals?

Q. Let me put the question this way: Is the renewal value fixed or determined in your mind by the potential sale of the sheet music, or are there other considerations that give it value?

A. The potential sale of sheet music has some value, but not much. The chief consideration would be the performance fees.

Q. And isn't it a fact that your compositions are of high standing and prestige in the musical world?

A. Yes.

Q. Are they frequently performed in symphonic halls?

A. They are.

Q. Are they performed on the stage as well?

A. Yes.

Q. And do you have performances of your compositions also on the radio?

A. Yes.

Q. As a matter of fact, you are a commentator on the radio today, aren't you?

A. Yes.

[fol. 369] Q. And have been for some time?

A. Yes, for over ten years.

Q. And in your comments on music do you connect your comments with some of your own compositions?

A. I have on occasions, yes. I try to preserve decent reticence in that regard.

Q. Would you say that your compositions, symphonic, musical and operatic, have something to do with giving you a standing and prestige as a radio commentator?

A. Oh, without a doubt, yes.

Q. Have your musical compositions from time to time been recorded on piano rolls or phonograph records?

A. Nothing of mine has been recorded on piano rolls; I have had some recording on phonograph records, yes.

Q. On the phonograph records do you participate in the royalties that are received by the publisher from the manufacturer of the records?

A. I receive the one cent royalty per side that the Government allows.

Q. That is, you receive 50 per cent of what the publisher receives; is that right?

A. I receive 50 per cent of the total statutory royalty, yes.

Q. Is that the usual and customary split on the royalty [fol. 370] between publisher and the writer in the business?

A. I believe it is a statutory split.

Q. Now, have you any control over the manufacture of the phonograph records with respect to fixing a price on that record for the public performance for profit of your compositions in the State of Florida or elsewhere?

Mr. Boggs: I object to that on the ground that it calls for a mere conclusion of law; the witness is not qualified to answer.

Q. You may answer it.

A. May I ask to have that repeated?

Q. (Question read.)

A. No, I think not.

Q. Now, if you were not in combination with any other member of ASCAP, if you were acting alone, could you determine and fix the price to be charged for the use and rendition of your musical composition, your copyrighted musical composition, sold in the State of Florida, for all uses and purposes?

Mr. Boggs: The question is objected to as immaterial and irrelevant. The section of the statute to which your reference is made now having been repealed in the State of Florida, and the State disclaims any endeavor to enforce such section.

[fol. 371] The Witness: May I answer it?

Mr. Frohlich: Yes, you may answer.

A. I should say offhand that would be utterly impossible.

Q. Now, in order for you to determine and fix a price for the public performance for profit of your compositions in the State of Florida, you would have to take into consideration certain factors with respect to the use of the work in that State; isn't that so?

A. I would, decidedly.

Q. Well, now, can you tell us briefly just what factors you would have to consider?

A. For example, in the case of the performance of a symphonic work given theoretically for profit, I would take into consideration the size of the hall, the size of the potential audience, also the elaborateness of the performance; if it were given by a small collection of instrumentalists in a hall holding 200 there would be one price; if it were given in a temple holding 4,000 by a 100 piece orchestra, that would be another price; also of vital importance to a composer of serious music is the quality of his performances, much more so than in the case of the composer of popular music, because such performances of serious music are comparatively few in number as compared with those of popular [fol. 372] music. For example, I hear a new popular song played at noontime on the radio and it is given a very bad performance; that leaves an unfavorable impression, and on that same day I may hear a brilliant performance of it later on, that will correct that earlier impression.

Now, in the case of a symphonic work a bad performance may ruin it in the eyes of the public, because its subsequent performances may be so infrequent that people won't bother to listen to it.

As I say, it is vitally important that I be able to have some control over the quality of a performance of my music.

Q. Now, Mr. Taylor, in order to do that, would you have to be either personally present in the State of Florida or have a representative in that State?

A. I should have to do one or the other.

Q. And would either you or your representative or agent have to contact various places of public entertainment in that State?

A. Yes, directly or indirectly.

Q. Would you have to have somebody in the State of Florida constantly to see that your work is not infringed and is not performed publicly for profit without your consent?

[fol. 373] A. Performances of music being what they are, I am afraid I would.

Q. Would that necessitate an expenditure of money by you for that purpose?

A. I would have to employ agents either on salary or commission to make such investigation, yes, or else go myself.

Q. And what would you estimate you would have to pay an agent to represent you in the State of Florida?

Mr. Boggs: The question is objected to on the ground that it is irrelevant and immaterial.

A. I haven't much idea, but I know that, I am sure that the cost of such an investigation, since mine is serious music not so frequently performed, would probably be in excess of any fee I might derive from such performances.

Q. You would have to have a lawyer in the State of Florida to protect you against infringement of your works?

Mr. Boggs: The same objection.

A. Yes.

Q. Are you willing to have your contract with the American Society of Composers, Authors and Publishers cancelled and annulled?

A. Certainly not.

Q. Would you be able at this time to fix a price on your [fol. 374] compositions with respect to the public performance for profit in Florida with respect to all its uses?

Mr. Boggs: The same objection.

A. No.

Q. Would you be able at this time to fix a price or file a list, or make available to the user in Florida of your musical compositions with respect to public performance for profit with respect to television?

A. No, I would not be able to do that.

Q. Have you enough information at this time to help you fix a price for that purpose?

A. I have not.

Q. Do you sometimes restrict the public performance for profit of your compositions?

A. Yes, I do.

Q. Can you tell us when and under what circumstances you do that?

A. I do that, in the first place, to avoid having certain works overplayed; it is not good for a piece of serious music. Put it another way: there is a limit to the frequent performance that is good for the piece of serious music; people begin to get tired of it and its life is shortened. Also, as I have said before, the quality of the performance is so [fol. 375] vitally important that with certain orchestral

works I would reserve the right to refuse to have them played by organizations that I do not think are capable of doing them justice.

Q. Is that right of restriction very valuable to you?

A. Surely.

Q. Is it a necessary thing for you in order to preserve the life of your compositions?

A. The life of my compositions and my personal reputation as a composer.

Q. Now, if a manufacturer of rolls or records in the State of Florida should fix a price for the public performance for profit of one of your compositions, is there any way in which you could compel him to give you a part of the money he receives for that purpose?

A. So far as I know, there is no way.

Q. Are you willing to have a manufacturer of records act as your agent or act in your interest and in your behalf, in fixing and determining the price to be charged for the public performance for profit in your compositions in the State of Florida?

A. No; because I trust my own judgment more than his, in that respect.

Q. Have you any control whatever over the manufacture [fol. 376] of records of your compositions?

A. The only control allowed me is the right, I suppose, of allowing them to be recorded at all.

Q. Once that recording is made, have you any further control afterwards in the country over the manufacture and sale of the records of your compositions?

A. None at all. And that, I might say, is why so comparatively few of my works have been recorded, because rather than risk incompetent performances I have chosen to keep them out of circulation in that particular field of production.

Q. Do you know that the Society licenses compositions by means of a blanket license?

A. Yes, sir.

Q. And you know that from your association with the Society, don't you?

A. Yes.

Q. Now, are you willing to have your works licensed in the State of Florida on any system other than blanket licenses?

Mr. Boggs: The question is objected to as incompetent and irrelevant.

A. No, I am not.

Q. Well, if you arrived at some system of licensing other [fol. 377] than blanket licensing, would there be additional expense attached to it, as far as you are concerned?

A. I should think there would be because I would have to deal differently with every individual producer and performer, and I would have to take up every work of mine separately.

Q. And would that mean personal contact with each and every user of your work in that State?

A. Yes.

Q. That would mean personal association?

A. Yes.

Q. You would have to have somebody do that for you?

A. I could not possibly do it myself and I would have to assign someone to do it.

Q. Do you desire at the present time to continue to have a right to restrict your musical compositions with respect to public performance for profit?

A. I do.

Mr. Frohlich: Your witness.

Cross-examination.

By Mr. Bennett:

Q. Mr. Taylor, I would like to refer to the list of your compositions marked as Exhibit No. 3. I notice under the [fol. 378] column headed "Publishers," various publishers are mentioned alongside of the individual compositions. Are they, the publishers, the owners of the copyright of that particular composition?

A. In some cases yes, and in some cases no; most of my more ambitious works are copyrighted in my name, although they are issued bearing the publisher's imprint.

Q. I call your attention to Exhibit A, attached to the petition in the Florida suit, which purports to be an agreement between you and J. Fischer & Brother. Is that a representative agreement; does that represent the type of agreement you have entered into with regard to——

A. It represents a large number of agreements that I have entered into with J. Fischer & Brother.

Q. Would you say that that represents the agreement covering a substantial proportion of the numbers in Complainant's Exhibit No. 3?

A. Roughly, I should say it represents about two-thirds of my agreement with J. Fischer & Brother.

Q. Then as to those two-thirds, the copyright is owned by J. Fischer & Brother; is that correct?

A. Yes.

Q. In the remaining one-third what type of agreement do you have with the publisher?

[fol. 379] A. It is an agreement giving him the right to publish, and they have the music during the life of the copyright; the work is copyrighted in my name, and the copyright is not part of his assets.

Q. Do those copyrights represent primarily the dramatic works which you have composed?

A. They represent dramatic, musical and symphonic works, orchestral works largely.

Q. Now, as to those dramatic and symphonic works, the American Society of Composers, Authors and Publishers does not license the public performance for profit; is that correct?

A. It does not license the public stage performance; it does not license the so-called grand rights; that is, the right to produce the opera with scenery and costumes, no; it controls the small right, that is, the right to perform on the air or otherwise, brief excerpts from those works.

Q. Now, as to the symphonic rights for the syphonies which you have composed.

A. There again, the Society controls the right to license broadcast performances.

Q. I thought you testified that you restricted those rights, that you only permitted certain organizations to perform [fol. 380] your symphonies.

A. That right of restriction, of course, I exercise intermittently; certain works I restrict, not all of them. Some I restrict for a certain length of time, and then raise the restriction. It is a right that the Society allows me to exert, that I am at liberty to exert, and which I do not always exercise.

Q. Do you know whether the Boston Symphony Orchestra has a license from ASCAP, a public performance for profit license?

A. No, I am sure it has not, because ASCAP so far has not claimed jurisdiction over concert performances. Over symphonic works?

Q. That is what I am getting at, Mr. Taylor.

A. No.

Q. ASCAP then does not license the symphonic works?

A. That license is for broadcast performances.

Q. Suppose the Philharmonic Orchestra is giving a broadcast from NBC or Columbia: does the ASCAP license to NBC and Columbia cover that symphonic broadcast?

A. Yes.

Mr. Finkelstein: You mean from the broadcasting studio?

The Witness: Yes, it has no control over the actual per-
[fol. 381] formance in the hall; it controls only the right to broadcast that hall performance over the air.

By Mr. Bennett:

Q. And that only applies to radio broadcasting, not to large orchestras, symphonic orchestras?

A. No.

Q. In auditoriums and halls?

A. No.

Q. Is there anything in your agreement with ASCAP which is designating Complainants' Exhibit No. 4, which makes that differentiation between broadcasting?

Mr. Finkelstein: Are you asking him to interpret the agreement?

Mr. Bennett: No; I am curious. I am not trying to be facetious.

Q. Do you find anything in the agreement there which gives this right to license?

A. You mean if there is any distinction between the two; you mean anything in the agreement that makes a distinction between the two?

Q. Yes, which reserves to you the right to license auditoriums for your symphonies, for ASCAP to license symphonic broadcasts by radio.

A. Section 9. (Reading): "Public performance." De-
[fol. 382] fining the term "Public Performance." "Public performance shall be construed to mean vocal, instrumental and/or mechanical rendition and representation in any manner or by any method whatsoever, including transmission by radio broadcasting stations, transmission by telephony and/or 'wired wireless,' and/or reproduction of performances and renditions by means of devices for repro-

ducing sound in synchronism or timed relation with the taking of motion pictures."

My answer would be then that, strictly speaking, there is no such distinction made in my contract, because the definition mentions certain methods of transmission as being included in the term "public performance," but does not necessarily limit those methods. I mean it does not necessarily limit a public performance to these methods.

Q. Then I take it from your further statement that ASCAP, in your agreement with it, has the right to license symphonic compositions in auditoriums?

A. Yes, sir.

Q. And all others as well as in radio?

Mr. Finkelstein: His testimony also was that they have not been exercising the right with respect to halls and auditoriums, but that right has been exercised by the members [fol. 383] of the Society. Is that correct?

The Witness: Yes.

By Mr. Bennett:

Q. Did I understand you correctly in your direct testimony to say that you personally licensed symphonic performances in auditoriums?

A. I have done so, yes.

Q. Have you collected fees for that license?

A. Yes.

Q. You have done that in spite of your agreement with ASCAP, transferring your right to them?

A. I have done that with no objection from ASCAP.

Q. How do you arrive at the price you charge for the public performance for profit of a symphonic composition?

A. Well, by the size of the auditorium, the importance of the event, the possible profit to the performer, possible gross profit: I should say those are the principal facts—and, oh, also in relation to the fees generally paid to other composers of similar music.

Q. Could you not also apply the same methods to determine a price to be charged for the broadcasting of that symphony in a given community?

A. I don't see how I could determine that, promising any [fol. 384] effective and unvarying price, because circumstances change with every performance. For the first performance of a work I might charge a higher or a lower

fee than I would charge later. If the occasion were a very brilliant one and the orchestra conductor, for instance, very famous and extremely competent, and the occasion one that I felt would give my work a brilliant introduction and get a lot of publicity, I might charge a comparatively low fee in relation to what I might charge for an event the following week.

On the other hand, if the performance was given in a hall at increased prices, where I thought that the management stood to make an enormous gross profit, my fee might be higher than for a subsequent performance.

Q. If you had the right to vary that fee, could you then determine the price, vary it as to different types of performances and vary it as to time?

A. I should say it would be pretty difficult, considering the number of performances, with whom we have to be in contact, and the amount of information that I would have to have to determine beforehand for any length of time.

Q. But you could put a price on it?

A. I could put a price.

Mr. Finkelstein: You mean physically?

[fol. 385] The Witness: Certainly, physically, I could put a price on it.

By Mr. Bennett:

Q. Mr. Taylor, are you a member of the Board of Directors of ASCAP?

A. Yes.

Q. How long have you been on the Board?

A. I believe since 1932.

Q. Are you a member of the Membership Committee of ASCAP?

A. Yes.

Q. How long have you been on the Membership Committee?

A. I would have to refresh my memory on that; I should say about the same length of time, offhand.

Q. Would you mind stating the requirements for membership by a composer and author?

A. Well, the primary requirement is that he should have had at least five compositions published by a publisher member of ASCAP; that enables him to file an application for membership.

Q. Were you a member of the Membership Committee in 1934?

A. Yes, I was.

Q. Did you ever hear of Perry Bradford?

A. Yes, I probably did.

[fol. 386] Q. I understand that Perry Bradford wrote quite a number of compositions which have been published, including "Crazy Blues" and "Black Bottom," "All I had to do is Done Gone," and a number of others, and that he was denied membership in ASCAP in about the year 1934.

Mr. Finkelstein: Won't you ask a question instead of testifying. You are telling what your undertanding is, and I object to that.

Q. Were you a member of the Committee when he was denied membership?

A. Yes.

Q. Will you state why he was denied membership.

A. Since I have no very clear recollection of Bradford or his application, I can only give you my—shall I say the reason that must have been responsible for that denial, and that is, in the opinion of the members of that Committee his work, while qualifying in number, did not qualify in quality—that is, in our estimation. They were not of such an order of merit, of possible potential popularity as to be of any considerable value or any value to our clients.

Q. Do you know Ray Walker?

A. Offhand, I do not.

Q. Do you know as a member of the Membership Com-

[fol. 387] mittee whether Ray Walker has made application for reinstatement?

A. I don't recall.

Q. For membership in ASCAP?

A. I don't recall.

Q. Do you know whether Ray Walker was a member of ASCAP in 1916 and 1917?

A. That I don't recall, as I do not remember the ASCAP at that time.

Q. Do you know—Could you ascertain from the records of ASCAP whether Mr. Walker has made application from time to time?

A. Yes, that I could do.

Mr. Frohlich: We will have someone who will be able to testify to that. I will have someone here to tell you all about Ray Walker. He had quite a history.

(Discussion off the record.)

Mr. Bennett: That is all.
Mr. Frohlich: That is all.

(Witness excused.)

(A recess was taken to 2:30 p. m.)

[fol. 388] After Recess

Edgar Leslie, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?
A. Edgar Leslie. I live at 59 West 46th Street, New York City.
Q. What is your occupation?
A. Songwriter.
Q. Do you write the words, the lyrics or the music?
A. Generally the words.
Q. And have you occasionally written music?
A. In remote instances.
Q. For how many years have you been engaged in the profession?
A. 33 or 34 years; from 1906 or 1907.
Q. In those thirty-odd years have you written and published many compositions?
A. Yes.
Q. Do you usually write your compositions in collabora-
[fol. 389] tion with a composer who composes the music to your lyrics?
A. Yes.
Q. And after you write a composition and that music is set up by your collaborator, you take this manuscript to a publisher and arrange with him for the publication of the music?

A. I submit it to a publisher in the hope that he will like it; then arrange for its publication.

Q. Have you dealt with many publishers through these years?

A. Yes.

Q. I show you a list of some of your compositions and ask you whether that list truly represents a great many of the compositions that were written by you over the years.

A. I examined this list on one recent occasion, and it is not quite complete, but it represents a great bulk of my compositions.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(List received in evidence and marked Complainants' Exhibit 5 of this date.)

Q. Are you a member of the American Society of Com-
[fol. 390] posers, Authors and Publishers?

A. I am.

Q. How long have you been a member?

A. Since its inception in 1914.

Mr. Frohlich: It is stipulated on the record that Mr. Leslie has a contract with the American Society of Composers, Authors and Publishers, dated July, 1935, identical with the contracts in evidence, Complainants' Exhibits 2 and 4.

Q. Now, have you written any hit numbers, Mr. Leslie?

A. As hits are judged, yes.

Q. Now, what would you define, in the language of your profession, as a hit number?

A. A song that has caught the fancy of the public in various areas of the country; a song played in sheet music form and record form and played in various places over the road.

Q. Can you give us a number of your compositions that were published prior to 1923 that were hit songs.

A. Well, I should say the first one was "Tough Guy Levi"; "I Am a Yiddisher Cowboy"; "Good Lucky, Mary"; "You Have to Get Out and Get Under His Automobile"; "Grown Up Ladies Act Like Babies"; "For Me and My Gal"; "Oh, What a Pal was Mary"; "Rolling
[fol. 391] Stones"; "Hello, How Are You, How Are You"; "California and You," and some others I possibly have overlooked.

Q. Now, which of those songs that you have mentioned, Mr. Leslie, sold over a million copies of sheet music?

A. The first one was "Lonesome"; then "You Have to Get Out and Get Under His Automobile"; "California and You"; "The Bells Are Ringing for Me and My Gal"; "Oh, What a Pal was Mary"; —this is prior to 1923.

Q. Can you give us some of the hit numbers that you wrote, say, since 1923 or '24 or '25, since those years.

A. "Blue"; "By the River St. Marie"; "Dirty Hands, Dirty Face"; -Farmer Gray."

Q. Was "Among My Souvenirs" one of your hits?

A. That came in 1928.

Q. Well, I want the songs you wrote about in 1924, 1925, 1926 and 1927. Please give us now the songs from 1926 down to the present time.

A. "Among My Souvenirs"; "Crazy People"; "In a Little Japanese Tearoom"; "A Little Bit Independent"; "It Looks Like Rain in Cherry Blossom Lane"; "On Treasure Island"; "Moon Over Miami"; "At a Perfume Counter on the Rue de la Paix"; "The Man Was Yellow"; "Me and the Man in the Moon"; "Romance"; "I Wake Up Smiling."

[fol. 392] Q. Now, this last mentioned group that you have just given us consists of hit numbers after 1925, 1926, and 1927, in those years and after those years, down to the present time; is that right?

A. Yes, dating from 1921. The last group I mentioned dates from 1921.

Q. Well, let's get this specific; let us take the year 1928 down to 1940, take that twelve year period: which of the songs come within that period?

A. "Among My Souvenirs," 1928.

Q. And "Romance" comes within that period?

A. Yes.

Q. And "The Man in the Moon" comes within that period?

A. Yes.

Q. "In a Little Japanese Tearoom," that comes within that period?

A. Yes.

Q. "On Treasure Island" comes within that period?

A. Yes.

Q. "Moon Over Miami," that comes within it?

A. Yes.

Q. "It Looks Like Rain in Cherry Blossom Lane," that comes within that period?

[fol. 393] A. Yes.

Q. "Robins and Roses"?

A. Yes.

Q. "At a Perfume Counter on the Rue de la Paix" comes within that period?

A. Yes.

Q. Now, did any of those songs, Mr. Leslie, sell as much as a million copies?

A. The last song in that group that sold a million copies, in excess of a million copies, was "Among My Souvenirs," in 1928 we sold a 1,400,000 or 1,500,000, according to my statement.

Q. Since 1928 have any of your songs hit as high as a million copies?

A. No.

Q. What is the highest that any of them sold, if you know?

A. "On Treasure Island" sold close to 350,000 copies; the next song in the matter of large sales was "In a Little Japanese Tearoom," which sold about 358,000 copies, as I recall it: "It Looks Like Rain in Cherry Blossom Lane" sold about a quarter of a million copies; "Moon Over Miami" sold 225,000 copies—not "Moon over Miami." "A Little Bit Independent" sold 225,000 copies, and "Moon [fol. 394] Over Miami" sold about 200,000 copies. "Robins and Roses" sold about 175,000 copies; and the other songs sold less than 175,000 copies.

Q. Do you know what explanation there is for that difference in the sale of hit songs prior to 1923 and subsequent to 1923?

A. Why, I could speculate on what the difference is.

Q. Well, have you ever analyzed it from your own knowledge, what the difference is due to?

A. Well, people don't seem to have to buy music; they hear too much of it; they are confused, to my way of understanding, day in and day out. By the time that they make up their minds that they like a song and get to buy it in the store, perhaps they hear 50 others that divert their attention from their original aim.

Q. Has radio broadcasting anything to do with that.

A. Oh, I think so, considerably.

Q. What was the life of a hit song prior to 1923?

A. For a period of six months to two years, to two and a half years.

Q. Now what is the life of a hit song in the last ten years?

A. Considerably less; they become less and less.

Q. What is it today?

[fol. 395] A. Oh, I think the song today, judging from what I receive, has a sheet sale perhaps of for two or three months and then collapses.

Q. Does that necessitate the writing of more music by you writers in order to supply current music?

A. Yes.

Q. You have to write more music; is that right?

A. Yes, sir. There is a demand for more music from the facilities operating today.

Q. Now, in making your contracts with publishers, as a rule who becomes the owner of the copyright, you or the publisher?

A. I turn the song over to the publisher, he copyrights it, subject to certain conditions to be fulfilled by him.

Q. Now, among the conditions that are expressed in your contract with publishers, is there a covenant or condition that you receive royalties from the mechanical reproduction of your songs?

A. There is.

Q. And does the publisher license the mechanical companies to make phonograph records and piano rolls?

A. Yes.

Q. And when he receives moneys from these companies [fol. 396] for the reproduction of these compositions, does he settle with you?

A. Yes.

Q. On what basis generally is that settlement made?

A. My contracts call for a 50 per cent.

Q. 50 per cent of what the publisher receives?

A. Yes.

Q. And is that the universal custom throughout the music business, do you know?

A. More or less, generally now.

Q. Now, do you have any contracts with any mechanical reproduction companies at all in your name as the writer of the song?

A. No.

Q. Have you any control over the manner in which the manufacturer of the piano roll or phonograph record exploits the record?

A. No.

Q. Does he pay you personally anything?

A. No.

Q. Have you any right with respect to the manner in which that particular record or music roll is sold?

Mr. Boggs: I object to that as it calls for a conclusion of law.

[fol. 397] Mr. Frohlich: You may answer it, Mr. Leslie.

A. No.

Q. Have you any control over what the manufacturer of the roll or record places on the composition by way of statement, credit or otherwise?

A. No.

Q. Is there any way in which you could compell the manufacturer of a music roll or phonograph record to pay you any part of the money that such manufacturer would receive from the performance for profit of the particular record or roll?

Mr. Boggs: Wait a minute; I object to that on the ground that the sections of the statute with which this question is concerned have been repealed and, further, that the State of Florida has disclaimed any intention to enforce it.

Mr. Frohlich: You may answer it.

A. No.

Q. Has there been a change in the amount of money you receive for the mechanical reproduction of your compositions over the years?

A. Considerably.

Q. Now, what did you receive as a rule on a hit song from [fol. 398] the mechanical reproduction of your work prior to 1923?

A. Prior to 1923, in many instances, we received in mechanical revenue an amount equal to the sum we received from the sale of sheet music, sometimes less, but from 66-2/3 per cent to 100 per cent would be the amount received as royalties for the sale of sheet music.

Q. On the sale of sheet music. Was the arrangement you made on a fixed price basis for the sale of sheet music?

A. I can clarify that; for instance, if the agent sold, we will say, a song like "Oh, What a Pal Was Mary," which sold a couple of million copies, and I received a cent and a half royalty on that, with sheet music sales totalling $30,000, my mechanical revenue, as I can recall it, amounted to from 66-2/3 per cent to 100 per cent of that amount.

Q. In other words, from $20,000 to $30,000?

A. Yes.

Q. Do you usually receive one and a half cents a copy for sheet music?

A. Yes; today we do. In the olden days, of course, we did not. When music was sold in the five and ten stores, a lot of copies were sold for 6½ to 10 cents, and less royalty was paid; but the present day mechanical income, as against the amount received for the sale of sheet music, was as I [fol. 399] stated.

Q. What do you receive at the present time from the sale of a hit song, by way of mechanical reproduction?

A. It has dwindled to almost nothing; I daresay we don't receive in excess of 10 per cent.

Q. That is, 10 per cent of what you receive from the sale of sheet music?

A. In other words, if a song nets me $5,000 for the sale of sheet music, I am lucky if I get $500 for my share of the mechanical revenue.

Q. Have you renewed any of your compositions from time to time as the original term of copyright expired?

A. I have reapplied for copyright and recaptured those songs myself.

Q. And after you have done that, have you arranged with some publisher for the continued publication of the work?

A. Not as yet.

Q. Have you received any advance royalties from any publishers on any of your renewal copyrights?

A. I have had offers of advances, but I have not accepted any.

Q. Well, now, can you tell us some of the offers you had with respect to some of the songs, specifying any one spe- [fol. 400] cific instance?

A. Well, I have a song that is due next year, entitled "You Have to Get Out and Get Under His Automobile." I received an offer from one publisher not later than last week for $1,000.

Q. As advance royalty?

A. As advance royalty against.

Q. Against?

A. Assigning that song over to him.

Q. On which you would be paid 1½ cents a copy?

A. Yes, that's what I would get; maybe 2 cents.

Q. Have you received any other offers on songs for renewals?

A. I have had no publishers come to me and say that they would like to get together with me in the matter of contracting for renewal rights on some of my songs that have expired.

Q. Now, you have written somewheres between five and six hundred songs?

A. I have written perhaps a couple of thousand of them; all of them have not been published.

Q. I am speaking of only published songs.

A. That would be a fair estimate; somewhere between 400 and 600 songs; I'd say so. I think I have averaged [fol. 401] fifteen to twenty songs published for the last thirty years.

Q. Now, have these renewal rights that you have a substantial value in dollars and cents?

Mr. Boggs: I object to that question as incompetent, immaterial and irrelevant, calling for a purely conjectural answer.

Mr. Frohlich: You may answer.

A. I consider them to have.

Q. How much would you say your renewal rights are worth?

Mr. Boggs: Same objection.

A. All of my compositions?

Q. Yes, on all of your compositions.

A. When and as they come due?

Q. Yes, sir.

A. I would not take $100,000 for them.

Q. You believe that they are worth at least $100,000 to you?

Mr. Boggs: Same objection.

A. They are to me.

Q. Now, did you before you joined the American Society of Composers, Authors and Publishers ever receive from

any source, from anybody at any time, any compensation for the public performance for profit of any of your com-
[fol. 402] positions?

Mr. Boggs: That is objected to as irrelevant and immaterial.

A. No, sir.

Q. Did you, after you became a member of the American Society of Composers, Authors and Publishers receive any compensation for the public performance for profit on your compositions?

A. Yes.

Q. When for the first time did you receive such compensation?

A. I received dividends the first time in 1921.

Q. And have you been in receipt of dividends regularly from the Society for those rights since that time?

A. Continously to date.

Q. On a quarterly basis?

A. Yes, sir.

Q. What have you been drawing by way of royalties from the American Society of Composers, Authors and Publishers in the aggregate?

A. Actually for the past ten years—I don't know for the past ten years— I know for the past five years I received a total sum of $70,000. I haven't figured the amount I have received previous to that.

[fol. 403] Q. I want to get the average yearly income that you received from the Society.

A. As best as I can recall—I do know that from 1914 to 1925—Of course, for the first seven years we received no royalties, but until December 31, 1925, inclusive, from 1914 I received a sum total of $5,000, or an average of about $400 a year for the first twelve years of my membership. Thereafter the amount of revenue increased; for the next five years I should say it average about $2,500 a year; and from 1930 to 1935, perhaps $6,000 or $7,000 a year; and from 1935 to 1940, the five years inclusive, $70,000, or $14,000 a year.

Q. Now, what do you receive today from the sale of your sheet music on all of your compositions, say for the year 1939, what did you receive?

A. I haven't the figures.

Q. Approximately,

A. During the years 1938-1939 I was inactive, due more or less to illness; I don't think I can give you a fair estimate on the songs sold during that time, not having been very active; but during the period of 1935 to 1938, when I wrote, the number of hits reached the pinnacle point, the Number One position on the Lucky Strike Hit Parade, I received one and a half times the total amount of copies on the songs that [fol. 404] I have outlined to you as sheet music royalties; and, oh, perhaps 15 per cent of that amount, 10 to 15 per cent at the outside, as mechanical revenue for recording rights and privileges.

Q. Did you receive as much from the sale of sheet music and mechanical rights together as you received from the Society for your performing rights during these three years?

A. No.

Q. Are you at the present time in receipt of moneys from your sheet music and mechanical rights to any large or substantial extent?

A. No.

Q. Your performing money from the Society is the largest part of your income today?

A. Yes.

Q. And if you were not in receipt of that income, could you continue your profession as a songwriter?

Mr. Boggs: That is objected to as irrelevant and immaterial.

Mr. Frohlich: You may answer.

The Witness: Do you wish me to answer?

Mr. Frohlich: Yes, sir.

A. I don't believe so.

[fol. 405] Q. Did any one of your publishers at any time give to the manufacturers of records or rolls the right to make a charge or demand money for the public performance for profit for your records or rolls?

Mr. Boggs: That is objected to on the ground that the witness has not been shown to be in possession of any knowledge as to what his publishers did with regard to that matter.

Mr. Frohlich: You may answer.

A. No.

Q. Did you ever give such a right to manufacturers of rolls or records?

A. No.

Q. Would you be willing to have the manufacturer of records or rolls, at any time collect in your interest or behalf any moneys for the purpose of public performance for profit of those records and rolls?

A. No.

Q. Do you give the publisher the right to collect any moneys for you from the public performance for profit of your compositions?

A. No.

Q. Do you desire to continue possession yourself and keep that right of public performance for profit?

[fol. 406] A. Yes.

Q. And do you wish to retain for yourself the right to determine and fix the price to be charged for the public performance for profit of your compositions?

A. Yes.

Q. Are you able to fix the price for public performance for profit of any of your compositions in the State of Florida at the present time, acting alone and independent, not in combination with anyone else?

A. No.

Q. In order for you to fix and determine the price for the public performance for profit of your compositions in that State, what would you have to do?

A. I would have to make a study of the establishments in the State, the number of them, the radio stations, the value of my works to their operation as a whole; I would have to employ someone to gather that information for me and, as a result of the acquisition of that information, I would perhaps get advice as perhaps what to fix as a price for the use of those works.

Q. Would you have to go down to Florida yourself, or send someone down to investigate each establishment that uses music?

A. Yes, sir.

[fol. 407] Q. And that would be an expensive proposition to you?

A. Yes.

Q. How many men do you think you would have to employ to go down there to Florida to cover the 376 establishments?

Mr. Boggs: The question is objected to as calling for a pure conjectural answer.

Q. You may answer.

A. Well, first I would have to engage a lawyer and get advice from him as to how to meet the requirements of the law and, as a result of that information, I could best determine the amount of help necessary to gain it for me.

Q. Would you have to familiarize yourself with the nature of each establishment in the State of Florida that uses your music?

A. Yes.

Q. Would you have to contact these establishments?

A. Constantly, for the purpose of seeing that they only used music——

Q. Your music, which they have paid for at the time they purchase the music?

A. Yes.

Q. Would you be in a position to demand from the owner [fol. 408] of these establishments, books, papers, documents or records to show you that your music was being performed there after it had been purchased, and the purchase price paid at the source?

Mr. Boggs: The question is objected to as calling for a pure legal conclusion; it would depend largely on how much the cost of operation in that information would be.

Q. Wouldn't you have to have men down there to investigate each establishment to see that your particular music is not infringed?

A. I would.

Q. And if it were infringed, wouldn't you have to employ somebody down there for the purpose of seeking redress for the infringement?

A. Yes, sir.

Q. And what do you estimate the cost to be of investigators and lawyers down there in the State of Florida to protect your own music?

Mr. Boggs: The question is objected to as incompetent. The witness has not been shown to be in possession of any knowledge which would qualify him to answer same.

A. I think the type of person needed to get that informa- [fol. 409] — for me would be worth at least $50 to $75 a week.

Q. Now, as a matter of fact, each establishment in the State of Florida that plays your music plays it in a different way from week to week?

A. Yes.

Q. I mean one week they may have a three-piece and another week a five-piece orchestra; one week they may have an attendance of 100, the next week an attendance of 500; isn't that the fact with regard to all places of public entertainment?

A. Yes.

Q. Are you able at this time to fix and determine a price with respect to each of your compositions that would be fair to you with regard to the public performance for profit of your compositions in the State of Florida?

A. No.

Q. Are you financially able at the present time to retain and employ a representative in the State of Florida to obtain information for you with respect to the nature of the establishments using your music?

Mr. Boggs: I object to that question on the ground that it is irrelevant and immaterial.

A. I don't believe that I am.

Q. Could you at the present time fix a price for your [fol. 410] musical compositions in Florida with respect to television?

A. No.

Q. Have you any information available with respect to television that would help you to fix such a price?

A. No.

Q. Could you today fix a price with respect to all future uses that may be made of your music in the State of Florida?

A. No.

Q. Are you in a position today to know what use television, with respect to your compositions, would be in the State of Florida ten years hence?

A. No.

Q. If you were acting alone, independent of any group or association similar to ASCAP, would you be willing to determine upon the publication of your compositions once and for all the prices for all forms of use for the balance of the copyright period in the State of Florida?

A. No.

Mr. Boggs: I object on the ground that the sections of the statute with which the question is concerned have been repealed and the State of Florida disclaims all intention of enforcing same.

[fol. 411] Q. Do you desire to retain for yourself, if you are alone and not acting in conjunction with any combination, would you desire to retain for yourself the right to fix the time when you begin to exercise the right of public performance for profit?

A. Yes.

Q. In other words, you might publish a song today and not want to give anyone a license to perform it for public profit until some future time?

A. Yes.

Q. And that is frequently done with respect to musical compositions?

A. Yes.

Q. Has that ever been done with respect to your musical compositions?

A. Oh, yes.

Q. They call that the right of restriction?

A. Yes.

Q. Have any of your compositions played in musical productions, musical dramatic works?

A. Yes.

Q. And have such compositions from time to time been restricted?

A. Yes.

[fol. 412] Q. Has that restriction been due to any particular reason?

A. Oftentimes the manager of the show did not want to have a song overdone while the show was in progress. Oftentimes the owner of a motion picture would prefer to have it later with a restricted amount of performances given the composition out of a show for inclusion in that picture.

Q. In other words, the producer of a show or of a picture does not want an inferior competition by somebody else with respect to his own works, does he?

A. That is the idea.

Q. If the public freely had a right to broadcast or perform in any other way musical compositions that were part of the show or part of the picture, that would be

competition between the public and producer of the show or picture?

A. Yes.

Q. And in order to prevent that competition and save his investment, it is necessary, isn't it, for the producer of a show or a picture to restrict the indiscriminate performances of the particular composition?

A. Yes.

Q. And is that customary and usual in this business?

A. Yes.

[fol. 413] Q. Is it necessary?

A. Yes.

Q. And has that been done with respect to your own compositions from time to time?

A. Yes.

Q. And that is true regardless of the fact that particular compositions are actually published and are on the market?

A. Yes.

Q. Now, have any of your compositions ever been performed over the radio?

A. Yes.

Q. Have you heard them so performed from time to time?

A. Yes.

Q. Well, have you heard your compositions performed over the national hookup of the National Broadcasting Company and the Columbia Broadcasting System?

A. Yes.

Q. Have you heard them particularly performed in that manner?

A. Yes.

Q. Are your compositions being presently performed in the State of Florida?

[fol. 414] A. I don't know.

Q. Well, if the Florida station had any hookup with the National Broadcasting Company or the Columbia Broadcasting System, then your compositions were performed under those two stations and they would be heard in Florida, wouldn't they?

A. Yes.

Q. Now, do you want to retain your contract with the American Society of Composers, Authors and Publishers?

A. Yes.

Q. You don't want your contract between you annulled and voided, do you?

A. No.

Q. Is it of value to you?

A. Yes.

Q. And you expect to renew that contract for a further period of time with the American Society of Composers, Authors and Publishers?

A. Yes.

Mr. Boggs: The question is objected to as immaterial and irrelevant and calling for a conjectural answer.

Q. Are you able to protect your public performance rights for profit without the cooperation and help of the [fol. 415] American Society of Composers, Authors and Publishers?

A. No.

Q. Have you personally had any experience in bringing suit for infringements of your musical compositions?

A. I think I have been the plaintiff in some actions brought by the American Society of Composers, Authors and Publishers on my behalf.

Q. No. I mean have you personally brought any such suit?

A. No.

Q. Would you know how to go about it?

A. Except to consult an attorney.

Q. Would you know how to protect your rights, if it were not for the American Society of Composers, Authors and Publishers?

A. I don't think so.

Q. Have you got the financial means to protect your rights throughout the United States against infringements of your works?

Mr. Boggs: The question is objected to on the ground it is irrelevant and immaterial.

A. No.

Q. Are your works licensed today by the American [fol. 416] Society of Authors, Composers and Publishers under a system of blanket licenses?

A. The American Society of Composers, Authors and Publishers licenses the use of my works to various estab-

lishments and users of copyrighted material, subject to certain conditions and restrictions.

Q. And these licenses by the American Society of Composers, Authors and Publishers are blanket licenses, aren't they?

A. Yes.

Q. Do you want the Society to continue licensing users of your works under a system of blanket licenses?

A. According to the present system of ASCAP, yes.

Q. Have you ever had any controversy with any person, firm or corporation with respect to the authorship or ownership of any of your compositions?

A. No.

Mr. Frohlich: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. Mr. Leslie, do you own the copyrights on any compositions written by you except the few renewals you mentioned?

[fol. 417] A. I don't understand your question.

Q. (Question repeated by reporter.)

A. Yes.

Q. When you entered into the contracts with the various publishers noted on this list, Plaintiffs' Exhibit No. 5, had those contracts provided that the publisher acquire the copyright?

A. Excepting in the matter of small rights.

Q. Who entered the copyright in the Copyright Office?

A. The publisher.

Q. In whose name does the copyright stand in the Copyright Office?

A. The publisher's.

Q. Does the publisher own the copyright then subject to your contract with him, whereby he pays you a certain amount of royalty?

A. Except in the instance of the small rights.

Q. What is the provision in your contract with respect to small rights?

A. Well, the publisher, when you bring the publisher a song, he knows that I have possession of the small rights

in ASCAP. He takes the song from me and publishes it subject to the contract that I have with ASCAP, and I receive 50 per cent of the revenue derived for the use of [fol. 418] that small rights to ASCAP.

Q. Does your contract with the publisher provide for that?

A. I would say it does.

Q. In every instance?

A. Yes.

Q. How about contracts you entered into thirty years ago?

A. Thirty years ago, I can't recall them to mind. We were not conscious of the value of the small rights in those days.

Q. Are contracts which you have entered into with the publishers similar to those entered into by Mr. Deems Taylor?

A. I don't know what Taylor's contracts are. Now, for instance, many of my songs were published by Watterson, Berlin & Snyder and are now published by Jack Mills. I had no written agreement, I entered into a verbal agreement with Mr. Watterson for a period of ten to twelve years.

Q. On what basis did Jack Mills publish them; where did they acquire the right?

A. He acquired the right, I believe, from the Referee in Bankruptcy, the Irving Trust Company.

[fol. 419] Q. The Referee in Bankruptcy for whom?

A. Watterson, Berlin & Snyder.

Q. Then in order to have acquired that right, Watterson, Berlin & Snyder must have owned the copyright in that, didn't they?

A. They owned the right to publish, to print and to mechanically reproduce those songs, but they did not own the exclusive small performing right to those songs.

Q. Was the copyright in the Copyright Office entered in the name of Watterson, Berlin & Snyder?

A. I believe so.

Q. Is there anything in the Copyright Office indicating that you owned or controlled the performing rights of any of the numbers which you have composed?

A. I don't know. I know I had an agreement with Watterson.

Q. What was your agreement with Watterson?

A. I owned 50 per cent of the small right, to be administered through the facilities of the American Society of Composers, Authors and Publishers.

Q. Do you have copies of any contracts?

A. Those are all verbal agreements; I had no contract with the publisher on any of those songs.

Q. When did you make this agreement with Watterson, [fol. 420] Berlin & Snyder?

A. About 1912.

Q. They had those provisions in it?

A. It was a verbal agreement with Watterson, a verbal agreement made in 1912 on the first song; in 1914 I made my agreement with Watterson when he joined up with ASCAP. I was to receive 50 per cent, and I retained a 50 per cent proprietary interest in those songs with respect to the small right.

Q. Yet the Referee in Bankruptcy transferred the copyright?

A. Subject to the conditions being fulfilled with respect to the small right being administered by ASCAP.

Q. Was there anything said about the provisional transfer by the Referee?

A. I don't know; I was only concerned in the transfer to the extent that I receive royalties from Jack Mills on the same basis that Watterson paid me.

Q. Have you ever tried to protect your performing rights in any compositions in any manner except through ASCAP?

A. No.

Q. Have you ever read over the Florida statute?

A. Well, I have read so many of these State statutes, [fol. 421] I can't catalogue them in my mind to the extent of identifying one from the other, but I have read them all.

Q. Do you know what the Florida statutes require?

Mr. Finkelstein: May he refresh his recollection?

Mr. Bennett: Just a minute. Let the witness testify.

A. No, I just can't bring it to mind, it is so confusing, all those statutes, to my mind.

Q. Then your testimony today has been not based upon knowledge of what is required in Florida?

A. I read what was required in Florida, but I just don't recall verbatim. I know there were restrictions placed upon me.

Mr. Bennett: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do you remember, Mr. Leslie, reading Section 1 of the Florida statute, Senate Bill 679, which reads as follows:

"It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any [fol. 422] society, association, partnership, corporation or other group of entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself of its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within the State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical [fol. 423] compositions privately or publicly for profit through personal performances, or through radio or any instrumentality or sound producing apparatus, shall be and the same hereby are declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members or interested parties shall not be collected in any court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State;

and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within the State, and shall be subject to the terms and penalties of this Act."

A. I read that.

Q. Do you recall having read that and discussed it with [fol. 424] me?

A. Either with you or Mr. Finkelstein; yes, I recall having read that and discussed it with Mr. Finkelstein or Mr. Frohlich.

Q. Do you recall having your attention directed to this particular section 3 of this Florida statute:

"All existing contracts, agreements, or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and nonenforcible in any court within the State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act."

Do you recall that particular paragraph being called to [fol. 425] your attention?

A. I read it.

Q. Do you recall having been advised as to whether or not your contract with the American Society of Composers, Authors and Publishers comes within sections 1 and 3, which I have just called to your attention?

A. Yes.

Q. Are you willing to have your contract with the American Society of Composers, Authors and Publishers declared unlawful and illegal?

A. No.

Q. Do you wish to retain your benefits from that contract?

A. Yes.

Q. Do you recall having had section 4-A called to your attention by Mr. Finkelstein and myself on various occasions?

A. Yes.

Q. Let me read the section to you and see if it refreshes your recollection:

"Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and [fol. 426] re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof."

Do you recall that Section?

A. Yes.

Q. Are you willing to have your compositions made available free to the users of Florida by this broadcasting without the State of Florida?

A. No.

Q. Are you willing to have your compositions made available free to the users of the State of Florida who operate motion picture theatres in that State?

A. No.

Q. Or hotels, restaurants, cabarets and other places of amusement or entertainment?

A. No.

Q. Do you recall this Section having been called to your attention by Mr. Finkelstein and myself:

"Section 5-B. When such theatre or theatres, moving pic- [fol. 427] ture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporation in this State with radio broadcasts, or electrical transcriptions, sound production

instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands, or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any [fol. 428] such person, firm or corporation collecting or attempting to collect such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such persons, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof."

Do you recall that section?

A. Yes.

Q. Are you willing to have your compositions performed by performers, singers, players, orchestras, or records or piano rolls, or any other instrumentality, outside of the State of Florida, produced free of charge and performed without payment of any royalty to you in the State of Florida?

A. No.

Q. And do you want to retain your exclusive right of the copyright?

[fol. 429] A. Yes.

Q. Are you willing to have the publisher retain the exclusive publishing right of your compositions?

A. Yes.

Q. And so far as the public performance rights are concerned, you desire to retain those rights that you possess

under your present copyright, or under the right you derive under the Copyright Act; is that right?

A. Yes.

Q. Are you willing to have the publisher have the exclusive right of public performance of your compositions?

A. No.

Q. You want those for your self?

A. Yes.

Q. Do you want to be free to protect your copyright of your public right of performance for profit in your musical compositions against infringement in the State of Florida?

A. Yes.

Q. And do you want to retain all rights and all exclusive rights given to you by the Copyright Act with respect to your compositions?

A. Yes.

Q. Are you willing to file any list in the State of Florida of your musical compositions?

[fol. 430] A. No.

Q. Has your attention been directed by Mr. Finkelstein or myself to the following Section of the Florida law, known as House Bill 1103, and Senate Bill 635, effective May 1939? Let me read to you Section 2:

"Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the [fol. 431] name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be

filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

"(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal."

A. Yes.

Q. Are you willing to pay a filing fee of two cents a composition to the State of Florida with respect to each compo-
[fol. 432] sition on such list?

A. No.

Q. Are you able to make an affidavit with respect to the accuracy of the matter contained on any such list?

A. No.

Q. Could you possibly make such an affidavit?

A. It largely depends upon what kind of a search my men would make in the Copyright Office for me.

Q. Are you at this time able to make available to the user of your composition within the State of Florida your public performance right for profit on each and every one of your musical compositions, by filing a list on which you fix and determine the price of such performance right for profit?

A. No.

Q. Are you able from time to time to file a new schedule of prices with any such list?

A. No.

Mr. Frohlich: That is all.

Mr. Bennett: That is all. Just a moment.

By Mr. Bennett:

Q. Are you a member of the Board of Directors of ASCAP?

A. Yes.

Mr. Bennett: That is all.

[fol. 433] FRED E. AHLERT, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?
A. Fred E. Ahlert.
Q. Where do you reside?
A. 10 West 96th Street, New York City.
Q. Now, what is your occupation?
A. Composer.
Q. How long have you been a composer?
A. About 25 or 26 years—just a minute; I want to make sure of that. I see "The Swing" here; that was copyrighted in 1909. A little longer than that.
Q. Would you say anywhere from between 25 to 30 years?
A. Yes, I would say that.
Q. Now, have you composed many compositions in that period?
A. Yes, sir.
Q. I show you a list of compositions entitled "List of Compositions written by Fred Ahlert,- and ask you whether [fol. 434] you recognize these compositions as having been composed by you.
A. Yes, sir.

Mr. Frohlich: I will offer this in evidence.
Mr. Boggs: No objection.

(List received in evidence and marked Complainants' Exhibit 6, of this date.)

Q. Is this list, Plaintiffs' Exhibit 6, complete, Mr. Ahlert?
A. Well, I wouldn't say it was complete; I guess there are quite a few numbers that I probably did not register with the Society. I was very careless sometimes, at various times, in not registering compositions.
Q. Are you a member of the American Society of Composers, Authors and Publishers?
A. Yes.
Q. When did you first join up with that organization?
A. 1920.

Q. Have you a contract with that Society dated July 1935, for a five-year period?

A. Yes.

Mr. Frohlich: It is stipulated that the witness has a contract with the American Society of Authors, Composers and Publishers identical with the contract in evidence as [fol. 435] Plaintiffs' Exhibits 2 and 4.

Q. Now, what year did you say you joined up with this Society?

A. 1920.

Q. Had you ever received any compensation for your right of public performance for profit for your compositions prior to the time you joined up with the Society?

A. No, sir.

Q. Did you receive any compensation for the public performance for profit of your compositions after you joined up with the Society?

A. Not right away, but after 1921 I did.

Q. And have you been continuously in receipt of royalties from those performing rights from the Society?

A. Yes, sir.

Q. Do you get regular quarterly fees?

A. Yes, sir.

Q. What have you been receiving from the Society for your compensation for your performing rights for profit on the average each year for the past ten years?

A. Well, I would say about anywhere from $16,000 to $18,000 a year.

Q. Can you look at this list, Plaintiffs' Exhibit 6, and name some of the outstanding successful hit numbers that [fol. 436] you published.

A. "I'd Love to Fall Asleep and Wake Up in My Mammy's Arms." "I'll Get By." "Mean to Me." "Walking My Baby Back Home." "Where the Blue of the Night Meets the Gold of the Day," Bing Crosby's film song. "Take My Heart." "I'm Going to Sit Right Down and Write Myself a Letter." "I Don't Know Why I Love You Like I Do."

Q. Were any of those hit songs published by you prior to 1923?

A. Yes.

Q. Which?

A. "I'd Love to Fall Asleep and Wake Up in My Mammy's Arms."

Q. How many copies of that song were sold?

A. Over a million.

Q. Now, were any of those hit songs published after 1923?

A. Yes.

Q. And how many copies of those were sold?

A. Well, the big hit songs sold on an average of around between 250,000 and 350,000 copies.

Q. Has there been a marked change in the amount of copies sold prior to 1923 and the amount of copies sold subsequent to 1923?

[fol. 437] A. Yes.

Q. Has the change been downward?

A. There has been a marked decrease in the sale in recent years, of course. I had some songs prior to 1923 that were not big hits, which sold 500,000 to 600,000 copies: "In Shadow Lane," for instance, that was published before 1923. "Put Away that Ray of Golden Sunshine" sold over 350,000 copies, and they were not big hits.

Q. Now, take a song like "Take My Heart," that was one of your outstanding songs, wasn't it?

A. Yes.

Q. It was a Number One song on the Hit Parade in 1936?

A. In 1936, that's right.

Q. What is this Hit Parade?

A. The Hit Parade is a commercial program, advertising Lucky Strike cigarettes, and they make a survey throughout the country of the popularity, both as to performance and as to sales of music of any given song.

Q. Is that Hit Parade fairly accurate in the business?

A. Yes. In my opinion, I would say it is fairly accurate.

Q. And is it looked up to by members of the profession [fol. 438] as an accurate and correct description of the songs that are current and popular?

A. That's right.

Q. Now, how many copies of the sheet music "Take My Heart" were sold in 1936?

A. 100,000 copies.

Q. Now, was that song "Take My Heart" as good a song and as popular a song as one of your earlier hits prior to 1923?

A. Well, I would say this, that it had on a survey made by the American Society, close to 26,000 uses, that is, on a partial survey that we make, and I think the top song of our survey in that year had 29,000 uses. I know it was very high in the number of uses on our partial broadcast checkup for that year.

Q. Now, with respect to your musical compositions, do you give the publishers the right to license the mechanical reproduction of your compositions?

A. Yes.

Q. How do you split that money with them?

A. Well, I get 50 per cent of what he gets.

Q. Well, now, prior to 1923, were the royalties from mechanical reproduction substantial?

A. Very substantial.

[fol. 439] Q. How did they run in comparison with the sale of sheet music; what percentage would you say?

A. Oh, I would say on a big song, a hit song, you could get sometimes more than you could get out of the sale of sheet music; again as much, if not more, on the mechanicals.

Q. Does that ratio or proportion hold true today with regard to your music?

A. No, I wouldn't say it is true at all. Up to about last year it depreciated about 90 per cent with regard to mechanical; in the last year there has been a little comeback, a slight comeback in the sale of mechanicals.

Q. Now, what do you do at the present time, say for this past year, 1939, from the sale of sheet music of all of your compositions?

A. In 1939?

Q. Yes.

A. A negligible amount of money.

Q. What would you call it? Let us get the figures.

A. Well, 1939 was a kind of a poor year for me.

Q. Let us take the last five years; going back to 1935, what have you been getting on the average from the total sales of your sheet music each year?

A. Oh, about back in 1936 I got about $35,000 to $36,000. It has been getting less since that time.

[fol. 440] Q. What did you get in 1935 down to the present time, each year, for mechanical royalties of all of your compositions?

A. Much less than that; much less than the sheet music royalties. I can't give you the exact figure.

Q. Has the money you received from the American Society of Composers, Authors and Publishers for the public performance for profit been greater in amount than the combined moneys you received from the sale of sheet music and mechanical royalty in the past ten to fifteen years, would you say?

A. I would say that the money I received from the American Society of Composers, Authors and Publishers, was more than double the combined money, if not treble, of mechanicals and sheet music.

Q. If you were unable to obtain money from the American Society of Composers, Authors and Publishers for the public performance for profit of your compositions, could you remain in business and practice your profession as a songwriter?

A. Well, it would handicap me so seriously, it would be an economic problem that I would be confronted with. If a condition like that arose, I would hate to contemplate it. [fol. 441] Q. In your contracts with your publishers for the publication of your compositions, who as a rule obtains the copyright or the right to copyright?

A. The publisher.

Q. Do you retain an interest in the public performance for profit right in your compositions?

A. Yes, sir.

Q. And are your contracts with the publishers made on the basis of you and the publisher each sharing 50 per cent of these moneys from the public performance for profit?

A. Yes, sir.

Q. That has been going on since the Society has been in existence; is that right?

A. Yes, sir.

Q. And that is the usual and customary arrangement between all writers and all publishers today?

A. It has been, to my knowledge.

Q. Are you willing to give the publisher the right to exercise complete supervision over the public performance for profit of your compositions?

A. I should say no.

Q. Are you willing to give the manufacturers of rolls and records the right to supervise or to collect for you or

[fol. 442] in your behalf moneys for the public performance for profit of your compositions?

Mr. Boggs: I object on the ground it is irrelevant and immaterial, and the sections of the statute to which it relates have been repealed, and that the State of Florida has disclaimed any intention of enforcing it.

Mr. Frohlich: You may answer.

A. In the past I have not been so minded as to give this right, and I certainly would hate to do so in the future, if I possibly could help it.

Q. Do you want to retain for yourself the right to exercise supervision with respect to the performance for public profit on your compositions?

A. Well, I am satisfied with the present administrative arrangements, where I have a 50 per cent administrative right and a small performing right with the publisher.

Q. And the rights are supervised by the American Society of American Composers, Authors and Publishers?

A. Yes.

Q. And you want to continue that arrangement?

A. Yes, that is very satisfactory to me.

Q. You want to remain a member of *of* that Society?

A. I certainly do.

[fol. 443] Q. And you want to keep your contract with ASCAP alive?

A. Yes.

Q. And you want to continue obtaining the benefits of that contract?

A. Yes.

Q. You are not willing to give it up?

A. No.

Q. And you do not want it to be declared null and void?

A. Naturally not.

Q. Now, from time to time you renew your copyright, don't you, as the original term expires?

A. Well, my first renewal, I don't believe, will come up until 1943.

Q. Have you had any negotiations with publishers for the publication of your works as and when they are going to be renewed?

A. Not yet.

Q. Are these renewal rights valuable to you?

A. That's what I've been building for all these years.

Q. And do you have reasonable expectation of deriving compensation for the continued publication from the performing rights and mechanical rights of your compositions [fol. 444] as and when they become due after twenty years thereafter?

A. Well, I have been hoping that that would be the heritage for my wife and children.

Q. You regard your catalogue of copyrighted musical compositions as your property, don't you?

A. Naturally.

Q. And you want to preserve and treasure that? What is the answer?

A. Yes.

Q. Now, if you were acting alone and not a member of any combination or not a member of ASCAP, could you proceed in the State of Florida to fix a price on your compositions with respect to the public performance for profit in that State?

A. Well, I think it would be almost impossible, if not entirely impossible, for me to do that, for the simple reason that it would be putting a mathematical gauge on my product. I wouldn't know what to charge one person as against another person; I wouldn't know what kind of a use they had for it; they might want it for a longer period of time at one time than at another time; or they might want to use what I considered my first song.

Q. Would you have to take into consideration the manner [fol. 445] of use by the performer of your compositions?

A. I would have to take that into consideration.

Q. Would you have to take into consideration the nature of the audience, the size of the orchestra, and the nature of the establishment and other elements of that kind?

A. Surely.

Q. Would you have to make a personal investigation of the 367 establishments in the State of Florida that used your music?

A. Yes, sir.

Q. And, by the way, your music is performed on the radio, isn't it?

A. It certainly is.

Q. Have you heard them performed yourself?

A. Yes.

Q. Is it performed on the National Broadcast chain of hookup and on the Columbia Broadcasting System hookup?

A. I guess it is performed on all radio stations.

Q. Well, then, you heard them performed yourself on the National hookup?——

Mr. Boggs: Counsel for the defendants here interpose an objection to the highly leading form of questions which plaintiffs' counsel is following.

[fol. 446] Q. Have you heard your compositions performed on the national hook up of the National Broadcasting Company?

A. I hear them performed all the time. They are being performed night and day, presently and in the past.

Q. And have you heard them performed also on the Columbia Broadcasting hookup?

A. I have heard them performed on the Columbia, NBC, WOR, and on a lot of the minor stations throughout the country. I have heard them performed all over the radio network.

Q. Now, if you were to attempt to fix a price for the public performance for profit of your compositions in the State of Florida, would you have to make an investigation yourself or have someone do it for you with respect to the various establishments that perform music in that State?

A. Well, I have made up my mind that I would have to do so much in the State of Florida that I probably would not have much time to think of writing a song.

Q. Well, now, let us take the various establishments in that State. Take the Rink; there is a roller-skating rink there?

A. Yes.

Q. Would you have to look at this establishment to see [fol. 447] what would be the fair charge to make with respect to an ice-skating rink as distinguished from a roller-skating rink?

A. I suppose I would.

Q. Would you have to do that?

A. If I wanted to be fair, I would have to do that.

Q. Take stadiums, where baseball is played, and where vaudeville is played, where they have dances, some have loud speaker systems; would you have to look up these

establishments and try to ascertain and fix a fair price for these establishments?

A. I would have to do that.

Mr. Boggs: Counsel objects to the leading form of questions.

Q. Well, what other types of establishments are there in the State of Florida that you know of, where music is played, in addition to rinks, stadiums, road houses, radio stations and hotels?

A. Restaurants, cabarets, dance halls, theatres, all kinds of theatres.

Q. Are there sound trucks in the State?

A. Sound trucks, and probably television trucks, for all I know.

Q. Are there cafes in that State?

[fol. 448] A. I said cabarets; cafes, yes.

Q. Are there department stores that play music in that State?

A. Yes, sir.

Q. Are there expositions in the State?

A. There are.

Q. Are there fairs and carnivals in the State?

A. There are.

Q. Are there circus performances given in that State?

A. Yes, sir.

Q. Are your works performed in the establishments you have just mentioned?

A. They are.

Q. And do any two establishments in these various groups in the State operate in the same way?

A. I don't believe any two establishments operate in the same way; it would be very difficult for me to determine how each individual establishment operated.

Q. In order for you to fix a fair price for the public performance for profit of your compositions with respect to those establishments, would you have to make a personal investigation as to each establishment to see how it operates and what the nature of the operation is?

[fol. 449] A. Yes, sir.

Q. Now, could you personally do that?

A. I don't see how I could personally do it. And if I had to spend my time developing an organization to do it, I

don't see what time I would have to write songs; I don't believe I could do it, as a question of mathematics; I don't think I could do it and be fair to the users.

Q. Have you the financial resources to hire an organization to go down to Florida to do that for you?

A. I doubt if I could even do it economically.

Q. Have you the financial resources to hire investigators to see that your works are not infringed in the State of Florida?

A. I am not.

Q. Are you financially able to employ a lawyer in the State of Florida to seek out infringements of your works?

Mr. Boggs: The question is objected to as immaterial and irrelevant.

Mr. Frohlich: You may answer.

A. I have not.

Q. Does the American Society of Composers, Authors and Publishers do that for you today?

A. Yes.

[fol. 450] Q. Would you be able to compile and complete an accurate list of all of your copyrights, and put on the list the name and title of the copyrighted compositions, the date of copyright, the number or the identifying symbol given thereto in the United States Copyright Office, the name of the author, the name of the publisher, the name of the present owner of the copyright to such composition, and the name of the present owner of the performing rights thereto?

A. That would seem to be a very difficult task.

Q. Are you willing to file any such list with the authorities of the State of Florida?

Mr. Boggs: That is objected to as immaterial and irrelevant.

A. I certainly would not like to do that.

Q. Would you be willing to pay two cents a composition for the filing of such a list and two cents a composition for duplicates of the list to the State of Florida?

A. No, sir.

Q. Do you know what a blanket license is?

A. Yes, sir.

Q. Does the Society license users in the State of Florida under blanket licenses?

A. Yes, sir.

[fol. 451] Q. Do you want the Society to continue licensing users in the State under such blanket licenses?

A. That seems to be the ideal status.

Q. Do you want to give up the licensing of your compositions under a blanket license?

A. No, sir.

Q. Are you able at the present time to fix and determine the fair price to you and to the user of the public performance for profit of any of your compositions in the State of Florida with respect to television?

A. No, sir.

Q. Have you any information available to you on television today that would assist you in coming to a fair price for that right?

A. No, sir.

Q. Are you willing to have the manufacturers of music rolls and records place upon the records and rolls which they sell in the State of Florida a price for the public performance rights for profit of your works?

Mr. Boggs: That is objected to as immaterial and irrelevant; also because the sections of the statute to which it relates have been repealed, and the State of Florida has disclaimed all intention to enforce those sections.

[fol. 452] Mr. Frohlich: You may answer that.

A. No, sir.

Q. And if a manufacturer of rolls or records did fix such a price for public performance for profit on the rolls and records in the State of Florida, are you in a position, legally or otherwise, to compel such manufacturer to give you any of that money?

A. I am not.

Q. Are you willing to have your publisher fix any price upon your compositions for the public performance for profit in the State of Florida?

A. I haven't heretofore been willing; I certainly am not now.

Q. Are you willing to have your musical compositions made available free to the users in the State of Florida when they are established outside of that State?

A. No, sir.

Q. Have you ever given a license to a manufacturer or producer of motion pictures to synchronize your compositions on their films?

A. I have done that through the publishing house.

Q. In other words, there are some agencies that do that for writers, including yourself?

A. Yes, sir.

[fol. 453] Q. And from time to time have your compositions been used by producers of motion pictures in their pictures?

A. There have been certain times where I worked for motion pictures; I always did that through the publishing house.

Q. Now, whenever you have given the right to synchronize your compositions with pictures to a producer of pictures, have you ever been informed by him as to the number of places where the picture is going to be performed?

A. No.

Q. Have you ever asked for such information?

A. No.

Q. And is the manner or the extent of the exhibition of the performances of the picture taken into consideration when you make your contract with the producer of pictures?

A. No, sir.

Q. Is your license to the producer of pictures limited strictly to the right to reproduce the composition on the sound track of the picture?

A. Yes.

Mr. Frohlich: You may cross-examine.

[fol. 454] Cross-examination.

By Mr. Bennett:

Q. Are you a member of the Board of Directors of ASCAP?

A. Yes, sir.

Q. Are you a member of any of the committees of ASCAP, such as the Membership Committee?

A. Yes.

Q. Which Committee?

A. I am a member of the Membership Committee and a member of the Relief Committee.

Q. Any others?
A. I am a member of the Finance Committee.

Mr. Boggs: I have a question.

By Mr. Boggs:

Q. In your direct examination I understood you to say that while the publisher took the right of ownership of the copyright, that an arrangement was made between you and the publisher by which each of you got 50 per cent of the small performance rights. Was that correct?

A. No, not 50 per cent of the small performance right. My performing right was originally assigned to ASCAP.

Q. Yes.

A. And the publisher took in all of my compositions sub-[fol. 455] ject to that assignment; he had notice of that assignment.

Q. Well, you didn't mean in your direct testimony then to say that actually there was a definite allocation of specific moneys for royalty to public performance rights on your pieces as differentiated from that of all the other ASCAP music, did you?

A. I only meant with regard to mechanicals and foreigns, where I get 50 per cent of what he gets; for the small performing right I also assigned to ASCAP originally.

Q. You take your compensation there out of the general pot, don't you?

A. That is right.

Mr. Boggs: All right.
Mr. Bennett: That is all.
Mr. Frohlich: That is all.

(Adjourned to Wednesday, February 7, 1940, at 10:30 o'clock a. m.)

[fol. 456] 1450 Broadway, New York, N. Y., February 7, 1940, 10:30 a. m.

Met pursuant to adjournment.

Appearances: As before.

WILL VON TILZER, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?

A. Will Von Tilzer. Brill Building, 49th Street and Broadway, No. 1619.

Q. New York City?

A. New York City.

Q. What is your occupation?

A. Music publisher.

Q. Now, how many years have you been in that business?

A. Oh, I would say about 36 or 37 years.

Q. And you are a brother of Harry Von Tilzer?

[fol. 457] A. Yes.

Q. He is a songwriter?

A. Yes, sir; songwriter and publisher.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. When did you join the Society?

A. Back in 1914.

Q. Have you continuously been a member of the Society since then?

A. With the exception of a short period in 1919 into the first part of 1921, about a year and nine months of that time I was out.

Q. And since 1921, have you been continuously a member of the Society?

A. Yes, sir.

Q. And you entered into an agreement with them, a membership agreement, each five years?

A. Yes, sir.

Q. Did you enter into an agreement with them in July, 1935?

A. That's right.

Mr. Frohlich: It is stipulated that the witness has an agreement with the American Society of Composers, [fol. 458] Authors and Publishers identical with the agreement in evidence as Plaintiffs' exhibits 2 and 4.

Q. Now, where is your publishing business located?

A. 1619 Broadway.

Q. And do you acquire rights under which you publish musical compositions?

A. By contracts with writers, composers and authors.

Q. Did you produce a contract known as a uniform standard popular songwriters contract with one of your writers?

A. Yes.

Mr. Frohlich: It is stipulated that a copy of the contract shall be used in place of the original.

I offer it in evidence.

Mr. Boggs: No objection.

(Contract received in evidence and marked Complainants' Exhibit 7, of this date.)

Q. Is that contract, Plaintiffs' Exhibit 7 typical of the contracts made between you and your writers since 1932?

A. Yes, I should say so.

Q. Mr. Von Tilzer, you have had a great deal of experi-
[fol. 459] ence in publishing music over these 36 years haven't you?

A. I have, I would say.

Q. And you have published a great many compositions?

A. Yes.

Q. Are you personally acquainted with a great many writers or publishers throughout the country?

A. Naturally.

Q. Now, prior to the time you joined the American Society in 1914, did you or your company ever receive any compensation for the public performance for profit on any of your compositions?

Mr. Boggs: The question is objected to on the ground that it is immaterial and irrelevant.

Mr. Frohlich: You may answer that.

A. We never did.

Q. When for the first time did you receive any moneys on compositions for the public performance for profit of your compositions?

A. As I remember, the first time the Society made any distribution of funds was around 1922.

Q. Did you receive that money through the American Society?

A. Yes, sir.

Q. Have you been receiving compensation from the right [fol. 460] to publicly perform for profit your compositions from the American Society of Composers, Authors and Publishers since that time?

A. Yes.

Q. And has that compensation come to you in regular periods?

A. Yes.

Q. Quarterly periods?

A. Quarterly periods.

Q. Is that the only source from which you received compensation for the public performance for profit of your musical compositions?

A. That is the only source.

Q. Now, how much did you receive from the Society in 1935, approximately?

A. 1935, around $24,000, I would say.

Q. How much did you receive an average each year for the past ten years from the American Society of Composers, Authors and Publishers?

A. I would say on an average—including the past year of 1939?

Q. Including the year 1939, yes.

A. It averaged $22,000; $21,000 to $22,000; I am not positive of that. That is quite enough, I should say.

[fol. 461] Q. Now, is your contract with the American Society of Composers, Authors and Publishers valuable to you?

A. Yes, sir.

Q. And do you want it destroyed and declared null and void?

A. I do not.

Q. Do you want to continue your relations with the American Society of Composers, Authors and Publishers?

A. I most certainly do.

Q. And do you want to continue that relationship as long as you remain in business?

A. Positively.

Q. When you publish musical compositions, do you make a contractual arrangement with manufacturers of records and rolls for the mechanical reproduction of these compositions on records and rolls?

A. Would you mind asking that again?

Q. When you publish a musical composition, do you in many instances make a contractual arrangement with the manufacturers of records and piano rolls for a mechanical reproduction of those compositions on records and rolls?

A. We do.

Q. Now, what do you receive from these manufacturers of records and rolls?

[fol. 462] A. Royalties.

Q. And how much does that amount to as a rule?

A. It varies. The record people—there are not so many rolls made nowadays, but the record people, we have a ceiling of two cents compulsory license, and that varies depending upon the retail price of the records, down to a cent and a quarter, and a cent very often.

Q. And out of the moneys that you receive from those manufacturers, do you pay any proportion to your writers?

A. Yes.

Q. What is the usual proportion paid by you?

A. Up until recently it has been 33⅓ per cent to them; in a great many cases recently the rate has been established as 50-50, they to receive 50 per cent and the publisher to receive 50 per cent.

Q. When you make your arrangement with the manufacturer of rolls and records, do you give such manufacturer the right to public performance for profit on such rolls and records?

A. We do not.

Q. Would you ever want to give such right to the manufacturer?

A. By no means.

[fol. 463] Q. Have you any control over the sale of those records and rolls which are manufactured by a particular manufacturer with whom you contract?

Mr. Boggs: I object to the question as incompetent, irrelevant and immaterial.

A. We believe we have the moral right and we would like to have that right, but I don't think that the way today has been found as yet.

Q. Are you able to dictate to the manufacturer of rolls and records?

A. In what way?

Q. To compel him to put a price on his records or rolls

with respect to the performing right for profit of records and rolls sold in the State of Florida.

A. No.

Q. Is there any arrangement, contractual or otherwise, between you and any manufacturer of rolls or records, under which you could compel such manufacturer to give you a portion of the money for the public performance for profit on the rolls or records if they were sold in the State of Florida?

Mr. Boggs: I object to the question as incompetent, irrelevant and immaterial, and as dealing with a portion of the statute which has been repealed, the enforcement of which [fol. 464] the State of Florida has disclaimed.

A. There are no such arrangements between ourselves.

Q. Have you any contractual arrangement or other arrangement with any manufacturer of rolls or records under which you could compel the manufacturer to determine and fix a price within the State of Florida for the public performance for profit of the rolls and records that he sells in the State of Florida?

Mr. Boggs: The same objection.

A. There is no such arrangement between ourselves and the manufacturers of rolls and records.

Q. Would you be willing to permit a manufacturer of your rolls and records to determine and fix a price to be printed on the particular rolls or records of your composition under which he fixes the price for the public performance for profit of that roll or record within the State of Florida?

Mr. Boggs: That is objected to as immaterial and irrelevant.

A. We would not permit.

Q. Would you be willing to permit any manufacturer of rolls or records of your compositions to act as your agent in the State of Florida in order to fix and determine the price [fol. 465] to be charged for the public performance for profit of your compositions in the State of Florida?

Mr. Boggs: The same objection.

A. No.

Q. Assuming that there are approximately 367 places or establishments in the State of Florida which use copy-

righted musical compositions for public performance for profit, would you be able to determine and fix a price for the public performance for profit of your compositions with respect to those 367 users in the State of Florida?

A. It would be almost impossible.

Q. If you were going to determine to fix a price for the public performance for profit of your compositions in the State of Florida, would you be required to obtain information to help you to do that?

A. Undoubtedly.

Q. Would you be able to obtain data and information with respect to the 367 places or establishments in the State of Florida without being required to pay someone in the State of Florida to make inquiries in your behalf?

A. I don't think so.

Q. Now, have you tried to determine and fix a reasonable price, or any price, for the public right of performance of your compositions in the State of Florida; and what would [fol. 466] you have to do? Just tell us all the steps that you would have to take.

A. Well, we have to examine into the nature of the place.

Q. The business they do?

A. The seating capacity, innumerable things that I can't think of offhand.

Q. Would you have to employ anybody?

A. I don't see how it could be done without.

Q. Would such a person have to be skilled in music?

A. Unquestionably.

Q. From your knowledge of the salaries paid in the business, what would that cost you?

A. We would have to pay a salary to a person like that—

Mr. Boggs: The question is objected to as incompetent and irrelevant, and because the statute does not necessitate such action on the part of the publisher.

A. I should say not less than $100 a week, most likely more, probably.

Q. Would you in addition to a salary have to pay hotel bills and traveling expenses?

A. I should say so.

Q. Would you have to employ a lawyer in the State of Florida to help you?

[fol. 467] Mr. Boggs: The same objection.

A. From my observation, I would say we would have to, certainly.

Q. Do you feel that you are financially able at this time to employ investigators and attorneys in the State of Florida to protect you against infringements of your compositions in that State?

Mr. Boggs: The question is objected to as irrelevant and immaterial.

A. I am not in a financial position to do that.

Q. Does the American Society of Composers, Authors and Publishers look after your interests with respect to the right of public performance for profit in the State at the present time?

A. They do.

Q. And are you anxious to have them continue to protect your rights in that State?

A. Yes.

Q. Now, in the course of your career as a publisher have you published music known as hit songs?

A. Quite a few.

Q. Can you tell us any of the names of a few of the more important songs that you published that were hit songs? [fol. 468] A. At any time, going back since the Society started?

Q. Well, since 1914.

A. 1914?

Q. Or even prior; it doesn't make any difference.

A. "You Made Me Love You," subtitle "I didn't want to do it." "When You're a Long, Long Way From Home." "Oh, Frenchy." "I May Be Gone For a Long, Long Time." "Go, By Jingo." "I'll Be With You in Apple Blossom Time." "I Used to Love You But It's All Over Now." "My Little Girl." "Just Around the Corner."

Q. Please confine yourself to hit songs that were published prior to 1923.

A. I see. Then exclude "Just Around the Corner." I think the others come in that period. "Muddy Water." Those two. And if you want the others, I can give you the others, if I want to concentrate.

Q. Now, those that you mentioned that were published prior to 1923, did any of them sell a million or more copies of sheet music?

A. Yes. "You Made Me Love You" sold more than a million. "Oh, Frenchy" sold more than a million. "My Little Girl" sold more than a million. Those I can think of offhand.

Q. And with respect to those that did not sell more than a million copies, what would you say was the average sale [fol. 469] of the sheet music of those hits?

A. Anywheres from a half million to 750,000 to 800,000 copies.

Q. Did you publish any hit songs after 1923?

A. Yes, I published "Muddy Water," and published "Just Around the Corner," "I Love Me," in recent years. "Be Still, My Heart." "Believe It, Beloved."

Q. Now, of those hit songs that you published after 1923, did any of them sell a million copies or more?

A. Now, they started to slow down about that time. "I Love Me," which was quite a big song, went around 350,000 co ies, as near as I can recall it. "Just Around the Corner" was approximately the same. And in more recent years "Be Still, My Heart," was published in 1934, that sold fine—When all the return copies came in I think it figured between 80,000 and 90,000—yet it was considered the greatest song of that year, not in point of sales, but in point of quality, the general opinion of the writers and generally all over the business.

Q. Take these hit songs prior to 1923, for how long a period did they remain popular and active?

A. Well, I should say they averaged around a year in those days; close to a year.

Q. Now, take the hit songs after 1923: for how long a [fol. 470] period have they remained popular?

A. Well, if they go two months we are really doing well. Once in a while there is an exception, but usually after a two months' period they are through.

Q. From your knowledge of the business, to what do you attribute that change in the amount of copies sold and the life of popularity?

A. There is no question as to the reason: they are pounded to death on the air and the public tires of them very quickly and have new songs take their place. It is just common knowledge.

Q. Is your business from the sale of sheet music and mechanical records as profitable today as it was prior to 1923?

A. There is no comparison.

Q. Well, is it more profitable or less profitable?

A. It is much less profitable than it was in those days.

Q. Are the moneys that you receive from the American Society of Composers, Authors and Publishers a vital and necessary part of your business today?

A. It is so necessary that I think we would all be out of business if it were not for the money—in fact, I am sure of it.

Q. Well, what would you say the value of the American [fol. 471] Society of Composers, Authors and Publishers' contract is to you today; what is its value to you in dollars and cents?

Mr. Boggs: The question is objected to as incompetent, no proper foundation having been laid.

A. I don't know just how to put it in words, excepting the answer that I gave you before, that without it there would be no use continuing our business.

Q. If the American Society of Composers, Authors and Publishers is to continue, is there a reasonable expectation that you would enter into future contracts of five year periods similar to the one that is now in existence?

Mr. Boggs: I object to that as calling for a speculative answer.

A. I would not want a condition where there would be no society for the collection of fees.

Q. I mean by this question, Mr. Von Tilzer, that if the Society remains in business, may you reasonably be expected to continue as a member of that Society?

A. Positively.

Q. And you would make further contracts for five year periods or longer with the Society?

A. Unquestionably.

[fol. 472] Q. Do you publish any compositions that are used in production on the stage?

A. Do you mean vaudeville performances?

Q. I mean dramatic music roles or songs of stage production or musical comedy.

A. We did publish.

Q. You did?

A. Yes.

Q. Did you publish any as far back as 1919?

A. I could not say offhand; we had a show called "Honey

Girl." It was back around that time. I do not know just exactly what year; I think it was before 1923.

Q. Well, from your knowledge of the business, would you say that songs that had been published, that are being performed in stage productions, are frequently restricted with respect to performances?

A. Oh, yes; I know that they are.

Q. Do you know the reason for that restriction.

A. Yes. In that case the show is the first consideration and they have to keep the songs as fresh as possible in order to continue the run of the show. I am not an authority on that subject, but that is to the best of my knowledge and intelligence. I think that would be the only reason that they have for the restriction.

[fol. 473] Q. When you publish a song today are you able to tell immediately upon publication whether that song is going to be popular or not?

A. Ask that question again. I want to see if I heard you right.

Q. (Question repeated by reporter.)

A. I would like to ask a question. What do you mean by publication?

Q. Songs that you publish.

A. The answer is No.

Q. Is there a great deal of uncertainty with respect to the ultimate success of these songs?

A. I am trying to think of a superlative phrase that would give you a sufficiently clear idea of just how much so that is the case. It is as big a gamble as I guess there is in anything today.

Q. It is impossible to tell, isn't it, when a published song is going to be a hit or not?

A. More so than ever in the history of the business. There was a time when we had some certain elements that would help us a bit. Today we are so far away from it that until the public start clamoring for the song it is all guesswork.

Q. Now, a song that becomes a hit has greater value to [fol. 474] you than a song that is not a hit?

A. Naturally.

Q. If you were required to determine and fix a price to be charged for the rendition of your copyrighted musical compositions in the State of Florida, to fix a price upon a

particular composition that is sold in the State of Florida, for all uses and purposes, including public performance for profit, could you determine upon publication of the composition what price you could charge for public performances for profit, this price to be fixed by you for the complete life of the copyright of the composition?

Mr. Boggs: The question is objected to as immaterial and irrelevant, and as dealing with a portion of the statute which has been repealed, and the enforcement of which the State of Florida has disclaimed.

A. I would not have the least idea how to go about to get such a result; I don't think it is possible.

Q. Well, when you publish a composition, are you able to tell immediately upon the publication that the song is or is not going to be valuable to you?

A. No, I would not know.

Q. It takes a little time before you find that out, isn't [fol. 475] that so?

A. Yes.

Q. Sometimes it takes a long time?

A. That's right.

Q. And after a song becomes a hit its value is greatly enhanced to you, isn't that so?

A. Yes.

Q. You would want to average more for the performing right on that song than for a song that is a failure?

A. That is naturally so.

Q. So you could not immediately upon publication of the song fix and determine a proper, fair price to you or to the user for the public right of performance in the State of Florida?

Mr. Boggs: Same objection is interposed as to the last objection.

A. I would not.

Q. Have you any information that would help you today to fix a price and determine the price for public performance for profit on your compositions in Florida with respect to television?

A. No.

Q. Do you know at this time just what value television

may have in respect to your copyrighted musical composi-
[fol. 476] tions in the future in the State of Florida?

A. I do not.

Q. Are you able to obtain data or information from any source that will help you ascertain such value?

A. No.

Q. Can you tell today when you publish a composition what price to fix on your composition in the State of Florida for public performance for profit with respect to the hotels in the State of Florida?

A. I cannot.

Q. Can you now, if you publish a composition, determine and fix a price to be charged for the purpose of public performance for profit in the State of Florida of that composition for the full 28 years of the copyright of the composition and the renewal period of 28 years?

A. No.

Mr. Boggs: Repeat the same objection.

Q. Your answer is No?

A. No.

Q. Now, have many of your compositions been sold in the State of Florida during the years that you have been in business?

A. I assume so.

Q. Do you deal with jobbers?

[fol. 477] A. Yes.

Q. In this business how is music sold? Just please tell us the procedure.

A. Well, it is sold direct to the dealers; and it is sold through a jobbing organization who distributes the music to many dealers.

Q. I am speaking now of sheet music.

A. I know. And when you asked the question before I hesitated because I don't seem to remember any stores down in the cities of Florida that we did any business with direct. I think most of that business was done through jobbers.

Q. Are these jobbers located in various parts of the United States?

A. Well, naturally, Chicago; there are a few smaller jobbers situated in some other of the larger cities.

Q. Have you any agents or representatives of your own in the State of Florida?

A. No.

Q. Well, now, when you sell this sheet music to jobbers throughout the United States, do you know of your own knowledge whether these jobbers resell that music to various dealers in the United States?

Mr. Boggs: The question is objected to as no proper [fol. 478] foundation has been laid.

A. I know they ship that music, but the conditions are such in the business nowadays that music is not sold until it is actually paid for. So much of that music that is sold to the jobbers and then distributed to the dealers comes back.

Q. Are these jobbers at liberty to sell your music anywhere?

A. They are.

Q. There is no restriction placed upon where they sell the music after you have delivered it to the jobber, is there?

A. None.

Q. So that once a jobber gets hold of the music you lose all further control over it; is that right?

A. Yes.

Q. And you can't recall any of that music from the jobber, can you?

A. No.

Q. Now, have you any control whatever over the sheet music which passes from you into the hands of the jobbers?

Mr. Boggs: The question is objected to as being immaterial and irrelevant.

[fol. 479] A. No.

Q. Is there any way by which you could imprint a price on the particular copy of sheet music for the public performance for profit, or any other use, once it is out of your hands and into the hands of the jobber?

Mr. Boggs: The question is objected to on the ground that it is immaterial and irrelevant and as dealing with questions of the statute which have since been repealed, and which the State of Florida has disclaimed all intentions to enforce.

A. No, is the answer.

Q. Do you know whether your music has been performed in the State of Florida?

A. Yes, I know it has.

Q. Have you yourself ever been in the State of Florida?

A. No, I haven't.

Q. Have you heard your music performed over the national hookup of the National Broadcasting stations?

A. Yes.

Q. And have you heard your music performed over the National hookup of the Columbia Broadcasting System?

A. Yes.

Q. And is that true over the years?

[fol. 480] A. Yes; over the last ten years, I should say.

Q. Now, how about your receipts for the mechanical reproduction of records and rolls? Has there been a falling off or a diminution of the moneys received from such sources in the last fifteen to twenty years?

A. For a while it was down to almost nothing.

Q. Would you say that the history of the decline in the receipts from mechanicals is practically the same as that of sheet music?

A. Unquestionable.

Q. Have you a complete catalogue of all musical compositions published by your company?

A. Not a catalogue, no. We have some sort of typewritten list; we have never had a catalogue.

Q. Is that typewritten list you have complete?

A. I would not say it is entirely complete; that would be rather difficult, it goes back for so many years it would be almost impossible to put that into our prospectus.

Q. Would you be able to file with the Comptroller of the State of Florida a list which is complete, of each and every musical composition that has been published by you, in which you own the copyright, which list contains the name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto [fol. 481] in the United States Copyright Office, the name of the author, the name of the publisher, the name of the present owner of the copyright to such composition, and the name of the present owner of the performing right thereto?

Mr. Boggs: The question is objected to as immaterial and irrelevant, as the statute makes no mandatory require-

ment that a complete list should be filed, but only those compositions which are entitled to be licensed for public performance in the State of Florida.

A. I would not be able to furnish such a list.

Q. Have you information that would enable you to make up such a list?

Mr. Boggs: Same objection.

A. I don't believe so.

Q. As a matter of fact, a great many of the compositions published by you from time to time become obsolete, don't they?

A. That is right. They are no longer active.

Q. They are no longer active?

A. That's right.

Q. You even run out of print of the copyrighted sheets of music, don't you?

[fol. 482] A. Yes.

Q. Is that true of most publishing houses?

A. I believe so.

Q. Now, you know that the Society at the present time licenses its users in the State of Florida by blanket licenses?

A. That is my understanding.

Q. And do you want your compositions licensed and do you want to have the blanket licenses on your compositions continued in the State of Florida?

A. I do.

Q. You don't want your compositions licensed in any other way, do you?

A. I do not.

Q. And do you want to retain the right to have blanket licenses issued for the public performance for profit of your compositions in the State of Florida without any conditions attached thereto?

A. Yes.

Q. Do you want to fix or determine any price for the public performance for profit with respect to your compositions in the State of Florida at this time?

Mr. Boggs: The question is objected to, as the wishes of the witness are irrelevant and immaterial issues in this [fol. 483] case.

A. I do not.

Q. If you were to file a list of your compositions with the Comptroller of the State of Florida, do you think that you could get up a list which would be so accurate that you could make an affidavit to support that list?

A. May I have that question repeated?

Mr. Boggs: The question is objected to as being violently leading.

Mr. Frohlich: It is a simple question.

Q. (Question repeated by reporter.)

A. I believe I could. It sounds like an involved question to me.

Q. I will ask the question in another way, then. Suppose you try to conform to the statute and got up a list of your works and filed that list——

A. What do you mean, conform to the statute?

Q. Let me read Section 2 of the statute to you of House Bill 1103 and Senate Bill 635:

"Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has [fol. 484] been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be

required by the Comptroller for filing any list under this Act.

"(b) Shall simultaneously file an affidavit which shall [fol. 485] describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal."

Now, Mr. Von Tilzer, having read this Section to you, I ask you now whether you could file the affidavit called for by this section.

A. I would say no. I could give you my reasons too, if you want them. I don't know if it is necessary.

Q. I did not ask for the reasons.

A. All right.

Mr. Frohlich: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. Mr. Von Tilzer, are you a member of the Board of Directors of ASCAP?

A. I am.

[fol. 486] Q. How long have you been a member of the Board?

A. Ever since 1914, with the exception of the period I spoke of before, a year and nine months.

Q. Are you a member of any committees of ASCAP?

A. I am on the Membership Committee.

Q. Is that the only committee?

A. That is the only one.

Q. That is the committee which passes on applications for membership?

A. That's right.

Q. Now, with regard to the musical compositions which you acquire from composers and authors and which you publish, who is the owner of the copyright of those compositions: you or the composer and author?

A. I always understood that the publisher, unless there is a certain contractual arrangement to the contrary, that the publisher owns the copyright.

Q. From your knowledge acquired during the past 37 years in the music publishing business, would you say that that is substantially true of all music publishing businesses?

A. I should say so, if you take my entire answer, and that is, there are some instances where the writer——

Q. It is substantially true?

[fol. 487] A. Yes.

Q. Primarily the publisher owns the copyright?

Mr. Finkelstein: That is not what he testified to.

Mr. Bennett: I am asking the question. Let him answer the question.

Mr. Finkelstein: You just made a statement; you said that primarily the publisher owns the copyright.

Mr. Bennett: I am asking the question. Please permit me to do so. You may object to the question.

Mr. Finkelstein: You just made a statement.

Mr. Bennett: No. The witness is on cross-examination, don't forget that.

Mr. Finkelstein: Go ahead; ask your question, but you just made a statement.

The Witness: Will you please repeat the question.

Q. Primarily that is substantially the case, isn't that so?

A. Now, you are asking this question directed to what? You appear to doubt my statement. I don't want to get confused myself, and if you question my veracity that isn't [fol. 488] so pleasant.

Q. The question is that the publisher primarily is the owner of the copyright.

A. I can speak for ourselves. I would not like to speak for the entire music business; I don't think it is right for me to do so. After all, I am not in their confidence, any more than they know how we run our business. But I can speak for ourselves, and that is that we are the copyright owners of songs that we publish—I would like to retract that on reconsideration; that statement of mine about the publishing business in general, because that is hearsay, and I don't think I have the right to say that.

Q. In 37 years of work in the music publishing business——

A. You get impressions, that is all; I mean, after all, they are not proof, they are not positive proof of that, and I don't know that. A statement to that effect means nothing one way or the other, other than we ourselves, other than the records of our own publications. I would not want to speak for other publishers; I don't have this right.

Q. Mr. Von Tilzer, will you refer to Plaintiffs' Exhibit No. 7 and state whether, from your knowledge of the music publishing business, that that exhibit represents the form [fol. 489] of contract commonly entered into between music publishers and composers and authors.

A. I will speak for the Broadway Music Corporation. That is the form that we have been using since 1932. It is the form that we have been using since that time. Does that answer your question?

Q. Have you any knowledge as to whether this form is approved by other music publishers?

A. I think it was at that time; whether they have been using it since then or not I don't know.

Q. Are you a member of the Music Publishers Protective Association?

A. Yes, but I am not on the Board. I don't get up that way very often.

Q. You have testified with regard to the decline in the sale of sheet music?

A. May I have that again?

Q. You have testified with regard to the decline in the sale of sheet music subsequent to 1923?

A. Yes.

Q. What was your experience in 1939?

A. With sheet music?

Q. Yes.

A. I think it is bad, the same as has been during this [fol. 490] bad period. They have had songs occasionally, songs that we call "free songs," that have done pretty well, but the majority of songs have been way under; and after all, it is the majority of the songs that make the business, not the exceptions.

Q. Have you noticed any improvement in conditions?

A. Not in sales of sheet music.

Q. How about phonograph record royalties?

A. Well, there seems to be a temporary increase right now, *do* to the slot machines, which we have not enjoyed any particular advantage of; and how permanent it is and how

much of an improvement it will be over any space of time I don't think anyone knows. No business can subsist upon freak gains, particularly a business as hazardous as the music business, of which there is none more hazardous. And with the natural sales of sheet music down to a minimum, due to many reasons, including the one I mentioned before, that of getting the performance free over the air and having our work taken away from us and sold in song sheets from which we get nothing, why, if we didn't have this other form we would be nowheres. I mean there is no necessity of bad reports; the situation is there. It is so obvious and so plain that I don't think anybody can question it.

[fol. 491] Q. I don't think you understood the question.

A. Possibly not. Once your mind travels, after you get out on a certain track——

Q. Did you have any hits in 1939?

A. No; no new songs.

Q. Do you sell the recording rights for electrical transcriptions and to motion picture producers for the incorporation on sound tracks of motion picture films?

A. We do.

Q. How do you arrive at the price you charge the motion picture producers for the right to record a particular number?

A. Well, it depends upon the way that number is used in the picture. Some are minor uses and some are major uses; it depends on the importance of that number to the picture. There are so many ways of estimating value that it would be hard to pin it down to one thing.

Q. Do you vary it also in accordance with what your opinion is of the value of the particular composition?

A. Yes, I should say so, if that entered into it.

Q. You have ways and means of determining the value?

A. Yes. If the number is a standard number and it is constantly being performed, I should say if it is constantly being broadcast by artists and it has a standard popularity, [fol. 492] I should say that would make that number more valuable than a number that there is no request for. Does that answer your question?

Q. Yes. Referring back to the Membership Committee, of which you testified you were a member, are you a member of that committee as a representative of publishers?

A. That is right.

Q. Are you familiar with the publisher members of ASCAP?

A. I know them all. You mean their businesses?

Q. Do you know how many there are all told?

A. I couldn't say offhand. There are over a hundred to my knowledge; I don't know how many over a hundred it is.

Q. Do you know whether any of those own additional publishing companies or have acquired catalogues of additional publishing companies?

A. Well, some of them are members because they acquire catalogues, I believe.

Q. From your knowledge of the music publishing business in the United States which you acquired during your 37 years of experience as a Director and member of the Membership Committee of ASCAP, what would you say is the percentage of music publishers of the United States regularly engaged in the publishing business who are [fol. 493] members of ASCAP?

A. Well, that would be difficult, because a great many publishers throughout the United States publish piano pieces and things of that kind and symphonic works.

Q. What percentage would you say of the popular music publishing business is represented in ASCAP?

A. It would be difficult for me to give you the percentage; I can only give you an idea, by telling you that there are publishers all over the United States in almost every town in the country who publish music, a great many of whom are not in the Society; local publishers socalled.

Q. Would you say these publishers are regularly engaged in the music publishing business?

A. They think so.

Q. I asked you what you think.

A. Well, I don't know. They have the equipment; they know how to accept a number and, to print it up.

Q. Can you name any of those publishers?

A. Not offhand. I got this knowledge, as you say, over a space of 37 years, in a general way. Just to itemize and go into detail without research work, it would be pretty hard to do. It is common knowledge that there are publishers who probably start as music stores, retail music stores, and then they go into the publishing business and [fol. 494] publish numbers.

Q. Would you say that the membership of ASCAP rep-

resents all those regularly engaged in the publishing of popular music?

A. I would not want to say offhand; I think a great many of the important publishers are in the Society because they find that there is no other way of protecting their interest than through an outlet that will enable them to get this money that we depend upon with which to operate our businesses.

Q. Has the Society ever denied membership to a music publisher who has made application?

A. If they are recognized, if they are regularly employed in the business and they are permanently engaged, we want them, if they are actively and legitimately engaged. I don't think the Society, speaking personally, wants fly-by-night people who are in the business today and out tomorrow, because that would interfere with our license fees.

Q. Would you say that all those who are permanently engaged in the business, in the music business, or substantially all of them, are members of the Society today?

A. I should say most of them are; I wouldn't say all of them. I wouldn't be prepared to make the statement.

[fol. 495] Q. Substantially?

A. Well——

Mr. Finkelstein: He said most of them.

A. —I think most of them. I know I would not want to be on the outside.

Q. You stated in your direct examination that you could not file the affidavit required by Section 2 of the 1939 Florida statute. Will you amplify that and say why you could not file that affidavit.

A. For one thing, it is voluminous; it requires endless work that would require a great deal of additional expense in our organization, which our income does not provide for. It would be difficult because it would be very unhappy work in view of the fact that to my way of thinking there is no object gained to Florida or a publisher in so requesting that kind of information. I should say that we——

Q. Let us refer back to Plaintiffs' Exhibit No. 7, which is a copy of the contract between the Broadway Music Company and Jack Egan and Allen Flynn, as composer and author. The contract covers the number "Be Still, My Heart." Do you know who composed that number?

A. The music, you mean? Jack Egan.

Q. Did you enter the number in the United States Copyright Office and acquire the copyright?

[fol. 496] A. Yes.

Q. Will the records of the Broadway Music Company show the number of the Copyright Office?

A. Yes.

Q. You have the card from the Copyright Office giving that information?

A. Yes.

Q. Do you still own the copyright on that number, or have you assigned it?

A. We still have it. In fact, if memory serves me, it cost us quite a bit to retain it.

Q. But, in any event, the records of the Broadway Music Company would show whether you still own that copyright?

A. Yes, we have a copyright card.

Q. Can you state the owner of the performing rights of that composition?

A. I wouldn't know how to answer that. According to the contract that we have, the publisher owns all the rights; we have all the rights; we have the moving picture and the performances for profit, as well as the sheet music, the mechanicals; we have them all.

Q. Now, Mr. Von Tilzer, having all that information in your records, could you put it on a card or other form [fol. 497] and execute an affidavit that it was true?

The Witness: What is that question again?

(Pending question read by reporter.)

Q. Well, have you the contract there? Answer the question, please.

A. I wouldn't know how to answer that question. I would not know what it involved, because you asked something in your question that I haven't given you reason to believe that I can in that way.

Q. I have asked you whether you had——

A. You said "having."

Q. —the itemized information that the statute of Florida requires be filed with the Secretary of State, or rather with the Comptroller of State. You have stated that you had that information. Now I ask you, could you incorporate that information on a card or form and state in an affidavit that the information is true?

A. Since we have the knowledge of a certain thing, I don't see any physical detriment that would keep us from writing it on a card, excepting were we to do that and put all of our numbers into a catalogue and put to that expense, it would mean additional help, additional cost, which would be a hardship to us to do. I don't know whether——

Mr. Boggs: When you said that you could not make such [fol. 498] an affidavit as was called for by the 1939 Florida statute, what you really meant then, is that you don't want to do it because you think it is burdensome and expensive; is that what you really mean to say? You do not mean to say that you could not make such an affidavit?

The Witness: Well, the two are somewhat entangled. After all is said and done, a man may start out and attempt to accomplish a certain objective. He may get part of the way and fall down and break a leg. But assuming, because of the fact that we are physically able or financially able to go through with it, I don't know any more than you do just how far I would get with those obstacles put in my way, running my business. After all, we are in the business to publish music. So that answer of mine before stands just as I have given it to you.

By Mr. Bennett:

Q. Mr. Von Tilzer, I am not asking you whether you would like or dislike to file such an affidavit; I am asking you if there is any good reason why you could not prepare such a list.

A. I told you and answered on that point, by saying that I am not sure whether it would be possible or not, because, [fol. 499] situated as we are today, the additional cost, in order to include that system in our business, we might very well find it impossible to go through with it, to accomplish that which you desire.

Q. Would it be an obstacle that would make it impossible of accomplishment?

A. Yes, the high cost of operation.

Q. Well, you said a while ago, did you not, that you had a substantially complete list of all your musical works?

A. I said most of them, yes.

Q. Now, also, that list would include those that offer any possibilities of commercial profit, wouldn't it, that list that you speak of?

A. Yes, sir.

Q. Well, wouldn't that list make a substantial compliance with that Florida statute that was read to you by Mr. Frohlich?

Mr. Finkelstein: I object to asking the witness whether a certain thing would be substantial compliance with his question.

Q. You heard Mr. Frohlich read that section of the statute, didn't you?

A. I am just thinking of a point that has come up since in my mind that might very well make the whole question [fol. 500] that you ask very awkward and very destructive to our business. While it is true that we have the songs in our catalogue that there is most demand for, every so often a song comes out of the clear, a song that was not so successful twenty years ago, and then later on, for some reason or other, it becomes in demand. If I were to travel along the lines that you ask or are speaking about I might well forget this part of my catalogue; it might be drying in the vault, because concentrating on the songs that are more prominent, there are many reasons why it is—Here is a case where the State of Florida is trying to run our business for us.

Mr. Bennett: I move to strike out the witness's comment about the State of Florida. It is not responsive to the question.

Q. You seem to have a great deal of difficulty, Mr. Von Tilzer, in telling me why it would be impossible to make such a list. Can you think of any other reasons besides those that you have given so far why it would be impossible for you to file such a list with the Comptroller of the State of Florida?

A. Possibly, after a great deal of thought, I might. I am satisfied to stand on what I have said.

Q. Now, with reference to the cases that you alluded to [fol. 501] just now, you said that sometimes an old song that you had more or less had no sales on for a long time had become popular again: would there be any reason why you could not, in such cases as that, file a supplement to your original list with the Comptroller and add that song?

A. That is not the objection I had about my point. So in having our attention directed away from those possible numbers, we might lose them entirely, just because of con-

centrating on the more prominent numbers. After all, they don't happen by themselves. They happen because you keep shoving songs around in your books, as it were, and you bring a song to somebody's attention and they see the possibilities in it that maybe you don't see yourself, artists and singers who are looking for certain types of material.

Q. In what form do you keep these cards that come from the Copyright Office, showing that you have copyrighted a piece; how do you file them?

A. They are filed in the filing cases.

Q. A card index filing case?

A. Yes. I don't handle all the forms in our business, so naturally I would not be able to answer just what nook it is in.

Q. But you do have such a compartment?

[fol. 502] A. Yes.

Mr. Bennett: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Mr. Von Tilzer, do you recall when I read to you Section 2, subdivisions A and B, that subdivision B provided that "simultaneously with the filing of the list," if you were to make up such a list and file it in Florida, you would have to file an affidavit which shall describe the performing rights to be sold, licensed or otherwise disposed of in that State, and in that affidavit you would have to state that you had full authority to sell, license or otherwise dispose of the performing rights in such composition. Have you now at the present time full authority to sell, license or otherwise dispose of the performing rights in any composition in your catalogue today?

A. No.

Q. Who has that authority?

A. The writers have the joint right in that number.

Q. Who has the ultimate right to sell or license those performing rights today?

A. The American Society of Composers, Authors and Publishers; there is no question about that. They have [fol. 503] the contract with us. It was stupid of me not to get your point, indeed.

Q. Can you tell us offhand how many songs your company has published in the past 37 years?

A. Oh, close to a thousand.

Mr. Frohlich: That is all.

Recross-examination.

By Mr. Bennett:

Q. One further question. In the event that you did not have a contract with the American Society of Composers, Authors and Publishers, would you then have the right license or sell the performing rights?

Mr. Frohlich: I object to that on the ground that it is hypothetical, speculative, incompetent, irrelevant and immaterial; and it assumes a state of facts that is not in existence from all the evidence.

You may answer it.

A. I hate to think what would happen if that were the case.

Q. Would you have the right to sell the public performing rights under your contract, of which Plaintiffs' Exhibit 7 is a sample?

A. I would not want to answer that question unless I [fol. 504] could give you all the garnishings that go with it; it would not be fair to answer yes or no if I were not allowed to state why. I think it would smell to the high heavens even if I were. So if you want me to answer and you will give me the privilege of including my further remarks, why, I would answer it.

Mr. Finkelstein: Answer it any way you want to.

The Witness: If we had no contract with the American Society, naturally we would have the right; there is no question about that, but we would have such an ungodly hard time in collecting our money—with a fine organization like the American Society of Composers, Authors and Publishers, what chance would a small individual who, if it weren't for this small amount of money that we get a year, what chance would we have to go out and collect this money for ourselves? I ask you,—and I can go on that way for the next ten hours.

Mr. Boggs: I move to strike the last part of the witness's answer on the ground that it is not responsive to the question.

By Mr. Frohlich:

Q. Let me ask you this, Mr. Von Tilzer. Do the writers [fol. 505] claim any proprietary interest in the performing rights of the compositions published with you?

A. They do.

Q. Haven't there been controversies for a long time between publishers and writers, including yourself and writers, with respect to who owns those performing rights?

A. Yes.

Q. And haven't those controversies existed for a great many years?

A. They have.

Q. Would you, in the face of the controversies, be prepared to swear under oath in an affidavit that your publishing firm owns completely the rights of public performance in your musical compositions?

Mr. Boggs: I object to the question as leading.

A. There is that question of moral right and legal right involved in this.

Q. No. I only ask you if you would be prepared to make an affidavit under oath as to that right.

A. Well, as it now stands to-day, the rights are enjoyed 50 per cent——

Q. No. Let us assume that there is no American Society [fol. 506] of Authors, Composers and Publishers.

Mr. Frohlich: I will withdraw that.

A. There are always two sides to the thing.

Q. All right; I will let it go.

Mr. Frohlich: That is all.

Mr. Bennett: That is all.

(Witness excused.)

(A recess was taken until 2:30 o'clock p. m.)

After recess.

WALTER S. FISCHER, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Finkelstein:

Q. What is your name and address?
A. Walter S. Fischer; my home address is Darien, Connecticut.
Q. Are you connected with the firm of Carl Fischer & Company?
A. I am.
[fol. 507] Q. In what capacity?
A. I am president of that firm.
Q. Is that a corporation?
A. That is a corporation.
Q. Under the laws of what State?
A. New York State.
Q. Can you tell me when the Carl Fischer Company first engaged in business?
A. Well, we became a corporation, I think, in 1923, the end of 1922; prior to that we operated as a partnership, and prior to that my father operated independently.
Q. When was the firm first founded?
A. 1872.
Q. And has it always been in business in the State of New York?
A. Yes.
Q. What is the business of Carl Fischer, Inc.?
A. Music publishers, music dealers, music jobbers.
Q. What kind of music do you publish?
A. We publish all kinds of music except the socalled popular music.
Q. Can you tell us whether there is any way of defining the words "standard music"?
A. No, it is very difficult to define. In the trade, of [fol. 508] course, we know. Sometimes the standard music books contain popular music and sometimes the popular music books contain standard music. But generally speaking, it is the type of music that is referred to as popular;

that is what I referred to when I said we do not publish popular music.

Q. Do you publish all kinds of music other than popular music?

A. Yes. Our activity is not known as that of a popular publisher.

Q. And would it be fair to say that your activity was known as that of a standard publisher?

A. I think definitely so.

Q. Is Carl Fischer, Inc. a member of the American Society of Composers, Authors and Publishers?

A. It is.

Mr. Finkelstein: It is hereby stipulated that the membership agreement of Carl Fischer, Inc. is the same as Complainants' Exhibits Nos. 2 and 4, and covers the same period of time.

It is further stipulated that the contract between the American Society of Composers, Authors and Publishers and each and every one of its members is identical, and that all present agreements expire on the same date, to wit, [fol. 509] December 1, 1940.

Q. How long has Carl Fischer, Inc. been a member of the Society?

A. I believe since 1924.

Q. And has it from time to time signed five-year agreements with the American Society of Composers, Authors and Publishers?

A. Yes, it has.

Q. The last agreement having been signed when?

A. Five years ago from this next December; it was signed in advance of the expiration; just when it was signed I don't know.

Q. The last agreement became effective January 1, 1936?

A. That is right.

Q. Can you produce a copy of the catalogue issued by Carl Fischer, Inc., a copy of each of the catalogues issued by Carl Fischer, Inc.?

A. Yes.

Mr. Finkelstein: Let the record indicate that the witness has handed to me 11 printed catalogues of Carl Fischer, Inc.

I offer them all in evidence.

Mr. Bennett: No objection.

[fol. 510] The Witness: There are a few additional ones that are not there.

Mr. Boggs: Each catalogue is independent of the other one?

The Witness: That's right.

Mr. Boggs: No objection.

(11 catalogues received in evidence and marked Complainants' Exhibits 8-A to 8-K, inclusive, of this date.)

By Mr. Finkelstein:

Q. Are Exhibits 8-A to 8-K inclusive current catalogues?

A. Yes.

Q. Can you state the approximate period of time during which they were issued? That is, have they all been issued during the past year or two?

A. I will have to check as to that; I can't say from memory when they were issued. Some of them are dated. The catalogues are reissued as they are required from time to time.

Q. Now, can you tell us why you have 11 different booklets here instead of just one?

A. Books of music are classified according to the kind of music. If you will notice, we have a catalogue of band [fol. 511] music; we have a catalogue of orchestral music, we have a catalogue of violin and string music, we have a catalogue of sacred music, we have a catalogue of secular music, we have a catalogue of vocal music, we have a catalogue of books—I notice there is a catalogue of woodwind instruments, a catalogue of brass instruments and its related phases.

Q. Do those catalogues, Exhibits 8-A to 8-K inclusive list all of the compositions copyrighted by Carl Fischer, Inc.?

A. No, they do not, because there is always new material that is added to the catalogue, which would not go into the catalogue until the catalogue is reprinted. And there also, I notice, there is no plectrum instruments catalogue there. I don't think you will find any catalogue there of harp music, or piano accordion music. There are a few odds and ends that are not represented.

Q. Are all your old numbers listed in the catalogues?

A. Yes. All the numbers that are not eliminated from our catalogues are listed.

Q. What do you mean by numbers being eliminated from your catalogues?

A. From time to time we eliminate numbers that we con-
[fol. 512] sider have no longer value. We take them out of the catalogue as we reissue them.

Q. But you nevertheless continue to own the copyrights of those numbers which are eliminated from your printed catalogue?

A. Yes, we do, if the copyright has not expired.

Q. So that I understand your testimony to be that you own copyrights on compositions in addition to this list of your printed catalogues; is that correct?

A. That is a correct statement.

Q. Have you any idea of the approximate number of compositions in which you own the copyright?

A. Yes.

Q. Can you state that they are approximate?

A. We have always stated it; we calculated it at one time between 25,000 and 26,000 numbers.

Q. Do you add compositions to your catalogues from time to time?

A. Regularly, yes.

Q. Approximately how many compositions are added to the catalogues of Carl Fischer, Inc.—and by that I mean how many additional copyrighted compositions?

A. I would say in the last four years it has averaged more than 300 compositions per year.

[fol. 513] Q. Where is the principal place of business?

A. 56 Cooper Square.

Q. New York City?

A. New York City.

Q. Does the corporation own that building or does it lease it?

A. We lease the building; we lease two buildings.

Q. Have you a long term lease on the building?

A. No.

Q. How long a lease do you have?

A. I think the lease has now three years more to run; we just readjusted our lease. We had a 21-year-lease originally, and we have just made readjustment with the owners of the building.

Q. Can you state what the actual rental is?

A. The actual rental, I will have to just figure for a minute.—I think the amount is $28,000. Now, our lease is on the basis of the corporation paying the upkeep of the building and taxes.

Q. Are the taxes in addition to the $28,000 you just mentioned?

A. Yes.

Q. Do you know approximately what the taxes amount to?

[fol. 514] A. I don't recall the exact figure.

Q. I wonder if I can refresh your recollection. Would that refresh your recollection (handing paper)?

A. I would have to check on the taxes. The taxes have been changed; I don't know the exact figure on the taxes.

Q. Do you know approximately?

A. I know the taxes are about $12,000, in that neighborhood; but just what the exact figures are I don't know.

Q. Now, prior to the time that Carl Fischer, Inc. became a member of the Society did it receive any income from public performances for profit of any of its works?

A. No.

Mr. Boggs: The question is objected to on the ground that it is immaterial and irrelevant.

Q. Now, can you state in what way you entered into agreements for the publication of copyrights or how you secure the manuscript?

A. Why, we do so in a number of ways. We enter into a royalty contract; we buy material outright; we also have a staff that is employed; we also will buy copyrights that have been published by others.

Q. Do you represent any foreign publishers in the United States?

A. We do, we represent two important catalogues, the [fol. 515] Oxford University Press, which is an English firm, and Patterson Publications, and a few individual publications or compositions published by a great many publishers.

Q. Now, with respect to those compositions, by whom is the copyright owned?

A. In some cases the copyright is assigned to us, and in some cases, for instance, the Oxford University Press has the copyright. The same is true of Patterson.

Q. And you have the publication rights for the United States with respect to those works; is that correct?

A. That is correct. We have both printing rights and the sole agency rights.

Q. Now, what practice do you follow in copyrighting the composition where you receive the manuscript from the author?

A. The practice?

Q. Are you familiar with the copyright practice?

A. Very familiar; depending upon the type of manuscript, it goes to one of our editors who has to prepare the manuscript, see that it is in proper form for publication. It is then engraved, proofs are read, then it is printed. After it is printed it is copyrighted, that's all. The copyright is registered, then it is placed on sale. We follow the general practice in the standard field of releasing monthly [fol. 516] to dealers our current new issues.

Q. Now, does each and every composition have a stamp on the copy of it, a copyright notice that indicates that Carl Fischer, Inc. is the owner of that copyright?

A. Those that are copyrighted, yes.

Q. And no composition that is copyrighted by you ever goes out without that copyright notice?

A. That is correct.

Q. Now, under your practice with authors other than your employees, do you agree to compensate them on the basis of payment of certain royalties, as a rule?

A. Yes.

Q. And do you have any provision for royalties with respect to mechanical recordings?

A. We have provisions with respect to mechanical recordings in all of our new contracts with respect to synchronization rights.

Q. Can you explain what the synchronization right is?

A. It is very difficult. A synchronization right is a combination of two rights. It does not exist in copyright law. It is pretty difficult to define, except that we understand what it means in the trade.

Q. Now, when a socalled synchronization right is granted to a motion picture company, what right does the motion [fol. 517] picture company get by that grant?

A. He really gets the right to record that composition. If the performance is given under the ASCAP license he

gets the right to use the music for synchronization with the motion picture; that is the basis right he gets.

Q. Is that because the performing rights have been assigned to the Society?

A. Yes.

Q. And the right given to the motion picture company is the right merely to record it on the film?

A. That's right. They get that right; the right includes the right to rearrange it for their purposes, because generally they cannot use it in the published form.

Q. A composition that you receive for the synchronization right is computed on the basis of the value to the motion picture company of the right to record that on the motion picture film?

A. That is right.

Q. Now, where the copyright expires in any composition that you have published and the author is dead, at the expiration of the first term, do you in such cases negotiate with the author's widow or children, or whoever may own the renewal right?

A. Yes.

[fol. 518] Q. For the purpose of acquiring such rights as you may wish to acquire in those compositions?

A. That has been our practice.

Q. Does that happen frequently?

A. It happens very frequently.

Q. Where you acquire any of these renewal rights, do you often pay advanced royalties?

A. Rarely pay advance royalties, but generally we agree to pay royalties on the renewal rights that come up on compositions that have been assigned to us. In those cases we generally make a royalty agreement, sometimes we make an outright purchase of the renewal rights, depending upon the nature and type of composition and the desire of the owner of the renewal rights.

Q. Have any of your works been part of stage shows?

A. Yes.

Q. Socalled dramatico-musical works?

A. Yes.

Q. And have some of them been incorporated in motion pictures in a way other than mere background music?

A. Yes.

Q. Forming a substantial part of the picture?

A. Yes.

Q. Now, with respect to those pictures, do you find it [fol. 519] necessary to restrict the use of those compositions from time to time?

A. We haven't found it necessary so to do, no.

Q. Did you publish "Shadrach"?

A. Yes. That was put on the restricted list. I don't think it is on the restricted list now. The reason that it was put on the restricted list was because MacGimsey, the composer, did not wish to have the song introduced except under certain auspices. There is a standard song that became popular.

Q. Now, when a song is restricted, is it necessary to examine the nature of the performances to be given before determining whether the specific permission will be given for that particular performance?

A. Yes. This particular restriction that you referred to was one that MacGimsey asked us to impose, and he became the arbiter as to whether or not the restriction was to be released with respect to the artists who wished to perform this particular song.

Q. Has that happened in many other instances?

A. Yes, as compared with the number of works that we publish, in isolated instances only.

Q. But where the author makes such a request, you accede to the author's request?

[fol. 520] A. Yes.

Q. I think you testified with respect to the synchronization right that you did not receive from the motion picture company any compensation for the performance in the theatre itself?

A. That's right.

Q. Do you receive that composition in some way?

A. We receive it because of membership in ASCAP.

Q. Can you explain how that happens?

A. Well, the motion picture exhibitor is licensed by ASCAP, and under its license it has the unlimited use of the repertoire of ASCAP; the money collected by ASCAP is evenly distributed to the publisher members as well as the writer members. It is not exactly the fact; it is the motion picture theatre that has the license, not the exhibitor. If you mean by exhibitor the theatre, then the answer is

correct; if you mean by producer of the picture as exhibitor, then the answer is not correct.

Q. The exhibitor is the man who owns the theatre?

A. If you mean by exhibitor the man who owns the theatre, the answer is correct.

Q. Have you a great many of your compositions recorded on phonograph records?

A. Do you mean have many of our compositions been recorded on phonograph records?

[fol. 521] Q. When the compositions are recorded, does the manufacturer receive from you any performing right or any right to license performances?

A. No.

Q. What does he acquire from you?

A. The right to mechanical recording.

Q. And once you grant a right to one manufacturer, do other manufacturers record that work under the compulsory license position?

A. They have a right to, but as a matter of practice they rarely do so.

Q. Is that just in the standard field?

A. I don't know what the practice would be in the popular field.

Q. Do you know what royalties are generally paid by the manufacturer on manufactured records?

A. Well, the royalty under the Act is two cents; there is a royalty of two cents on every record manufactured, but most agreements are made with some sort of a provision, either of reduced royalty, if the record is sold at a certain price, or on the basis of sales rather than manufactured.

Q. When you say reduced royalty, you mean royalty [fol. 522] lower than two cents a record?

A. That's right; royalty less than the statutory fee, which is two cents.

Q. In other words, you have found that the statutory fee is the maximum fee?

A. It is the maximum.

Q. That any manufacturer pays?

A. Yes.

Q. Now, is there any way that you could compel the manufacturer of the record to put on the record a price to cover the performance of the record?

Mr. Boggs: The question is objected to as incompetent, irrelevant and immaterial, and dealing with sections of the statute which have been repealed and in which the State of Florida has announced its intention not to enforce.

The Witness: Will you read the question.

(Pending question read.)

A. I don't know of any such.

Q. Would you be willing to have the manufacturer of the record——

Mr. Boggs: The same objection.

Q. —fix a price for performance, or collect performance fees in your behalf?

[fol. 523] A. No, sir.

Q. Does the record manufacturer act as your agent in any way at all?

A. No.

Q. Are copies of your compositions sold in the State of Florida?

A. Yes.

Q. Have you an agent there?

A. We have dealers—You mean by an agent——?

Q. You have no agent in the technical sense, no agent of the corporation?

A. No.

Q. Can you describe the manner in which copies of your compositions reach the public?

A. They reach them in several ways there. They are either distributed through the jobber to the dealer, and the dealer in turn to the public, or distributed by us to the dealer, and the dealer in turn sends them out to the public; and we also sell direct by mail.

Q. Do you sell directly to any dealers in the State of Florida?

A. I don't know who the dealers in Florida are at this moment, but we sell to all the dealers that may be in good financial standing.

[fol. 524] Q. What do you mean by a dealer? Is that the store that sells, or is the dealer somebody else?

A. The dealer, as applied to our policy, would be a music store that carries a representative stock of our publications.

Q. Do you also sell to jobbers?
A. We also sell to recognized music jobbers,
Q. And they in turn sell to dealers?
A. They in turn sell to the dealers.
Q. Do you have any office in the State of Florida?
A. No.
Q. Do you know whether your works have been performed in the State of Florida?
A. Yes.
Q. Have they been so performed?
A. Yes.
Q. Have your works been performed over the national network of the National Broadcasting Company and the Columbia Broadcasting System and the Mutual Broadcasting System?
A. Yes.
Q. Over all of them?
A. Yes.
Q. Will you be able to print on the face of the musical [fol. 525] compositions sold in the State of Florida a price to be charged for the use or rendition of that copyrighted work for all purposes in the State of Florida?

Mr. Boggs: The question is objected to as irrelevant and immaterial, and because it deals with a portion of the statute that has been repealed, the sections of which the State of Florida has disclaimed any intention of enforcing.

The Witness: Shall I answer it?
Mr. Finkelstein: Yes.

A. It would be possible but most impractical. I don't see how you could find enough space on a piece of music to cover all the various possibilities that would enter into fixing a price for the performance; there would be so many different types of performances, the nature and character of which would enter into a price that would be fixed, it would be impossible from a practical standpoint to do it.

Q. Can you state some of the factors that would have to be taken into consideration in fixing a price to cover the performances of the work?

A. First off, you would have to consider the nature and character of the work, its life, its importance as far as the composer is concerned, the nature of the performance that [fol. 526] would be given. For instance, we have in the

case that I cited before, of MacGimsey, the reason he restricted the work, because he wanted to safeguard the type of performance. Especially in the standard field, where there are certain artistic standards that have to be adhered to, it becomes important that a work be introduced under proper auspices, because unless it is so done you might ruin the reputation of the composer and of the work; you would have to consider the station, its potential listeners, the time of day, whether there was a sponsor connected with it or whether there was no sponsor, and there are endless ramifications that would have to be taken into consideration.

Q. And a separate price would have to be fixed, depending upon the particular factors that were taken into consideration?

A. Definitely.

Q. Would all of these separate factors have to be taken into consideration with respect to the performance of 367 establishments now licensed by the Society in the State of Florida?

A. If there are 367 licenses in the State of Florida, which I don't know, each one of those would have to be analyzed as to all the factors that would be involved.

[fol. 527] Q. Now, at the time you sell copies of your compositions in the State of Florida, or at the time you first issue copies of the compositions for purposes of distribution in the United States, including the State of Florida, can you fix a price to be charged for the use and rendition of the copyrighted musical compositions in the State of Florida?

Mr. Boggs: That is objected to as immaterial and irrelevant and as dealing with a section of the statute which has been repealed and which the State of Florida has announced its intention not to enforce.

A. Well, of course, upon publication, no one knows what the value of that composition, the potential value of that composition, is going to be. Therefore, it would have to be—it would be difficult if not impossible at the outset to fix equitable fees.

Q. Does the value of a particular composition for purposes of public performance change from time to time?

A. Definitely.

Q. Can you state some of the factors affecting such a change?

A. Well, let me give you an instance. We published many years ago a composition which became known as "The Stein Song." For years that composition in our catalogue had [fol. 528] no real value. When radio evolved, we decided to slightly rewrite the song and to feature it. It became of tremendous value. And that same thing applies to all music. For instance, we published 50 to 60 compositions by a man, we will say, Leopold Godowsky; of those 50 or 60 numbers, eventually four or five will become of real value, the others are of little or no value.

Q. Does it often take years before a composition in the standard field is launched successfully?

A. It generally takes time; it is in the nature of the business; it takes time to develop serious music.

Q. Is it necessary in that connection to be careful about the particular artist who launches the particular work?

A. It is the very essence of it. If you get a particular artist to launch your work, you are almost sure of success.

Q. Would the amount that you would charge for a particular performance depend to some extent upon the artist giving the performance?

A. It depends on the artist giving the performance. It would also depend upon the artist, his popularity or his work as to future performing fee, to the future value of the performing fee; do you understand?

[fol. 529] Q. I think I do.

A. I just wonder if the record is clear.

Q. Do you mean that the performance by a particular artist at a particular time may at that moment enhance the value of the work for future purposes?

A. Definitely, yes. It is very necessary in our business to try to have compositions introduced under the proper auspices.

Q. Now, if you were to attempt to fix a price, or a schedule of prices for the performances of your works in the State of Florida, how would you go about attempting to secure the information necessary to even attempt to fix such prices?

A. Frankly, I don't know.

Q. Do you have information in your possession now that would enable you to do that for the 367 users of the State of Florida?

A. No, because we have no such information.

Q. Would you be able to make a personal investigation yourself in the State of Florida to determine the potential users of your composition and what prices should be fixed?

A. I suppose if I were to devote my entire time and attention to it for a number of months, I might be able to [fol. 530] accomplish it.

Q. What as a practical matter would you have to do?

A. As a practical matter, I presume we would have to get someone who is familiar with our type of music to be on the spot and keep in touch with the situation; you have to have probably a stenographer and maybe another assistant. I don't know what the problem would be. It would be a new problem.

Q. What salary would you have to pay for the type of person you would employ for that purpose in the State of Florida?

Mr. Boggs: The question is objected to as calling for a speculative answer; also because the Florida statute does not require such actions to be taken on the part of copyright owners.

Mr. Finkelstein: You may answer it.

A. I should think for that type of man we would have to pay $75 to $100 a week; I don't know what the rents are in Florida, I have no idea. I suppose a stenographer would have to be paid the prevailing wages in Florida, $25 a week maybe; I don't know.

Q. Would you have to set up a filing system?

A. You would have to have an office, equipment, filing system, card system.

[fol. 531] Q. You have been engaged for a great many years in ascertaining copyright information in the field of publishing music. Have you any idea what it would cost to set up the system necessary to administer your rights in the State of Florida?

Mr. Boggs: Same objection.

A. It would cost a very considerable sum of money, how much I would be unable to state without making an analysis of it. I mean, that is a problem. My gosh, you just can't figure all the ramifications of a problem like that.

Q. Would you consider it necessary if there were no blanket licenses issued in the State of Florida to have in-

vestigations made of the performances of your works in that State?

A. We would definitely have to check them; and that would be a man's size job in itself, the checking of performances—I don't know how you could attempt to check them with one man. I presume performances go on simultaneously; you would have to have more than one person looking in to do the checking; and if you are going to check over the year you would have to have people who know music, who would have to recognize the compositions that are played on the air. The titles are not announced, they are not often announced. It would require a very high type of musical knowledge.

[fol. 532] Q. What salary would you have to pay a person so qualified?

Mr. Boggs: Same objection.

A. You would have to pay him plenty.

Q. Now, you have been employing people that are skilled in that field of endeavor, haven't you?

A. Yes, we have.

Q. Have you any idea what you would have to pay such a person?

A. $75 to $100 a week. I don't think you could get them any cheaper.

Q. Would you have to establish the type of each and every user in the State of Florida?

A. You would have to have a regular organization to maintain your contacts.

Q. Would that require a complete force of men in the State?

Mr. Boggs: The question is objected to on the grounds heretofore given to similar questions, and on the further ground that it is obvious that counsel is leading the witness.

The Witness: Shall I answer?

Mr. Finkelstein: Yes.

A. Frankly, I don't know what the problem would be. [fol. 533] I can say that the problem would be a very big problem; how big it is going to be, whether it is even a possible problem, whether it is a problem that can be solved, I doubt very much, and I don't know whether the returns

that we might get out of the State of Florida would justify an organization to control these rights, to check them.

Q. Is it your testimony that in order to attempt to comply with the statute you would as a minimum be compelled to employ two people and to expend the sums of money that you have already mentioned?

Mr. Boggs: The question is objected to because it seems that the witness is familiar with the statute, and no foundation has been laid therefor.

Mr. Finkelstein: You say the witness is familiar or seems to be familiar?

Mr. Boggs: I say the witness seems familiar with the statute.

Mr. Finkelstein: Can we get an answer to that question then?

The Witness: What was the question? It was objected to, I know.

(Pending question read by the reporter.)

A. My answer would be yes.

Q. Assuming that you fix a price for its use, on the [fol. 534] physical copy of the composition sold in the State of Florida, will you have any means of ascertaining whether the performances were given from compositions purchased in the State of Florida or from compositions purchased elsewhere?

Mr. Boggs: The question is objected to as immaterial and irrelevant.

A. You would have to have access to the actual studio from which the performance emanates to determine that, of course.

Q. Would you have to employ someone for that purpose?

A. Someone would have to have the access.

Q. And the same thing that applies to radio studios also applies to dance halls in the State of Florida?

A. Definitely, yes.

Q. And all other users in that State?

A. Yes.

Q. Do you make a practise at the present time of affixing to your sheet music a price that covers the right to make any use of the works other than those uses listed as uses; that is, in the home, that do not amount to public performance for profit?

A. The only price that is affixed to our music is the price at which it is sold to the general public.

[fol. 535] Q. And that does not give any other right to the purchaser of that sheet of music?

A. It gives no other right to the purchaser.

Q. Now, if rights were being licensed on the basis required by this statute, will you be compelled to employ a lawyer in the State of Florida to protect your rights?

Mr. Boggs: The question is objected to, because it seems that the witness is familiar with the contents and provisions of the Florida statute, as to which no showing has been made.

Q. Well, the answer would be you don't know?

A. How could I tell that in advance? You would have to have an attorney or a staff of attorneys. I can't possibly tell you. Experience alone would determine that.

Q. Do you have the means at the present time for redressing any infringement of your works in the State of Florida?

A. Yes, through ASCAP.

Q. Now, if you were unable to do that through the American Society of Composers, Authors and Publishers, how would you do it?

A. We would have to attempt to do it through our own efforts.

Q. Those efforts would include the employment of attor-

[fol. 536] neys, in your judgment?

A. Well, obviously, they would.

Mr. Boggs: Same objection.

Q. Would you have to pay the expenses of your staff in the State of Florida?

A. Who else would pay them?

Q. Have you any idea of how much an expense allowance you would have to give for the administration of the investigation of your rights in the entire State of Florida?

Mr. Boggs: The question is objected to because the witness already testified that he is not competent to make such a calculation at the present time.

A. I would not be able to make a definite calculation; how could I?

Q. Assuming that there there are 367 places scattered throughout the State of Florida performing your works, can you state what would be the very minimum of expense incidental to protecting and enforcing your rights in the State under the statute?

Mr. Boggs: Same objection.

A. I couldn't give any definite figure. It would be a substantial amount, of course, but how much it would involve I couldn't say.

Q. Have you any means now of knowing what price you [fol. 537] would charge for use by television.

A. No.

Q. Is the right of performance by means of television one of those rights that will change from time to time?

A. I don't understand your question.

Q. The right to perform by means of television, are there factors that would make the value of the television right change from time to time?

A. You mean as to the——

Q. Apart from all the other factors.

A. You mean as to the fee for television?

Q. Yes.

A. Licenses for television, definitely.

Q. What are those factors?

A. The number of people who are going to be in a position to use television, the coverage of the particular station; the location of the station; all these other factors that come into the whole field of television. It is a new field; I know very little about television.

Q. I suppose the main factor would be the development of the art itself?

A. Definitely; the commerci-bility of it. I don't think it is commercially on a commercial basis, yet it may be; I don't know anything about television except by hearsay. [fol. 538] I have never seen any—what do you call it—televised performances?

Q. Is there any way then at this time to determine what amount ought to be charged for television performances?

A. None that I know of.

Q. Can you tell how much the Carl Fischer Company has received annually from the Society, on an average for the past five years?

A. About $100,000?

Q. Do you expect to renew your contract with the Society when it expires?

Mr. Boggs: The question is objected to as calling for a speculative answer.

A. We have renewed it.

Q. Can you tell us the value of your contract with the American Society at this time?

Mr. Boggs: The question is objected to, no proper foundation having been laid.

A. Well, I would say that the value of our contract—Do you mean on the basis of that which we have received?

Q. That is right, what you have received in the past, what you might expect to receive in the future, based upon past performances.

A. I would say their anticipation is considerably more.

[fol. 539] Q. Can you place a value on your contract with the Society?

Mr. Boggs: Same objection.

A. Yes, I can place a value on it. I think a very conservative value would be $175,000 annually.

Mr. Bennett: How much did you say?

The Witness: $175,000.

Q. If you were unable to receive the income which you now receive from the American Society, how would that affect the business of Carl Fischer?

A. It would affect it very seriously, because, as a matter of fact, we are now operating, as far as the sale of sheet music goes, at a loss.

Q. Has the situation with respect to the sale of sheet music changed since the adoption of radio in 1922?

A. Oh, definitely; it has changed the whole trend of music.

Q. Can you tell us in what respect it has changed?

A. It has lessened the sale of music. Just see what has happened to professional musicians; it has restricted the number of performances, it is confined now to a very few performances, to a very large group of listeners. We don't find pianos in the home. You find people turning to their radios instead of to a member of the family to provide the

[fol. 540] music in the home. It has taken away the incentive for self-expression of music very largely. It has developed, it is true, a great mass of listeners that acquire a knowledge of music, but as far as the individual performer goes, it has taken away his incentive. You just turn to your piano teachers and violin teachers and see what their experience is. Take the professional field: see how few professional musicians are engaged today as compared with a decade or two decades ago.

Q. Is the value of the performing rights a very substantial asset in your business?

A. It is the whole life blood of the business today.

Q. Could your business survive without licensing performances for public profit?

A. No, not in its present setup.

Q. Now, if you had to establish an agency in each State for the administration of your right of public performance for profit, could you continue in business?

Mr. Boggs: The question is objected to on the ground that it calls for a speculative answer.

A. It depends on a great many other factors whether we could continue in business or not. After all, we are not going to set up an organization in Florida because the Florida performing rights are not going to put us out of [fol. 541] business in the other States of the Union.

Q. My question was if you had it in all the States.

A. If we had it in all the States we would have to reorganize our entire method of doing business.

Q. Do you have the facilities for licensing your own works separately in the 30,000 establishments throughout the United States using your compositions?

A. We have no facilities for licensing at all at the present time.

Q. And taking into consideration the amount received from licenses for public performance for profit?

A. Unless we could substantially increase our revenue we could not possibly set it up on the basis of our present revenues; it just could not be done, in my opinion. Of course, that is a question that would have to be carefully analyzed and studied. I mean, I can have an opinion on it, but I don't know until I get down to facts how I could substantiate any opinion; I would have to have figures to go by. It is obvious if we are going to operate all the States of

the Union, either from offices there or from a central office in New York, we would have to have quite an organization. Now, what such an organization would cost I have no idea; it would be a very substantial sum, it is obvious, but how much I don't know.

[fol. 542] Q. Now, confining your answer to the State of Florida, could you administer your rights for the public performance for profit singly, licensing the separate rights for the public performance for profit for each separate use in each establishment in the State of Florida?

A. I presume as a theoretical matter it could be done; as a practical matter I think you would have to get so much more money than they get now that you could not be very hopeful of accomplishing it. Those are questions that would have to be carefully analyzed. It is pretty difficult to give you figures based on anything.

Q. Is a good deal of your music sold to music teachers?

A. Yes.

Q. And educators?

A. Yes.

Q. And schools?

A. Yes.

Q. And colleges?

A. Yes.

Q. If a single price were established for copies of your music that included all possible uses that might be made for public performance for profit, how would that affect the sales to people who are entitled to use the works for educational purposes?

[fol. 543] Mr. Boggs: The question is objected to on the ground that it is immaterial and irrelevant and deals with a phase of the statute which has been repealed and as to which the State of Florida has disclaimed any intention to enforce.

A. Well, in my opinion, you could not raise the price of educational music to cover performing rights without killing that phase of the business.

Q. I will call your attention to Section 2 of the Florida law, enacted in 1939, House Bill 1103, Senate Bill 635, which reads as follows:

"Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of,

in this state, the performing rights in or to any musica composition or dramatico-musical composition, which ha been copyrighted and is the subject of a valid existing copy right, under the laws of the United States, or to collect an compensation on account of any such sale, license, or othe disposition, unless such person:

"(a) Shall first have filed with the Comptroller on form prescribed by the Comptroller a list describing each such musical composition and dramatico-musical compositio the performing rights in which said person intends to se [fol. 544] license or otherwise dispose of in this state, whic description shall include the following: The name and tit of the copyrighted composition, the date of the copyrigh the number or other identifying symbol given thereto in th United States copyright office, the name of the author, th name of the publisher, the name of the present owner of th copyright to said composition, and the name of the prese owner of the performing rights thereto. Additional lists such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the pr visions of this Act. A filing fee of two cents a compositio shall be required by the Comptroller for filing any list und this Act.

"(b) Shall simultaneously file an affidavit which sha describe the performance rights to be sold, licensed or othe wise disposed of and shall state that the compositions listed are copyrighted under the laws of the United State that the facts contained in the list to which said affida relates are true, that affiant has full authority to sell, cense or otherwise dispose of the performing rights in su composition; and the affidavit shall set forth the name, ag [fol. 545] occupation and residence of the affiant; and if agent, the name, age, occupation and residence of principal."

Q. Could you file such a list in the State of Florida?

Mr. Boggs: The question is objected to as being too vag and general; the section of the statute just read to the w ness embodies a number of separate actions, whereas t witness, under the present question, is permitted to gi only one answer with regard to all of them.

Q. You heard that section read?

A. Of course, it would be possible to follow the regulations there. It would involve in our case thousands of compositions. Then it becomes a problem of how you could physically carry out the provisions. This compilation of catalogues, such as these, is a job in itself. Now, when I have to file with respect to each one of these an affidavit, God knows how it could be done in our case. And as I understood you, we would have to file an affidavit with respect to each composition.

Q. You have to file an affidavit and state with respect to each composition that you have full authority to sell, license or otherwise dispose of the performing rights in the composition.

[fol. 546] A. That was with respect to each composition?

Q. The affidavit—yes.

A. Yes, that could be done.

Q. Does Carl Fischer, Inc. at this time have the performing rights in any of its compositions?

A. In any of its compositions? Yes.—I want to change that. At the present time, no. Now I see what you are leading to. At the present time we don't own or control our performing rights. They are possessed in ASCAP under a contract which expires the end of this year and, as we take or renew our contract for another period of ten years, we are not the owners of these performing rights.

Q. Can you estimate the cost of attempting to file a list containing the copyrights in the catalogues of Carl Fischer, Inc.? I believe you said there were about 26,000?

A. Yes.

Q. Giving all of the data required in Section 2?

A. I could not give any definite estimate as to that. I do not know what it would cost.

Q. I call your attention to section 4-A——

A. Because, you see, in our case, we don't claim that we have the performing rights to all of the compositions in these catalogues. There are compositions in our catalogues [fol. 547] that are in public domain, compositions where the copyright has expired; compositions that are not copyrighted.

Q. You would have to have a search made as to the status of each?

A. You would have to make an investigation that would require certainly a lot of research work.

Q. You would have to engage somebody to make that search?

A. It would not be made of itself. Someone would have to do it.

Q. Well, you would have to consult counsel to determine whether in specific cases you had the right?

Mr. Boggs: The question is objected to as conjectural and speculative.

A. There are compositions, of course, in everyone's catalogue where there are questions of that kind that are not clearly set forth in agreements. For instance, we have a number of compositions where we have certain rights of republication, in arrangements made on foreign copyrights, the status of these performing rights with respect to these numbers is not very clearly established in our agreements.

Q. Will you be able, with respect to these compositions, to state under oath that you have full authority to sell, license or otherwise dispose of the performing rights in such [fol. 548] compositions?

A. Well, if there is a question I would not do it under oath. I would do it in cases where I was certain.

Q. Would there be any practical way of licensing those compositions?

A. No.

Q. If the requirements of the statute had to be met?

A. No. I mean, where the performing right is involved, as it is in many instances in our catalogues, it would be pretty hard to clear the title; certainly, we would not make any affidavit if we were in doubt. Now, probably some cases could only be determined finally by litigation.

Q. Are you willing to have your compositions that are broadcast outside of the State of Florida and under license from you rebroadcast in the State of Florida without the payment of any performance fee by users in the State of Florida?

A. No, we would not be willing.

Q. Are you willing to have broadcasts or other performances made in the State of Florida from phonograph records by transcriptions brought into that State from outside the State without payment of a performance fee to you?

A. Definitely not.

Q. Would you be willing to have a motion picture in [fol. 549] Florida give performances by means of motion

pictures imported into the State of Florida from outside of the State without payment of any license fee with respect to your copyrighted compositions?

A. No.

Q. I call your attention to Section 4-A of the 1939 Florida law, which reads as follows:

"Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end there shall be filed with the Comptroller, [fol. 550] either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof, and said prices shall remain in force

and effect until a new schedule of prices with respect to [fol. 551] the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof."

Now, in order to make works available at a price established for each separate performance, would it be necessary for you to do the things that you mentioned before in investigating the users in the State of Florida, and so forth?

A. Correct. You have that same problem of checking, with all the expense that is involved in that operation, and therefore we would be unwilling to do it.

Q. Would it be possible for you as a practical matter to issue licenses on the basis specified in Section 4-A which I just read to you?

A. As a practical matter, no.

Q. What are the practical impediments to such a basis for licensing?

A. It always involves all the policing that has to be [fol. 552] done in the operation of it, and the expense that would be incumbent upon us in order to control the situation, the checking of the program and these other things that enter into this. It would be just impossible for an individual.

Q. Are those things necessary with the blanket system of licensing?

A. No, because under a blanket system of licensing they have unlimited rights to your repertoire.

Q. Is it necessary to investigate the individual?

A. Yes.

Mr. Finkelstein: You may examine.

Cross-examination.

By Mr. Boggs:

Q. Mr. Fischer, I hand you Plaintiffs' Exhibit No. 7, which is entitled, "Standard Uniform Popular Songwriter's Contract," and bears the notation in the upper left-hand

corner, "Copyrighted 1933 by the American Society of Composers, Authors and Publishers." Will you examine that document and tell me whether that is a sample of the kind of contract that you make with your music composers and authors?

A. No, it is not; we do not use this contract.

Q. You do not use that?

[fol. 553] A. No, we have our own contract.

Q. You don't have one with you?

A. No, but I can get one.

Q. I will be glad if you would send one over at your convenience.

A. I will send one tomorrow.

Q. You said, I believe, that you have recently signed up a new ten-year contract with the American Society of Composers, Authors and Publishers?

A. Yes.

Q. How long ago was that?

A. That we signed it?

Q. Yes.

A. Oh, I should say, September or October of last year.

Q. 1939?

A. 1939, yes.

Q. Well, is that contract executed for a ten-year term identical with the old contract?

A. Yes.

Mr. Finkelstein: It commences at the expiration of the old one.

The Witness: It is a renewal of our old agreement.

Q. Do you know if other ASCAP members have also exe-
[fol. 554] cuted renewals, or does that come to your attention?

A. Yes, I know that they have, I think the majority of them have.

Q. Are you on the Board of ASCAP?

A. I am.

Q. And do you serve on any of its committees?

A. I do.

Q. What committees?

A. I am on the Foreign Relations Committee and on the Administration Committee.

Q. How long have you been on the Board?

A. Since 1925 or 1924.

Q. In your direct testimony you spoke about the necessity in standard music, such as yours, of investigating the particular artists that were going to perform. Now, when you spoke about that, were you speaking of branches of your business that are not handled through ASCAP?

A. No.

Q. In other words, you are speaking now of the rights you handle yourself; is that it?

A. No. I was speaking in general about specific cases that come up in connection with the "Shadrach" question, as to why that number was restricted; that particular num-
[fol. 555] ber was restricted because MacGimsey was very anxious that that song should be introduced by a certain type of singer.

Q. But that piece of music goes to ASCAP, doesn't it?

A. Oh, yes, under our contract with ASCAP we always have that right to restrict in good faith.

Q. Well, practically, how is that matter of restrictions of that kind handled, remaining always with the author or composer?

A. In our particular case, our restrictions have been very few. For instance, I might give you an instance: We are now publishing an orchestration to a violin suite by Ernest Bloch, called "Bal Schum Suite"; now, these numbers exist now for violin and piano and were published by us several years ago. In their new form with orchestra accompaniment, at the suggestion of Ernest Bloch, we were able to get a well known violinist by the name of Sgetti to introduce these with certain philharmonic engagements which he had. Now we are going to restrict those numbers pending his opportunity to introduce these compositions with their orchestral form. We are going to restrict them because of artistic reasons.

Q. How does the user know about that? Suppose somebody wants to perform that piece of music and he doesn't
[fol. 556] know that you have a restriction on it?

A. We advise ASCAP to place these numbers on the restricted list and they in turn notify the licensees.

Q. They notify all the licensees?

A. Yes. The restriction must be effective until notice has been served, naturally.

Q. Well, in that case, such as you gave the instance of, would that mean that nobody else was to play it at all until this particular performer had introduced it?

A. This group of performances by this man has taken place, but I would like to make it clear that considering the repertoire that is included in ASCAP from our source, those restrictions are small in percentage,—I mean, occasional restrictions.

By Mr. Bennett:

Q. You stated in your direct testimony that you sold the right to record individual compositions to motion picture companies. How do you arrive at the price that you charge?

A. It depends upon the use that is being made and the type composition that is involved.

Q. Do you base it in part on what you think the value of the particular composition is?

A. We base it in part upon the character of the music, [fol. 557] which determines its value. Now, for instance, that ground music which is particularly used from our catalogue, has more or less a definite value only. On the other hand, there are other compositions in our catalogue which become very valuable to motion picture people for use in a certain way; we don't measure that except when we know all the particulars of the use actually that it is going to be put to.

Q. Do you determine those prices yourself—I don't mean you personally—I mean does Carl Fischer, Inc. determine those prices?

A. Oh, yes.

Q. Is that more or less general with Carl Fischer, Inc.? Are they making such arrangements from time to time and continuously?

A. Oh, yes.

Q. Now, you stated in regard to recording that a two cent recording fee stated in the Copyright Act was the maximum amount you received.

A. That's right.

Q. But frequently it was less than that?

A. Yes.

Q. Do you license recording rights in addition to those records, phonograph records, other than to the motion pic- [fol. 558] ture people? Do you license rights for electrical transcription?

A. Yes.

Q. What do you charge for those rights?

A. I think we charge—I don't know just what we charge—we have two charges, one is double that of the other. I don't just remember what the charge is. I think it is ten and twenty, or fifteen and thirty; I am not sure.

Q. How did you determine that price?

A. I think we determined that price more or less by what the others were doing, other publishers were doing.

Q. That is in excess of the two cent price that you stated?

A. Yes. There is some relationship there too between—this is very vague—I don't handle that particular department, but there is some relationship there between the number of times it is used. I think it is—I don't really know; I would have to check on that detail.

Q. May I refresh your recollection?

A. Yes, you probably could, because——

Q. Is it on the basis of 25 cents for a normal number and 50 cents for a production number?

A. Yes, 25 cents for a normal and 50 cents for an outstanding number; I think that is correct.

[fol. 559] Q. How do you license those?

A. Through an agent, through Fox.

Q. Through Harry Fox?

A. Through Harry Fox.

Q. Called agent and trustee?

A. That's right.

Q. Who is Mr. Fox?

A. Who is he?

Q. Yes.

A. He is our agent and trustee in this particular matter; he is also connected—I don't know whether he is still connected—with Music Production Association. He was employed when I first knew him by the Music Publishers Protective Association.

Q. Has he always been the agent and trustee or did he succeed anyone?

A. He succeeded Mr. Payne.

Q. Mr. Payne; you mean who is now the general manager of ASCAP?

A. Yes.

Q. What was Mr. Payne's position at that time?

A. He was general manager of Music Publishers Protective Association and also acted as agent and trustee for publishers in connection with synchronization rights and

[fol. 560] Q. Is Carl Fischer a member of the Music Publishers Protective Association?

A. No.

Q. Are they a member of the Music Publishers Association of the United States?

A. Of the Standard Music Publishers Association.

Q. Can you tell me whether that 25 and 50 cent price is uniform with regard to transcriptions?

A. I believe it is pretty uniform; I think it is more or less a trade practice now, that price; I mean I haven't discussed it with anybody to know whether there is any change.

Q. You have no knowledge of how that price was originally determined?

A. No.

Q. I wonder if you would state what an electrical transcription is.

A. My understanding is that electrical transcription is a phonograph record made specially for broadcast purposes, operated at 33⅓ revolutions per minute instead of 78, which is the normal number of revolutions on a turntable for phonographs used in the home.

Q. In your direct testimony, you referred to the Oxford University Press. I believe you said that you had the sole agency rights. I wonder if you would explain just what [fol. 561] you meant by sole agency rights.

A. Well, the Oxford University Press is the correct title of a firm, and they are large English publishers; we have the sole right to their music for the United States of America, we are the sole agents, sole selling agents. Under our agreement we also have the right to print from time to time such compositions as we deem it advisable to print here.

Q. Do you also have the right of public performance for profit in the United States?

A. We have an interest in their performing rights.

Q. Do you have the right to license the performing rights?

A. The ASCAP has the right to license because the Oxford University Press are members of the English Society, and *and* through its reciprocal treaty of arrangements with ASCAP, they have in turn those rights—ASCAP hasn't, but we share in them.

Q. I notice in Plaintiffs' Exhibit No. 2, attached to the supplemental bill of complaint, in your suit, the list of mem-

and under the member Carl Fischer, Inc. is listed Oxford University Press. Do the performing rights in the copyrights owned by Oxford University Press come under the [fol. 562] ASCAP license by reason of your membership in ASCAP or by reason of the reciprocal agreement with the performing rights Society of England?

A. They come under the repertoire through its affiliation with the English performing rights Society (PRS). Now, in addition to the Oxford University Press of London, there is also an Oxford University Press here in New York, who publish some music under their own copyrights, and we also have that agency, and I think under our agreement we have the performing rights direct with respect to this small catalogue that they have started here. I am not sure whether we have those performing rights direct by contract or just what the status is there, but they are unimportant.

Mr. Bennett: That is all.
Mr. Boggs: That is all.
Mr. Frohlich: That is all.

(Witness excused.)

(An adjournment was taken until the following day, Thursday, February 8, 1940, at 10:30 o'clock a. m.)

[fol. 563] New York, February 8, 1940,
10:30 o'clock a. m.

Met pursuant to adjournment.

Appearances: Mr. Frohlich, Mr. Finkelstein, Mr. Bennett, Mr. Boggs.

Oscar Hammerstein, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Where do you live, Mr. Hammerstein?
A. Great Neck, Long Island.
Q. What is your occupation?

Q. How long have you been engaged in that occupation?
A. Since 1919.
Q. Do you write the music to musical compositions?
A. Yes.
Q. And you have also written what is known as a book [fol. 564] of dramatic musical works, stage plays, musical comedies, operas, and similar works?
A. That is right.
Q. Now, I show you what purports to be a list of works written by you and ask you if you recognize this as being accurate. (Paper handed to the witness.)
A. Do you want me to look through this?
Q. Yes. Glance at it and see if it is correct.
A. I can't testify whether it is complete or not.
Q. That's right; but with respect to the works mentioned, are those works written by you?
A. Yes.

Mr. Frohlich: I offer it in evidence.
Mr. Boggs: No objection.

(List received in evidence and marked Complainants' Exhibit 9, of this date.)

Q. Now, Mr. Hammerstein, do you usually write your musical works in collaboration with a composer?
A. Yes.
Q. And have you collaborated with a great many composers over the years?
A. Yes, I have.
Q. And have your works been published by music publishers?
[fol. 565] A. Yes.
Q. And have they been published by many musical publishers?
A. Yes, several; four or five, I should think.
Q. Can you state some of the outstanding successful dramatical music works that you have written in the past ten to fifteen years?
A. "Wildflower." "Rose Marie." You want the shows?
Q. Shows, yes.
A. "Show Boat." "Desert Song." "New Moon." "Music in the Air." "Sweet Adeline." "Song of the

Flame." "Sonny." "Golden Dawn." How many do you want?

Q. That will be enough. Could you name some of the popular hit songs that you have written in the past few years?

A. Yes. "Old Man River." "Lover, Come Back to Me." "When I Grow Too Old to Dream." "Who?" "All the Things You Are." "Can't Help Loving That Man." "Only Make Believe." "Bambellina." "Wildflower." "I Love You." "Stout-Hearted Men." Stop me when I have——

Q. That will be plenty. Did you write any hit songs prior to 1923?

A. Prior to 1923?

Q. Yes.

[fol. 566] A. I have to think. Yes, I believe that the "Wildflower" songs were written before then; they were written in 1922.

Q. Do yon know how many copies of sheet music were sold of that song?

A. No, I have no idea.

Q. You specialize in production numbers rather than popular songs, don't you?

A. Yes.

Q. And those songs of yours that did become popular were songs for the most part that were contained in shows?

A. All of them.

Q. Now, are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. When did you first join up with that Society?

A. I am under the impression that was about 1923.

Q. And have you been a member continuously since that time?

A. Yes.

Q. Now, did you sign a renewal contract with the Society in July, 1935?

A. Yes.

Mr. Frohlich: It is stipulated that the witness entered into a contract with the American Society of Composers, [fol. 567] Authors and Publishers identical with the contract appearing in evidence as Plaintiffs' Exhibits No. 2 and No. 4.

Q. Can you tell us approximately what your average income has been from the American Society of Composers, Authors and Publishers for the past ten years?

A. I should think about $15,000, although that may be high for the past ten years. I am not certain. I know that is what it has been for the past five years.

Q. For the past five years?

A. Yes. It must be close to that.

Q. You are also a member of the Board of Directors of the Society of Composers, Authors and Publishers?

A. Yes.

Q. Now, is that contract between you and the American Society of Composers, Authors and Publishers of value to you?

A. Yes, it is.

Q. And do you hope and expect to renew that contract with the Society for further periods?

A. Yes.

Mr. Boggs: The question is objected to as irrelevant and immaterial.

Q. With respect to the shows that you have written, you [fol. 568] derive compensation from the public performance for profit of those shows by direct contact with the producer of the show, don't you?

A. Yes.

Q. As distinguished from the small rights, what would you say the rights are for the stage performance of your shows? What are they called, production rights?

A. And also known as grand rights in the trade; yes, as distinguished from small rights.

Q. Those grand rights are not supervised by the American Society of Composers, Authors and Publishers?

A. No.

Q. And that is purely a matter of contract between you and the producer of the show?

A. Yes.

Q. You receive royalty from such producer based upon box office receipts?

A. That's right.

Q. Do you also receive royalties from your publishers for the sale of sheet music of your compositions?

A. That's right.

Q. As a rule, what has that royalty been?

A. Three cents a copy.

Q. Now, have your royalties from that source been sub-
[fol. 569] stantial in the past two years?

A. Yes, they have.

Q. And has there been any change in the amount of royalties that you received for the sale of sheet music over the past fifteen or sixteen years?

A. No.

Q. Has it been rather uniform with respect to your numbers?

A. It has always been the same, only when I have collaborated, I mean in the lyrics, in which case I split with them.

Q. Do you know from your royalty statement whether you have been selling as much sheet music in the past few years as you did prior to ten or fifteen years ago?

A. I should think not. I should think that the sales in general have gone down.

Q. And has that also been reflected in moneys that you received for mechanical reproductions of your compositions?

A. Yes.

Q. Could you tell us what is the cause of the diminution in returns from these sources?

A. Well, we have obviously bad performances on the radio.

Q. Now, with respect to your stage shows, have the num-
[fol. 570] bers written by you for those shows been restricted from time to time, if you know?

A. Yes, very often.

Q. At whose request have they been restricted?

A. At the request of the composer, sometimes the manager of the production, on the theory that too many performances on the air might hurt the novelty of the reception of the songs in the show.

Q. As a rule, what does the producer of a musical show invest in its production?

A. Well, I should say anywhere from $50,000, which is very low, up to $200,000.

Q. And are musical shows more expensive to produce than straight legitimate dramas?

A. Very much more.

Q. Is that due to the fact that there is a much larger cast?

A. Due to that, plus the fact that there is usually a much bigger production; there is an orchestra to pay. The whole thing is multiplied by ten, I should say.

Q. And the numbers are restricted in order to safeguard the investment of the producer?

A. That is right.

Q. And the restriction of these numbers is a common and [fol. 571] ordinary occurrence in your profession?

A. Yes, it is.

Q. Have any of your compositions been renewed with respect to copyright?

A. I don't think so; I don't think any of them are that old.

Q. Do you expect to exercise your renewal rights if and when the time comes?

A. Yes, I do.

Q. When the original time expires?

Mr. Boggs: The question is objected to on the ground that it is leading and also calling for a speculative answer.

Mr. Frohlich: You may answer.

A. I do, of course.

Q. Do you expect to receive advance royalties from any of your compositions that you renew?

Mr. Boggs: The same objection.

Mr. Frohlich: You may answer.

A. My answer is that I haven't considered that. I really haven't.

Q. Do you consider these renewal rights of value to you?

A. That I do, yes.

[fol. 572] Q. Are you able at this time to place a monetary value on the aggregate of all of your renewal rights?

A. No, of course not.

Q. Now, with respect to your published compositions, on what basis do you split with the publisher for the mechanical reproduction of your songs?

A. The publisher gets one cent and the author and composer divide the remaining one cent.

Q. Now, as a rule, when you enter into a contract, does the copyright vest in the publisher?

A. Yes.

Q. And he undertakes to pay you royalty from the sale of the sheet music and from the mechanical reproduction of the music; is that right?

A. Yes, sir.

Q. Now, are you able to dictate to a manufacturer of rolls and records of your compositions with respect to any price that he must fix or determine for the public performance for profit of the particular rolls or records of compositions in the State of Florida?

Mr. Boggs: The question is objected to as leading and, further, on the ground that the witness has not been shown to be competent to answer the same; it calls for a conclusion of law.

[fol. 573] Mr. Frohlich: You may answer.

A. No.

Q. Have you any control over those rolls or records?

A. No.

Q. And when they are manufactured by the respective manufacturers of rolls and records, have you any control of the sale?

A. No.

Mr. Boggs: The same objection.

Q. Would you in the future be willing to grant to any manufacturer of records or piano rolls the right to fix a price for the public performance for profit of your records or rolls?

A. No.

Mr. Boggs: The same objection.

Q. So far as you are concerned, do you want to give that right to anybody at all?

Mr. Boggs: Same objection.

A. No.

Q. Do you want to give your publisher the right to fix and determine the price for the public performance for profit of your compositions?

Mr. Boggs: The same objection.

A. No.

[fol. 574] Q. Have you ever given him that right in the past?

A. No.

Q. Do you want to give it to him in the future?

Mr. Boggs: The same objection.

A. No.

Mr. Boggs: Counsel for the defendants here calls attention to the fact that substantially all of the questions asked by plaintiffs' counsel are put in a form that is obviously leading.

Q. Have your compositions been played on radio broadcasting stations very much?

A. Yes, a great deal.

Q. And have they been played for the past fifteen years?

A. Yes, sir.

Q. Have you heard them played yourself?

A. Yes.

Q. Have you heard any of your compositions played within the past four or five years on the hookup of the National Broadcasting Corporation?

A. Yes, sir.

Q. Have you heard them so played on the Columbia Broadcasting hookup?

A. Yes.

[fol. 575] Q. And are your compositions played in the State of Florida?

A. Yes.

Q. Have you ever been in the State of Florida?

A. Yes, in the past few weeks.

Q. Did you ever hear any of your compositions played there on your last visit to Florida?

A. Yes.

Q. Can you state which compositions were played?

A. "All the Things You Are", "Old Man River," "Heaven in your Arms," "Only Make Believe," and probably several others that I don't remember now.

Q. Where were those compositions played?

A. In restaurants and over the radio.

Q. Can you give us the names of some of the stations in Florida where you heard them played?

A. WJNO, that is the only one I can remember.

Q. And can you fix the period more definitely?

A. Yes. I remember it was a weekend, Saturday night,

when "All the Things You Are" was the Number One song on the Hit Parade.

Q. That was over WJNO?

A. Yes, between 9:00 and 9:45, Saturday night, a week ago.

Q. That would be January 27th. Where is WJNO, [fol. 576] offhand?

A. West Palm Beach. I was in Palm Beach.

Q. Let me read to you, Mr. Hammerstein, Section 2 of the House Bill 1103, the New Florida Law passed in 1939:

"Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this State, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of [fol. 577] the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

"(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such com-

position; and the affidavit shall set forth the name, age, occupation and residence of the affiant, and if an agent, the name, occupation and residence of his principal."

Now, with respect to dramatico-musical compositions, which is the legal and technical name for stage shows, these shows are produced and exhibited by various producers of stage shows?

[fol. 578] A. Yes.

Q. Have you any control over the places where these shows are exhibited?

A. No, not where the manager owns the road rights and he can take them wherever he pleases or, in the case of a stock exhibition like the St. Louis Municipal Opera or the Miami Bowl,—now, where there is a general fee being charged and the producer and the author share that lump sum fee, the only control either has is the assent to the price to be paid.

Q. Take a show generally, when you have written your musical compositions and turned them over to the producer of the show, from that moment on who has the right of determining the place for the exhibition of the show?

A. That is up to the producer entirely.

Q. Have you any voice in that whatever?

A. No.

Q. Contractually or otherwise?

A. No.

Q. And he may send it into the State of Florida or any other State of the Union?

A. That is right.

Q. Without consulting you?

A. That is right.

[fol. 579] Q. Are you able to state from the time when one of your musical compositions is bought until it is made a part of a stage show whether or not it is going to be exhibited at all or performed in the State of Florida?

A. No.

Q. You don't really know that until the show is produced down there; is that right?

A. Yes, sir.

Q. Now, are you in a position to fix and determine a schedule of prices on your musical compositions for all users in the State of Florida?

A. No.

Mr. Boggs: The question is objected to on the ground that it appears that the witness is not the owner of copyrights or performing rights therein.

Q. In order for you to ascertain and fix and determine the schedule of prices with respect to your musical works and your dramatico-musical works, with respect to performance rights therein, what information would you require?

Mr. Boggs: The same objection.

A. I would have to know what sort of a place the performance is going to take place in, what the seating capacity of the restaurant or picture house is going to be; I would [fol. 580] have to know the setup of the radio station; I would have to know a good deal about the whole situation in Florida, or any State, that I don't know and cannot possibly know.

Q. Could you ascertain that information yourself?

A. No.

Q. Would you have to employ someone to do it for you in the State of Florida?

A. I should think I would have to employ a whole army corps to ascertain it.

Q. Would that be an expensive proposition for you?

A. I should certainly think so.

Q. Are you financially able at this time to employ people to investigate the uses of your compositions in the State of Florida?

Mr Boggs: The question is objected to on the ground it is immaterial and irrelevant.

A. No, I am not financially able.

Q. Could you employ a lawyer in the State of Florida to seek redress for infringements of your compositions?

Mr. Boggs: That is objected to on the ground it is immaterial and irrelevant.

A. Well, I suppose I could employ a lawyer, but as to [fol. 581] what it would cost I don't know; it all depends; I don't see how I could keep a lawyer retained to check up all those performances.

Q. Have you any information at the present time that will enable you to fix and determine a price for the public

performance for profit of your compositions in the State of Florida on television?

A. No.

Q. Can you at this time fix and determine a price with respect to the performance rights on your compositions in Florida with respect to new methods of performances that may come into existence over the balance of your copyright period?

A. No.

Mr. Frohlich: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. Mr. Hammerstein, you testified that you are a Directors of the American Society of Authors, Composers and Publishers. Are you on any committees of ASCAP?

A. Yes. I am on the committee that is discussing the radio contracts, the future ones; that is the only special committee I am on.

[fol. 582] Q. Are you on the Membership Committee?

A. I am not on the Membership Committee.

Q. Are you on the Classification Committee?

A. Being a member of the Board of Directors I am automatically on the Classification Committee. I was very helpful in classifying others authors. I am on no other special committee at all except the radio committee.

Mr. Bennett: That is all.

Mr. Frohlich: That is all.

Gustav Schirmer, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your name?

A. Gust[illegible] Schirmer.

Q. And what is your residence?

A. 812 Park Avenue, New York City.

Q. Where is your place of business?

A. 3 East 43rd Street, New York.

Q. Are you connected with any company?

[fol. 583] A. I am the secretary of this company that bears my name.

Q. What is the full name of that corporation?

A. G. Schirmer, Inc.

Q. What business is the corporation engaged in?

A. It is engaged in the publishing of music.

Q. How long has it been engaged in that business?

A. Since 1865.

Q. Was the company founded by members of your family?

A. It was founded by my grandfather.

Q. What kind of musical compositions does it specialize in?

A. It publishes in every field of classical music, orchestral, piano music, vocal music, orchestral music, organ music, church music, and light operas.

Q. Now, does it from time to time publish musical operettas and stage musical plays?

A. That's right. We were the first publisher of Friml's light operas.

Q. Now, can you mention some of the more successful musical plays that you published the music of over the past ten to fifteen years?

A. "Firefly." "High Jinks." "Katinka." "Maytime," that's by Romberg. "Sweethearts," by Victor Herbert. "Debutante," that's by Victor Herbert. "Natona."

[fol. 584] Q. Did you also publish individual musical compositions?

A. Of a popular nature.

Q. Of a popular nature?

A. Yes. We published "Trees"; "Sylvia"; "Oh, Promise Me." All outstanding numbers.

Q. Are you a member of the American Society of Authors, Composers and Publishers?

A. Yes.

Q. When did you first join up with that organization?

A. 1919.

Q. Are you a member of the Board of Directors?

A. Yes.

Q. Have you a contract presently in existence between

yourself and the American Society of Authors, Comp osers and Publishers?

A. Yes.

Mr. Frohlich: It Is Stipulated that the witness has entered into a contract in 1935 with the American Society of Authors, Composers and Publishers identical with that of Plaintiffs' Exhibits Nos. 2 and 4.

Q. Do you expect to enter into additional contracts with the American Society of Authors, Composers and Pub-
[fol. 585] lishers of a similar nature from time to time?

A. Yes.

Mr. Boggs: The question is objected to as being conjectural.

Q. Is that contract now in existence between you and the American Society of Authors, Composers and Publishers of value to you?

A. Of great value.

Q. Can you give us an average figure of what you have received by way of compensation from the American Society of Authors, Composers and Publishers under that contract for the past five years?

A. In the neighborhood of $500,000.

Mr. Boggs: A year?

The Witness: No, that is the total in the last five years; on an average of between $90,000 and $100,000 a year.

Q. And is there a reasonable expectation that you will receive similar moneys in the future?

Mr. Boggs: The question is objected to on the ground that it is immaterial and conjectural.

Mr. Frohlich: You may answer it.

A. Yes.

Q. Do you want to keep that contract presently entered
[fol. 586] into alive?

A. I certainly do.

Q. And you want to be free to enter into contracts of a similar nature with the American Society of Aut-ors, Composers and Publishers?

A. I certainly do.

Q. You don't want that contract between you annulled and voided, do you?

A. No.

Q. Now, prior to 1923 did you have substantial sales of popular numbers that you published?

A. Yes.

Q. I mean hit numbers, numbers that were outstanding.

A. Yes.

Q. And how high did some of those sales go?

A. 200,000 or 300,000 copies a year, which is high in our field compared with the popular field. Could I mention some of them?

Q. Please mention some of the songs sold between 200,000 and 300,000 copies prior to 1923.

A. "Sympathy"; "Will you Remember"; "Oh, Promise Me."

Q. Now, have you found any falling off in the sales of your hit numbers since 1923?

[fol. 587] A. Definitely.

Q. What do you sell now of a popular composition?

A. Of that similar nature?

Q. Of a similar nature.

A. I should say not more than 40,000 to 50,000 copies.

Q. Now, what moneys did you receive from the popular songs prior to 1923 from your mechanical rights?

A. You mean from gramophones?

Q. From piano rolls and records.

A. Records, you mean from one composition?

Q. Take one composition which sold between 200,000 and 300,000 copies prior to 1923.

A. We would receive $500,000 to $600,000.

Q. Do you receive that much today from that source?

A. We don't.

Q. To what do you attribute the falling off in receipts of revenue from sheet music and records since 1923?

A. Playing the compositions on the air has affected the sale.

Q. Now, when you obtain a composition for publication from a writer, composer, or both, what is the regular procedure in that respect?

A. We enter into a contract with the composer for him to get a royalty and a percentage of the mechanicals.

[fol. 588] Q. Do you retain and secure the copyright in the name of your firm?

A. We do.

Q. And you copyright these compositions yourself in your name?

A. Yes.

Q. And do you personally own the copyrights in most of the compositions that you publish?

A. Yes, we do.

Q. Subject to payment of royalties to the writers?

A. Right.

Q. Now, when you make an arrangement with the mechanical reproducing people of records and rolls, on what basis do you make that?

A. It is a statutory fee fixed at two cents a record; and rolls, there aren't any more rolls.

Q. With the money you receive from that source, the mechanical reproduction, do you split that with the writers?

A. Yes.

Q. What is the usual basis of the split?

A. Fifty per cent.

Q. When you license your compositions with the manufacturers of rolls and records, do you reserve to yourself any right with respect to where they are to be sold or how [fol. 589] they are to be sold?

A. No.

Q. That is determined by the manufacturer of the roll or record, isn't it?

A. Right.

Q. Have you any control over the manner in which the manufacturer splits on the roll or record?

Mr. Boggs: The question is objected to on the ground that it is irrelevant and immaterial.

Mr. Frohlich: You may answer.

A. No.

Q. Is there any manner, contractual or otherwise, whereby you can compel the manufacturer of a roll or record to fix and determine the price for the public performance for profit of that roll or record in the State of Florida?

A. No.

Mr. Boggs: Same objection.

Q. Have your compositions been played in the State of Florida?

A. Yes.

Q. Have your compositions been played over the radio stations of the NBC national hookup?

A. Yes.

Q. Have they been played over the national hookup of [fol. 590] the Columbia Broadcasting System?

A. Yes.

Q. When they are so played, have you any control over the particular Florida stations where they are to be rebroadcast?

A. No.

Q. If they are played on a hookup may they also be played on some broadcasting station in Florida if that station is hooked up with the NBC or Columbia Broadcasting System?

A. Yes.

Q. You do not control that at all?

A. No.

Q. Are you willing to have your compositions played free and available to the public over the radio in the State of Florida?

A. No.

Mr. Boggs: I object on the ground it is immaterial and irrelevant.

Q. Now, you have published a great many works of your own, haven't you?

A. Yes, we have one of the largest catalogues.

Q. Let me read to you Section 2 of the Florida House Bill No. 1103, 1939;

[fol. 591] "Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition,

the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be sub-
[fol. 592] ject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

"(b) Shall sign simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal."

Would you be able, Mr. Schirmer, to prepare and file a list containing the matter which I just read to you now?

A. Well, that would be a tremendous task, and I don't believe we could carry it out. We have over 50,000 compositions in our house.

Q. Have some of your compositions become obsolete?

A. Yes.

Q. Have the composers of many of your compositions [fol. 593] passed away?

A. Yes, especially with an old firm like ours; in an old business like ours, eighty years old, lots of things happen in eighty years. I am the third generation.

Q. Would you be able to prepare an affidavit containing information such as is required in Bill 1103, as just read to you?

A. I would hate to undertake to do that.

Q. Would you undertake to swear to the truth or accuracy of a list such as is required by this Section 2?

A. No.

Q. With regard to music numbers which are published by your firm and which are contained in musical productions on the stage, are these compositions frequently restricted with respect to performances?

A. That depends upon the arrangement with the managers. Sometimes the managers want them restricted for a limited period of time; other times they do not. If the show is not especially successful, they want them played on the air because they believe it will popularize their show.

Q. When the show is a successful show in a large city they do not want them, as a rule?

A. That is right.

Q. Now, can you explain why that is done, why that [fol. 594] restriction is put on these works?

A. No, I never could. Where it was the managers;—they are very inconsistent about it,—sometimes some manager who asks you to restrict a number in a show, in the next two or three weeks will turn around and tell you not to restrict it.

Q. Where they have asked you to restrict these numbers, have you done it?

A. Yes.

Q. And you have done that by informing the American Society of Composers, Authors and Publishers that it will be placed on the restricted list?

A. Yes.

Q. And you want to reserve the right to yourself to restrict these numbers from time to time?

A. We do.

Q. Now, you know that the Society issues its licenses under a form of blanket license to the user, don't you?

A. Yes.

Q. You know that from your experience as a member of the Board of Directors?

A. Yes.

Q. Do you want the Society to continue to license your [fol. 595] compositions in the State of Florida under a blanket license?

A. Yes.

Q. Are you able at this time to prepare a schedule of prices on each and every one of your compositions with

respect to public performance for profit in the State of Florida?

A. That would not be possible to do.

Q. Now, if you were required to do that under the Act, under this House Bill 1103, what information would you have to have?

A. Well, it would have to be taken up with the various composers and writers, and every composer and writer would have a different idea as to what price should be quoted on their compositions; you might quote a price for one composer that would be unsatisfactory to another composer; I don't see how you could do that. Victor Herbert's heirs might want more than Friml's, and Friml's might want twice again as much as Herbert's.

Q. In other words, if you were to prepare such a schedule, the next thing you would have to enter into a new contractual arrangement with your respective writers and composers?

A. We would, yes.

Q. Before you did that would you have to have informa-
[fol. 596] tion with respect to the users of Florida?

A. Yes, that's right.

Q. Would you have to have information with respect to the nature of the establishments that had licenses?

A. I presume so, naturally.

Q. And the size and the extent of the use?

Mr. Boggs: The defendant objects because the witness is being most obviously led by counsel in this examination.

Mr. Frohlich: Well, you may answer that.

A. I would answer it Yes.

Q. Now, could you do that yourself?

A. No.

Q. How would you go about doing that?

A. Well, I would have to send somebody down to see each place that asks for a quotation, see what the use of it was, what the situation was governing it. It just couldn't be done.

Q. Would you have to employ somebody to see that there is no infringement on your music in the State of Florida?

A. Definitely.

Q. Would you have to employ legal counsel in the State of Florida to protect you against infringement?

[fol. 597] A. Yes; obviously we would have to do that.

Q. Would the employment of these people involve a substantial expense to you?

A. Yes, certainly would.

Q. Are you willing to undertake that expense?

A. No, I am not.

Q. What is today the greatest source of revenue from your works?

A. From the performing Society.

Q. That is to say, the moneys that you receive from the American Society of Authors, Composers and Publishers?

A. Right.

Q. Do you know of your own knowledge of the business that is true with respect to other publishers?

A. Yes.

Q. And also with respect to writers?

A. Yes.

Mr. Frohlich: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. Mr. Schirmer, you stated that you were on the Board of Directors of ASCAP.

Are you on the Membership Committee or any other [fol. 598] committee of ASCAP?

A. I am Treasurer of ASCAP, and I am on the Availability Committee of the Publishers.

Q. Any other committee?

A. No.

Q. For the purpose of the record, will you say what you mean by "Availability Committee," what its function is?

A. The Availability Committee of the Publishers classifies the availability of all publishers as distinguished from the revenues of ASCAP, and are divided in three manners: 1, performances of the actual composition, the publishers are paid for performance; then there is the category per catalogue. They classify various catalogues as to the nature of what they have in the catalogue and the type material which is made available, regardless of whether it is performed or not.

Q. You mean by that that the Availability Committee determines the quantity of musical compositions controlled or owned by publishers?

A. I don't say quantity enters into it. For instance, a certain type publisher only publishes standard music, certain publishers specialize in different types of music, while a publisher who is available to Spanish music, which would [fol. 599] be tangos and rhumbas, things of that sort, that is considered an availability which some other publisher hasn't got, maybe only have a limited number; and there are other type publishers who publish, for instance, violin music, some publishers do not have violin music. You will find that in popular publishers they do not have things published for violin to any extent; yet others have a tremendous amount of violin music, and some publishers publish a great deal of church music, these various gospel hymns and things of that sort, others of a different nature. Some catalogues specialize and the availability of those catalogues is classified.

Q. What is the purpose of the classification?

A. Well, because—for the publisher who can offer his repertoire which is necessary for the users of ASCAP so there will be a fair distribution. You might say he doesn't have a popular hit of the day, yet his catalogue is available, and the users have to find this particular type of music. So therefore that availability is rewarded in classification. In other words, if you join the Society, your catalogue of various compositions—it may not be popular current hits of the day—but they may have tremendous value to the Society by the nature of their availability, or in other words, what they have made available, not so [fol. 600] much quantity used as something that is used thousands of times, as it is a matter of when users wish that particular type of music, it is there for them to use; and that is what I meant by availability in the catalogue. I mean quantity does not always enter into it, because you may be a publisher of ten thousand little teaching pieces and they may be of no use at all, because users would not care to use little teaching pieces; they would be of no value. Yet if you wanted some Japanese music or some Oriental music, something of that sort to play, which is done all the time, then you have to go to a catalogue which has that type of music.

Q. I take it then from what you have said that the purpose of the classification is to assist in distributing the income of the Society to the respective publishers?

A. That is right.

Q. How many publishing members are there in the ASCAP?

A. Well, I think in the neighborhood of 110; there may be one or two more added lately.

Q. Do those publishers frequently own additional publishing companies for catalogues which they have acquired?

A. You mean is there more than one publisher and one publisher owns two or three catalogues?

[fol. 601] Q. Yes.

A. Yes, there are several instances.

Q. What percentage, in your opinion, of the available usable music in the United States is controlled by those publisher members?

A. Of course, it is only controlled by—the music is only controlled by the Society; it is the music of the thousands of writers who are members of ASCAP and, of course, they are the leading writers of the country. There is the music of Herbert, Friml; there is a tremendous amount of music which is in the public domain, like Beethoven's music, Chopin, or the works of all the old authors. Those people are not members of ASCAP.

Q. You have stated that your company, G. Schirmer, Inc., controls about 50,000 compositions?

A. Different compositions, yes, but I would not say all those 50,000 compositions are of a performing nature.

Q. Now, how many——

A. But you can never tell when somebody might want to perform them. In an old catalogue like ours we naturally have all the classics: Mozart, Beethoven, Chopin, Chaminade, and all great composers, though they are dead. We have arrangements of those things.

Q. Those arrangements are copyrighted?

[fol. 602] A. Those arrangements are copyrighted. We may have a man like Percy Grainger make an arrangement of "Country Garden," "Londonderry Air," and so forth.

Q. The public performance of that comes under the ASCAP license?

A. Yes.

Q. And with respect to publishers and other members of ASCAP, approximately how many copyright compositions are in the repertoire of ASCAP and how many do you think they control?

A. How many copyright arrangements?

Q. All kinds of copyright compositions, whether they have arrangements or are original melodies?

A. I could not answer that question offhand.

Q. Well, if you control 50,000 compositions yourself, and there are somewhat over 100 other publisher members in ASCAP——

A. Some publisher members of ASCAP have more than 500 compositions, some 200, and some 100 compositions.

Q. I thought you testified that in connection with the Availability Committee, you stated the availability of the material——

A. That is true of that 110 publishers. There are a great many smaller publishers. There are some publishers who [fol. 603] have only twenty works, or twenty-five works—very small publishers.

Q. Let's take some of the larger publishers: what is the availability in the Harms catalogue?

A. That is the largest of all of a certain nature, because it controls more musical comedies and plays than any publisher in the country. Harms has specialized in opera all their career. They have control of all those works of Kerns and Cole Porter; they have been the largest publishers in the country of that type of work.

Q. About how many compositions would you say they control?

A. Well, you see, that depends upon how many compositions are in the score. They control the score, and some scores contain more numbers than others. They are not all the same number; there are thirty numbers in some scores and in some there are ten numbers. How many scores and operettas they control I really don't know, because I have never——

Q. From your investigation for the Availability Committee, can you give us some idea of approximately what they control?

A. It must be on an average, since they have been members, they must publish on an average of at least 1,000 plays, [fol. 604] I should say. Some of these plays are not successes on Broadway; a few years later a composition comes out from one of those scores, sometimes a score which may have reached only a week or two and closed, a Broadway production, and then later something from that score becomes extremely popular.

Q. Is Harms as large as G. Schirmer in the quantity of stuff they control?

A. No. They are larger in the type of things they control, but they have general color, such as Friml's rights.

Q. Would you say that they are about half the size of Schirmer?

A. I don't know whether you are speaking of business that is done in dollars and cents, or whether you are speaking in quantity of material.

Q. I am speaking of material which——

A. No, they are not half the size of Schirmer, by any means; but, you see, this is particularly from the volume of business done. Music of the type which a publisher publishes, is sold for a great deal more than the little easy teaching piece. If you buy a composition from an operetta you will probably pay a great deal more for it than if you are buying a little teaching piece for five or ten cents. If you buy one of these operas you pay something like 40 to [fol. 605] 50 cents. So far as one concern is able to do more than someone else—if you are selling a few choruses to a church you do not get very much for them; if you have a choir in the church you can buy church music very much cheaper than production music.

Q. From your knowledge as a member of the Availability Committee, would you say that they would control one-third as much as Schirmer?

Mr. Frohlich: I object to that. The witness has testified he cannot tell you exactly how much their catalogue is in comparison with Schirmer's.

A. It is a different type of catalogue. It is highly specialized in a certain field.

Q. What is the classification of Harms by ASCAP for the purpose of receiving income?

A. Well, they have the highest classification of any publisher.

Q. Now, can you give us an idea of how much is controlled by Witmark?

A. Witmark controls the majority of the Victor Herbert works. They also are specialists in that type of composition. I should say that they are one-half of what Harms would be; it depends very much more upon the nature of the works which these catalogues control than on who the authors are. If you have a catalogue of Victor Herbert, you

[fol. 606] have a catalogue because Victor Herbert was one of the great writers of the day and is still in vogue, whether he is alive or dead. The Witmark catalogue just takes in the old compositions, never had any words to it. Witmark has just taken a composition which never had words to it, a melody of Herbert's called "Summer Serenade," and published within the last couple of months with words, somebody wrote the words to it, and the Victor Herbert melodies become known as the Number One hit of the day.

Q. Let me put the question in another form. From your knowledge acquired in connection with the Availability Committee, would you say that substantially all of the music in a form suitable for public performance for profit is contained in the ASCAP repertoire, as represented by the respective publishers and other members?

A. Now, just repeat that question.

Q. (Question repeated.)

A. Well, the answer to that would be Yes.

Q. Mr. Schirmer, does G. Schirmer sell recording rights to motion picture producers for incorporation in motion pictures?

A. We have licensed motion picture producers to use some of these musical plays, which are produced as plays and then become pictures.

[fol. 607] Q. Do you license the separate copyright works which G. Schirmer has acquired for incorporation in pictures as background music or for other purposes?

A. Yes.

Q. How do you arrive at the price you charge motion pictures companies for the right to record a particular number on the sound track of film?

A. It depends entirely upon the type of the composition and who the composer is. In other words, if you were buying a picture and you wanted to use a composition, "On the Road to Mandalay," and I know as a matter of fact that the producer of the picture comes to you just because you have that particular work and he cannot use anything else in the place of "On the Road to Mandalay;" or if there is a song he wants to use called "I Love you Truly," the director says "I want to use 'I Love You Truly,' " and there is no substitution for that, that is worth a great deal to a motion picture producer.

Q. You fix a price then on each individual composition?

A. Together with the composer; that is a matter in which

he is interested. We naturally will tell the composer we have an opportunity to place his composition in such a film and he will say what he values that at. Together we ar- [fol. 608] rive at a figure.

Q. Is that a common practice, so far as you know, with most music publishers?

A. Well, I don't know very much about how the other publishers do it; that's the way we do it. We have no affiliation with motion picture producers; we have no blanket contracts with them at all. They have the right to use our things. If it is just a little background music there would be a different price for it than for a standard work of importance.

Q. Do you also license the recording of your compositions for what are termed electrical transcriptions?

A. Yes.

Q. How do you arrive at the price you charge for recording on electrical transcriptions?

A. Well, that too, again depends upon the nature of the work. If it is an important work we ask more for it than if it is something not so important. Again, if you want an electrical transcription of something of Victor Herbert's or Rudolph Friml's, or compositions which have a national reputation, you will have to pay more for it than for something that is unknown.

Q. Do you make an individual contract each time in connection with your recording of a number on an electrical [fol. 609] transcription?

A. We usually make an individual contract, and then we make that contract. Suppose you wanted to broadcast something, say "On the Road to Mandalay," or on some such composition, we don't then charge you a different fee for that again; we charge you the same fee; if you were using it twenty times you are paying that same fee when we once agree with you what you are to pay for it; that is, for that particular transcription. I mean if you are evidently going to use that electric record over certain air stations, once you agree to pay for it, you will pay that fee, but you have to negotiate for that fee.

Q. Does that fee vary as to the quality and type of each individual number that is involved?

A. That is right.

Q. Each transcription is a separate transaction?

A. That is the way it is handled.

Mr. Boggs: When your firm obtains a copyright it receives a card from the Copyright Office, recording the fact that that copyright is registered; isn't that so?

The Witness: Yes, sir.

By Mr. Boggs:

Q. What do you do with those cards?

[fol. 610] A. Those cards are kept in our office.

Q. You have a regular file in which they are kept?

A. Yes.

Q. And that would be true with regard to all of your copyrights, wouldn't it?

A. Yes, we would have a record of it.

Q. And that card would show the date of the copyright and the name in which it was registered, wouldn't it?

A. That is right.

Q. And would show the number of the copyright?

A. The Government issues a number for each card.

Q. And then you have a different system of numbering of your own?

A. Yes, our numbers of compositions do not tie up with the register number at all.

Q. But you preserve all those cards which you receive from the Copyright Office?

A. I don't know how far back we have got them; I can't tell you that every card is there, because I know that is not so.

Q. Still that is the regular practice of the office?

A. That is the regular practice. I do not think the Government issued cards all the time. They didn't always issue copyright cards. There was one time they used to send you [fol. 611] the music back and write something on it; it wasn't always that they issued cards. Just how long the Government has been issuing cards I don't know offhand.

Q. Do you keep something in the nature of a register of composition which your firm owns?

A. Yes.

Q. What information is shown on that register?

A. The title of the composition and the plate number of it; that's all.

Q. Does it show the name of the author and composer?

A. Whether that is in the register or not I couldn't say. I don't think it is. That would be in the contract, and I

know when we want to find out something we have to look at the plate number and we have to go and find out from that who the composer is.

Q. To what do you refer as the plate number?

A. On the copy, on the music, is printed a plate number and, as you go along, you add to that. For instance, if it is 25,000, then the next one is 25,001, going right along.

Q. Those are numbered consecutively?

A. Yes.

Mr. Boggs: That is all.

(A recess was taken until 2:30 o'clock p. m.)

[fol. 612] After Recess.

Saul H. Bornstein, called as a witness in behalf of the Complainants, having been first duly sworn, deposes and says:

Direct examination.

By Mr. Frohlich:

Q. What is your full name?

A. Saul H. Bornstein.

Q. Where do you reside?

A. New York City, 14 East 75th Street.

Q. With what firm are you connected?

A. Irving Berlin, Inc.

Q. Is Mr. Irving Berlin also a director and officer of that corporation?

A. Yes, sir.

Q. Have you been associated with him in that corporation for many years?

A. I have been associated with the company since its inception.

Q. How long has that been?

A. 1919.

Q. What is the business of that company?

[fol. 613] Q. Does it specialize in the publication of any particular kind of music?

A. Not necessarily.

Q. Can you tell us just briefly what kind of music it does publish?

A. It publishes particuoarly popular music and production music, and some standard music.

Q. Now, by production music, just what do you mean?

A. Songs that are written for a dramatic show, a musical production.

Q. Now, have you from time to time published any so-called hit numbers?

A. Yes, sir.

Q. Has Mr. Irving Berlin turned over his compositions to your company for publication?

A. Yes, sir.

Q. And your company publishes all of his music?

A. Yes, sir.

Q. Have some of his compositions been popular?

A. Yes, sir.

Q. Have they achieved outstanding popularity?

A. Great popularity.

Q. Now, can you name some of the earlier compositions published by you prior to 1923 that were very popular [fol. 614] and big hits?

A. Well, you mean both production and popular?

Q. Both.

A. The songs in the various Ziegfeld Follies productions; the songs in the scores of the Music Box Revues; such songs as "My Mama"; "Put Me To Sleep In My Old Kentucky Home"; "You'd Be Surprised"; "I've Got My Captain Working For Me Now." Shall I keep on giving them?

Q. Yes, please.

A. "Nobody Knows and Nobody Seems to Care." Did you say 1923?

Q. Yes, prior to 1923.

A. I would have to go back to that list; hundreds, hundreds of them.

Q. Which ones of those that you have named sold as high as a million copies of sheet music?

A. "Put Me To Sleep In My Old Kentucky Home"; "Mamy".

Q. Now, can you name some of the numbers that you published after 1923 that were outstanding hits?

A. Yes, sir. "What'll I Do?"; "All Alone"; "Yes, Sir, That's My Baby;" "When You and I Were Seventeen;"

"Yearning"; "Oh, How I Miss You To-night." Do you want some more?

Q. No, that will be sufficient. Did any of those numbers [fol. 615] sell as high as a million copies?

A. Yes, sir.

Q. Which?

A. Most of them.

Q. I am speaking of numbers after 1923.

A. Yes, sir. Oh, 1923? Well, 1923 to about around—1923 to 1924, after that they didn't sell quite so much.

Q. And what has been your experience with respect to the sale of sheet music before 1923 and after 1923?

A. Before 1923 a successful song hit would sell between a half million and a million and a half copies. We could sell a great many songs, to the extent of about 100,000 copies, that were not considered hits.

Q. Now, after 1923 what was the situation?

A. After 1923 those songs that we could get about 100,000 sale out of disappeared, or sold perhaps five or ten thousand copies, and the million copy hits vanished, with probably a rare exception here and there, none of which I can think of at the moment.

Q. And what would you say that was due to, Mr. Bornstein?

A. That was due to the radio, in my opinion.

Q. I neglected to ask you what office you occupy with the Irving Berlin Company, Inc.?

[fol. 616] A. I am the secretary, the treasurer and the general manager.

Q. Have you charge of the publishing of the compositions?

A. I have charge of everything that comes under the general manager duties.

Q. Now, with respect to mechanical reproduction rights of your compositions prior to 1923, can you tell us what amount of money on the average you received from the manufacturers of rolls and records on hit numbers?

A. You mean in bulk?

Q. In bulk.

A. Prior to 1923 Irving Berlin, Inc. had a revenue from mechanical reproduction that was approximately $400,000 a year.

Q. And what has been its average yearly income from

mechanical royalties on its compositions since 1923 down to the present time?

A. It has dropped down to approximately 5 to 10 per cent, between 5 and 10 per cent of that amount.

Q. And do you attribute that diminution in revenue to the same source, radio?

A. I do.

Q. Now, in the publishing of your compositions, have you [fol. 617] particularly restricted the performances of those compositions?

A. Yes, sir.

Q. In which particular compositions as a rule do you restrict?

A. Production numbers.

Q. Is there any particular reason for restricting such numbers?

A. So as to prevent the over-rendition of the so-gs from a musical production, so that they would not compete with the production itself.

Q. Now, you entered into contractual arrangements with the writer and composer. Will you just please briefly state the mechanics of it, just what happens when a man walks into your office with a composition.

A. You want the story of what happens to a song?

Q. Yes.

A. Songs are submitted to Irving Berlin, Inc., either to the professional exploitation manager or one of his lieutenants, and sometimes directly to me; but in all cases the song must receive my approval before it is published. If we like the manuscript we give the writer a contract and send him in to our arranging department. The chief arranger takes down the melody and makes a piano part, from which we [fol. 618] print up what is known as professional artist's copy; at the same time the chief arranger makes a vocal orchestration in the various keys, and a dance orchestration arrangement, and suitable also to band arrangement. All this material is printed up and sent to our branch professional departments throughout the country, as well as in the home office, and in these various places we have a staff of contact men, whose job it is to contact the various artists and find out if the song is suitable to them and whether they are interested in doing the song. Sometimes a song will be tremendously performed, but will not sell.

Q. Now, in contacting performers of these compositions, do you distribute professional copies?

A. Yes, sir.

Q. Are these distributed gratis?

A. Yes, sir.

Q. Is it necessary in the conduct of your business to distribute these professional copies?

A. Yes, sir.

Q. Is that a part of the plug of the song?

A. That is what we call plugging. Plugging, which means exploitation.

Q. Now, you have published a great many compositions [fol. 619] over the years, haven't you?

A. Yes, sir.

Q. Do you know exactly how many compositions you have published?

A. No, sir.

Q. Is there any way in which you could ascertain that information?

A. Well, it would be very difficult to get an accurate compilation of all the compositions we have published.

Q. What would you say is the value of your present catalogue of music in dollars and cents?

A. You mean of our copyrights?

Q. Of your copyrights.

Mr. Boggs: I object to that question on the ground that no proper foundation has been laid.

Q. You may answer it.

A. May I answer it?

Q. Yes.

A. It is my opinion that the catalogue of Irving Berlin, Inc., would be appraised at approximately $2,000,000.

Q. Did Warner Bros., some years ago purchase a catalogue of musical publications in New York City?

A. Yes, sir.

Q. Whose catalogue did they purchase?

[fol. 620] A. They purchased the catalogues of M. Witmark & Sons, Harms, Inc., Jerome H. Remick & Company, and one or two other small subsidiaries.

Q. Do you know what they paid for those catalogues?

A. Yes, sir.

Q. How much?

A. I understand that they paid approximately—of course, I don't know the exact figure.

Q. What is the approximate figure?

A. Approximately $10,000,000.

Mr. Boggs: I object to it.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. When I say you I mean your firm, Irving Berlin, Inc.

A. Irving Berlin, Inc. is a member of the American Society of Composers, Authors and Publishers.

Q. When did it first join up with that Society?

A. In 1919.

Q. Has it been a member since then continuously?

A. Yes, sir.

Q. What moneys did your company receive from anybody, any person, firm or corporation, or from any source whatever for the public performance for profit of your com-
[fol. 621] positions prior to 1914?

Mr. Boggs: The question is objected to on the ground it is immaterial and irrelevant.

Mr. Frohlich: You may answer.

A. None. Nothing.

Q. When for the first time did your company receive any revenue for the public performance for profit of your compositions?

Mr. Boggs: The same objection.

Mr. Frohlich: You may answer.

A. When did the American Society pay it to us? I think that was in 1921.

Q. And has Irving Berlin, Inc. been in receipt of revenues from the American Society of Composers, Authors and Publishers for those rights since 1921?

A. Yes, sir.

Q. Are those payments made on some regular basis?

A. Yes, sir.

Q. How, particularly?

A. Quarterly.

Q. Can you tell us on an average how much Irving Berlin, Inc. received for the last five years from the American Society of Composers, Authors and Publishers?

A. Approximately $500,000.

[fol. 622] Mr. Frohlich: It is Stipulated that Irving Berlin, Inc. entered into an agreement with the American Society of Composers, Authors and Publishers in July 1935, identical with Plaintiffs' Exhibits 2 and 4.

Q. Now, do you regard that contract with the American Society as valuable to Irving Berlin, Inc.?

A. Extremely so.

Q. Would you want that contract between Irving Berlin, Inc. and the American Society of Composers, Authors and Publishers annulled and voided?

A. Definitely not.

Q. Would you want Irving Berlin, Inc. to give up their membership in the Society?

A. No, sir.

Q. Would you want to continue to be a member of the Society in the future?

A. Yes, sir.

Q. And do you want to be free to make future contracts with the American Society of Composers, Authors and Publishers similar to those now existing?

A. I could not remain in the music publishing business if I did not receive such revenues from the American Society.

[fol. 623] Q. Is the revenue from the American Society today one of your chief sources of revenue?

A. It is the chief source.

Q. In your contracts for the mechanical reproduction of your musical compositions, how much do you receive from these mechanicals, for each composition; on what basis do you contract for them?

A. For the mechanical reproductio. of our songs we receive from one-quarter cent per side of a record up to two cents per side of a record.

Q. Do you give any part of that money to the respective authors and composers of the compositions?

A. Yes, sir.

Q. On the average how much do you give them?

A. At the present time they receive 50 per cent.

Q. When the author and composer makes a contract with you for the publication of the composition, who obtains the right to secure the copyright of that composition?

A. The author.

Q. The right to secure the copyright?

A. Irving Berlin, Inc.

Q. And do you invariably secure such copyright in the name of Irving Berlin, Inc.?

[fol. 624] A. Yes, sir.

Q. And with respect to the compositions that you publish do you presently own any great percentage of the actual copyrights of your compositions?

A. Yes, sir.

Q. When you make an arrangement with the manufactu-er of the mechanical records or rolls for your compositions, do you make any restriction or condition with respect to the sale of those records or rolls?

A. No, sir.

Q. And when those records or rolls are manufactured pursuant to the license that you grant, do you have anything to do with the sale or exploitation of those records or rolls?

A. No, sir.

Q. Have you any control over the public performance for profit of those compositions from the records or rolls?

A. No, sir.

Q. Could you prevent the manufacturer of rolls or records from taking those records or rolls into the State of Florida?

A. No, sir.

Q. Could you compel the manufacturer of records or rolls [fol. 625] to fix a schedule of prices with respect to the public performance for profit of those records or rolls in the State of Florida?

Mr. Boggs: The question is objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. Now, have your comp-sitions appeared from time to time on the radio?

A. Yes, sir.

Q. Have they been performed by other users of music as well?

A. Yes, sir.

Q. Have you heard them performed over any network of the National Broadcasting Company?

A. Yes, sir.

Q. And have you heard those compositions performed over the network of the Columbia Broadcasting System?

A. Yes, sir.

Q. And have you heard those performances over the air frequently?

A. Yes, sir.

Q. Have you ever been to Florida?

A. Yes, sir.

Q. Have you, while in Florida, heard your compositions [fol. 626] performed by radio?

A. Yes, sir.

Q. Also in hotels?

A. Yes, sir.

Q. Also in restaurants?

A. Yes, sir.

Q. Can you tell us your most recent visit to Florida: when was that?

A. Last week.

Q. Can you tell us the names of the particular compositions you heard performed in Florida last week?

A. Yes, sir.

Q. Will you please state the names.

A. "Punchinello"; "It's a Blue World"; "A Pretty Girl is Like a Melody"; "Say It With Music"; "You'd Be Surprised." Do I have to go on?

Q. Yes.

A. "Pinocchio," and there were others.

Q. Were any of those songs that you have just mentioned performed over any radio broadcasting station in Florida?

A. Well, I heard most of them over the radio.

Q. And can you identify the particular radio station?

A. No, sir.

[fol. 627] Q. Now, let me direct your attention, Mr. Bornstein, to House Bill No. 1103, the New Florida Law of 1939, particularly to Section 2, which reads as follows:

"Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copy-

right, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copy-[fol. 628] right to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

"(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal."

I now ask you, Mr. Bornstein, having heard the section read, whether you could compile the list described here in this section.

A. I don't think I could.

Q. Can you tell us why?

[fol. 629] A. Well, do I understand your question correctly to state that I have to make a compilation of all the numbers I have published?

Q. Would you desire to make available to the user in Florida such a list?

A. Well, that is, all the numbers?

Q. Yes, that is right.

A. What else must I do?

Q. Then in compiling the list, you have to give the name, title of the composition, date of the copyright, the number or other identifying symbol given by the United States Copyright Office, the name of the author, the name of the publisher, the name of the present owner of such composition, the name of the present owner of the performing rights thereto——

A. I could do that to some extent, of course; but it would be an awfully difficult job. It would be something that I could not give accurately. I could never swear to the accuracy of that kind of a compilation.

Q. Could you make an affidavit to that compilation?

A. No, sir.

Q. What do you estimate the cost would be to make such a compilation of your catalogue?

[fol. 630] Mr. Boggs: I object; no proper foundation has been laid for the question.

A. I have no idea.

Q. Now, could you make an affidavit at the present time with respect to your compositions that your publishing firm is the present owner of the performing rights in such compositions and has full license to sell or otherwise dispose of same?

A. Do I understand you correctly to say where our company owns the performing rights?

Q. No. Could you make an affidavit to the effect that your company now owns those performing rights and can license them?

A. No, sir.

Q. Who owns those rights today?

A. Well, there is a question as to who owns them.

Q. The question is between whom?

A. The writer and the publisher.

Q. But who, as a practical matter, disposes of those rights today?

A. The publisher, the copyright owner.

Q. To whom does he dispose of them?

A. To ASCAP.

Q. And is ASCAP the one who licenses these rights?

[fol. 631] A. Yes, sir.

Q. Now, could you prepare a schedule of prices for the public performance for profit of your compositions in the

State of Florida with respect to establishments or users in the State of Florida at the present time?

A. Will you repeat that, please.

Q. Could you prepare a schedule of prices for the performing rights of your compositions with respect to the users of Florida?

A. No, I could not.

Q. What information would you have to have if you tried to prepare a schedule of prices for the users in Florida?

A. Well, I would have to know the different prices to charge for the different compositions, because certainly one composition may be worth more than another.

Q. Would you also have to have information with respect to the users of the establishment?

A. I certainly would; whether it is a large, important establishment or an unimportant use.

Q. Would the fluctuation in the business of these users have a bearing on the price to be charged?

A. Definitely so.

Q. Could you at this time fix definitely a price for the [fol. 632] public performance for profit of your compositions in Florida with respect to television?

A. No, sir.

Q. Have you available any information with respect to television?

A. None.

Q. Could you at this time fix a price for the public performance for profit of your compositions in the State of Florida with respect to some of the uses that might be made, mechanical or otherwise, in the years to come?

A. No, sir.

Mr. Frohlich: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. I wonder if you would amplify slightly the term "plug," stating just what it includes.

A. Plug means to get the material of the musical composition in presentable form for artists or instrumentalists to use, and then the contact man or salesman or representative demonstrates the song, or shows the song to the artist.

Q. Does Irving Berlin, Inc. urge artists, broadcasting

stations and other users to perform their musical com-
[fol. 633] positions?

A. I would say that they do not urge; I would say that they show true merchandise.

Q. Isn't it a fact that Irving Berlin, Inc., maintains in its plugging department contact men who go around to the NBC and Columbia studios here in New York, and other broadcasting companies, requesting the performance of Irving Berlin numbers?

A. Let me answer it this way. They'd go around and contact the artist, and they'd follow up that artist, because of first showing their song to that artist—and usually the artist has some querry, or some question, or a request for a change of arrangement of some certain thing in connection with the artist desiring to sing the song, who suggests these things to the contact man from keeping in contact with the artist.

Q. Does he not also call on the programming department of various broadcasting stations requesting that they include certain numbers which Irving Berlin desires to plug to those in control of the programs of the stations?

A. Yes, sir, only if they have shown them the song first—shown the song first to the artist or the program builder—and request a follow-up as to the date he will do it or may do it.

[fol. 634] Q. But they do urge the station to include particular songs in programs, do they not?

A. When you say "urge," do you mean to say urge contrary to the wish of the one that is to sing it, or do you mean they contact them, showing them the merchandise and then ask them when they are going to sing it? In other words, I mean this: speaking very plainly, if I may——

Q. We want facts. The Court doesn't understand the meaning of the special terms.

A. We are in the business to publish music and receive from the publications all the revenue we can. The artist is in his business to sing or play music and he must have me and, necessarily, I must have him. Now, you can change that about any way you choose as to the contact. That's it.

Q. Don't you know, as a matter of fact——

A. When I say—please let me finish—when I say must have him, I don't mean to say that we could not do without him, because we could—we did very much better without him before radio than since radio.

Q. Don't you know that, as a matter of fact, in the preparation of programs to be broadcast over the air, the Program Department of the National Broadcasting Company prepares a program for the station there in that network, [fol. 635] and that the Program Department of the Columbia Broadcasting System prepares a program for the Columbia Broadcasting System?

A. Not always; in rare instances.

Q. In most instances?

A. As a rule, no; I would not say in most instances. I would say, as far as my experience goes, that the program is invariably arranged, if it is a sponsored program, by the sponsor's representative, and if it is a sustaining program, by the orchestra leader or the vocalist.

Q. Don't you know that that is in conjunction with the Program Department of the respective stations?

A. No, I don't understand that. I understood you to say that the broadcasting Program Department made the programs up of their own choosing.

Q. That is true.

A. I do not know that to be a fact.

Q. Is it not a fact that Irving Berlin sends letters all over the United States to Broadcast stations requesting the performance of particular numbers which they desire publicized?

A. That is not true. They send letters all over the United States calling the attention of all singers and instrumentalists as to the merchandise that they have to offer for [fol. 636] their consideration.

Q. Are not those letters sent directly to the broadcast stations throughout the United States? and not to the singers?

A. It may be possible, but I am inclined to believe that our company does not do that; I believe with our company it is sent to the artist or the orchestra leader.

Q. Is it not a fact that Irving Berlin, Inc. sends such letters to broadcasting stations located in the State of Florida, requesting the performance of particular numbers?

A. It may very well be, but I have no recollection of the letters going to the stations. My instruction has always been to contact the singer or the orchestra leader. But you may be right.

Q. Are you a member of the Board of Directors of ASCAP?

A. Yes.

Q. How long have you been a Director?

A. Since 1919.

Q. Are you on any committee of ASCAP, such as the Rate Committee or Membership Committee?

A. Yes, sir; I am on the Foreign Relations Committee.

Q. What other committees are you on?

A. No other.

[fol. 637] Q. Does Irving Berlin, Inc. sell the recording rights to motion picture producers for incorporation on the sound track?

A. That would be known as synchronization rights; we license some of our work for synchronization use of motion picture producers.

Q. How do you determine the price to charge a motion picture producer for the right to record a particular number?

A. We take into consideration the importance of the composition and the importance of the use.

Q. In each case you determine the factors surrounding the particular number?

A. Yes, sir.

Q. And determine the price which you are to charge a producer; is that correct?

A. That is correct. I want to amplify this answer, by saying that this is with respect particularly to vocal rendition. As to what is called an atmospheric instrumental use, there is generally about the same price charged.

Q. When you say atmospheric instrumental use, do you mean what is commonly called background music?

A. Yes, sir; of that nature.

Q. Does Irving Berlin, Inc. license the recording rights to record on electrical transcriptions?

[fol. 638] A. Yes, sir.

Q. How do you determine the price to charge for the electrical transcription recording?

A. Well, we charge on electrical transcription, for a production number, I think it is 50 cents, and for a non-production number 25 cents.

Q. Is that price uniform?

A. I think so.

Q. How did you come to decide on that price?

A. That was, I think, at the suggestion of the electrical transcribers at a meeting that I attended many years ago.

Q. Are you referring to the meeting which took place in 1930?

A. It may have been 1930.

Q. Is Irving Berlin, Inc. a member of the Music Publishers Protective Association?

A. Irving Berlin, Inc.?

Q. Irving Berlin, Inc.

A. It is now a member.

Q. Was it a member in 1930?

A. I think so, but for a period of time, in between 1930 and today, they were not members of the MPPA; I don't remember the exact years.

Q. Were you a member of the Board of Directors of the [fol. 639] Music Publishers Protective Association?

A. Yes.

Q. Were you at any time—Question withdrawn.

Q. Were you a member of the Board of Directors in 1930?

A. I think I was.

Q. As a member of the Board of Directors, do you recall a meeting of the Music Publishers Protective Association in 1930, at which the question of licensing electrical transcriptions was discussed?

A. No.

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial and not within the issues here.

The Witness: I don't remember.

Q. Do you recall any discussions at that time——?

Mr. Frohlich: Same objection.

Q. —with regard to the determination of the price to be charged electrical transcription companies for the privilege——

A. No.

Q. —of recording——

A. You're not——

Mr. Frohlich: Same objection.

[fol. 640] A. You are not speaking now of the Board of Directors of the MPPA?

Q. Yes, sir.

A. No, sir.

Q. Let me put the question in another way. Do you recall a meeting or meetings attended by the leading publishers of popular music at which the price to be charged electrical transcription manufacturers was discussed?

Mr. Frohlich: Same objection.
Mr. Bennett: What is your answer?

A. No, I don't recall that. I have a recollection of having talked to the electrical transcribers, but I don't remember if any publishers were present at that time.

Q. Do you know Mr. John Payne?
A. Yes, sir.

Q. Was Mr. John Payne chairman of the Board of Music Publishers Protective Association?
A. Yes, sir.

Q. Do you know when he became chairman of the board?
A. No, sir; I don't remember.

Q. Do you recall whether he was chairman of the board in 1930?

A. I don't recall that; either he was or E. C. Mills was, but I don't remember which one.

[fol. 641] Q. Do you recall any meeting you attended with Mr. John Payne at which the price to be charged electrical transcription manufacturers was discussed?

Mr. Frohlich: The same objection.

A. No, I was not; I don't recall.

Q. You stated that a charge of 50 cents per production number is charged electrical transcription manufacturers?
A. I believe so.

Q. Is that 50 cents to transcription manufacturers for rendition of each transcription, or does it cover the entire recording?

A. Well, they might——

Mr. Finkelstein: I wonder if you could tell me the relevancy of this.
The Witness: Can this be off the record for a minute?
Mr. Bennett: Yes.

(Discussion off the record.)

A. I have no personal knowledge of it, as that is handled by a special department.

Q. Mr. Bornstein, when you copyright a musical composition do you receive a card or other evidence of copyright from the Copyright Office in Washington?

[fol. 642] A. Yes, sir.

Q. What form is that in: is it a card or what?

A. It is a card; yes, sir.

Q. What do you do with those cards after you receive them?

A. We have them; they keep them.

Q. You keep them in a card index file?

A. In a card index file; yes, sir.

By Mr. Boggs:

Q. Reverting back to these plug agents that you said your company, Irving Berlin, Inc., makes use of to contact artists——

A. That's right.

Q. —do you have them only in New York City or do you have them in other places as well?

A. We have them in other places as well.

Q. A number of other places, or just a few?

A. A few.

Q. And are those people employees of your company?

A. Yes, sir.

Q. Can you recall some of the places where you have them?

A. Certainly. We have one in Chicago, one in Hollywood, one in Boston, one in Cleveland; I think that is all of them.

[fol. 643] Q. And those people, I presume, must be familiar with all the important parts of your catalogue, the plug agents?

A. Yes. Those people are particular- familiar with the current catalogue and have a fair knowledge of the general catalogue, a fair knowledge.

Q. And they make their own contacts with the producers or the renderers of the music, the artists?

A. The artists, yes.

Mr. Boggs: That is all.

Mr. Bennett: That is all.

Mr. Frohlich: That is all.

(Witness excused.)

GEORGE W. MEYER, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Finkelstein:

Q. What is your name and address, Mr. Meyer?
A. George W. Meyer, 205 West 57th Street.
[fol. 644] Q. New York City?
A. New York City.
Q. What is your occupation or profession?
A. Songwriter.
Q. Do you write the lyrics or the music?
A. The music.
Q. How many years have you been a composer?
A. About 35 years.
Q. I show you what purports to be a list of compositions——
A. No, about 30 years.
Q. —of George W. Meyer, and ask you whether those compositions are works of which you composed the music.
A. Do you want me to look at every title?
Q. Well, you just glance through it and see if those are you- compositions.
A. I guess these are mine. Whether that is a complete list or not I don't know.
Q. Are the works listed on this list your works?
A. Yes.

Mr. Finkelstein: I offer the list in evidence.
Mr. Boggs: No objection.

(List received in evidence and marked Complainant's Exhibit 10 of this date.)

[fol. 645] Q. Can you tell us some of your more popular compositions?

A. "For Me and My Gal"; "When You're a Long, Long Way From Home"; "My Mother's Rosary"; "Tuck Me To Sleep in My Old Kentucky Home"; "Everything is Peaches Down in Georgia"; "Brown Eyes, Why Are You Blue?" "Tenn, Tenn, Tennessee"; "Sitting in the Corner"; "I Believe in Miracles"; "Song of the Nile." Is that enough?

Q. Yes. Did you have any composition the sales of which were in excess of a million copies?

A. Several. "For Me and My Gal" sold about three million copies. "Tuck Me to Sleep in My Old Kentucky Home" sold three million copies, or around that. Most of those all sold over a million copies.

Q. About what was the sale of "When You're a Long, Long Way From Home"?

A. About 1,200,000 or 1,300,000 copies.

Q. Now, when were those compositions published; can you give us the years when some of those compositions were published?

A. "For Me and My Gal"—I'll be within a year of it——

Q. Take first those before 1923. You can use Plaintiffs' Exhibit 10 to refresh your recollection, as to some of your hit numbers published before 1923.

[fol. 646] A. "For Me and My Gal," that was in 1917. "Tuck Me to Sleep in My Old Kentucky Home," that was in 1921. "My Mother's Rosary," that was in 1915.

Q. What would you say was the average sale in sheet music of your hit numbers before 1923, hit numbers of the type you have just mentioned?

A. Oh, I would say they would average about 1,500,000 copies.

Q. Have you had hit numbers since 1923?

A. Oh, yes.

Q. What has been your experience with respect to the number of sales of sheet music since 1923 down to the present time?

A. Oh, no comparison. For instance, "I Believe in Miracles," which was quite a hit, it was considerable of a hit enough, that in the old days, well, you would have said that song would have sold a million copies; yet I sold only 110,000 copies.

Q. What year was that?

A. 1930. Then in 1929, I think it was 1929—I will make sure—No, in 1932, "I am Sure of Everything But You," that was quite a hit, and that only sold about 115,000 copies.

Q. Were those songs listed or represented on the Lucky [fol. 647] Strike survey?

A. Oh, yes.

Q. Did they attain Number One popularity on that list?

A. They certainly did.

Q. Is the Lucky Strike survey considered an accurate survey of the popularity of musical compositions?

A. I think it is considered an accurate one.

Q. Are you familiar with the sales generally of music in the profession, that is, music composed and written by other authors?

A. To some extent.

Q. Were the sales of sheet music before 1923, that you say were characteristic, your own compositions, similar with respect to hit numbers of other composers and authors?

Mr. Bennett: I object to that. It calls for information not shown to be within the personal knowledge of the witness. It is hearsay.

The Witness: Shall I answer?

Mr. Finkelstein: Yes.

A. Well, of course, I could not say in actual figures, but from songwriters talking to each other, telling each other information, they average about the same. In fact, I know of one song that has passed a sale of five million copies, [fol. 648] called " 'Till We Meet Again," which was not my song, and it is common knowledge in the music business.

Q. Are you familiar with the number of copies of sheet music of hits sold at the present time?

A. Very well.

Q. Do you know what the average, how many copies the average hit song sells today?

Mr. Boggs: Same objection.

A. The average hit song today has to be a pretty good hit to sell around 250,000 copies. There have been a few of these in the last year that have sold as high as 600,000 copies, but the average is 250,000. That is considered very good.

Q. Would that correspond with what the average was in the period before 1923?

A. It would not correspond at all.

Q. What I mean by my question is, how many copies of sheet music of a corresponding hit number would sell prior to 1923?

Mr. Boggs: Same objection.

A. You mean songs that sell around 250,000?

Q. That is right; that attained the same popularity.

A. Those would be million copy songs; those that go 600,000 would be two and a half or three million.

[fol. 649] Q. There has been a considerable decline in the sales of sheet music since 1923?

A. It is almost nothing; one or two thousand in a song now is terrific.

Q. What did your royalties net you in the period prior to 1923?

A. Well, they were considerably more than at present.

Q. What has been your experience with respect to royalties from the socalled mechanical rights?

A. You mean recently?

Q. Well, say back before 1923.

A. They used to be terrific; almost as big as the sheets.

Q. You mean the revenue from mechanicals was about the same as the revenue from sheet music?

A. I know on my slip I had over 3,000,000 records.

Q. Was that representative of what you had on——

A. No, that was an exceptional case.

Q. Was "Tuck Me to Sleep" the number you said you had about 3,000,000 copies of sheet music?

A. Yes.

Q. About what would the ratio be between the sales of records and sales of sheet music for the average song, that is, take a hit number that sold a million copies, will you tell us about how many.

[fol. 650] A. Sheet music would always be just a little more.

Q. The sales on sheet music would be greater than mechanicals?

A. Yes; a song might sell 1,500,000 copies and you would have 1,000,000 records. And if it happened to be an instrumental type song, it would sell more records than sheet music.

Q. Now, what is the situation today?

A. The situation today is, I have had some phonograph statements for $1.12, $12, $27,—things like that.

Q. Would you know how many records that would represent? Can you reduce that to how much it would make it per record?

A. We get 50 per cent of a cent and a quarter, to be divided among two or three writers, according to how many there would be who wrote that song.

Q. And your total record royalties from certain compositions would be the figures you just mentioned at the present time; is that it?

A. Yes.

Q. Does that represent the general decline in the revenue from the licensing of mechanical rights?

A. Say that again.

Q. Does that represent the general decline that there [fol. 651] has been in the revenue from the licensing of mechanical rights for phonograph records?

Mr. Boggs: The question is objected to on the ground that the witness is not shown to be qualified to answer it.

A. Yes.

Q. That has been your experience; you have written a great many songs?

A. Between 500 and 600.

Q. Over the past 30 years?

A. Yes.

Q. Do you know of any song in recent years that has sold a million copies by any composer or author?

A. What do you mean by recent years; how recent?

Q. Say within the past five or six years.

A. Nothing like it at all.

Q. On what factors, from your observation of the music profession, do you attribute the reduction in the sales of sheet music and mechanical royalties to?

A. The radio.

Q. In what respect does the radio affect the sales of sheet music and mechanical royalties?

A. Because it is unnecessary to buy them, because all you do is go home and turn on the switch and you have [fol. 652] music for hours.

Q. And have you observed the length of time during which a song is popular at the present time as compared with the period prior to 1923?

A. Yes, I have.

Q. What has been your observation in that respect?

A. Oh, between six weeks and three months. An exceptional song would last maybe three months, the average song six weeks.

Q. That is at the present time. What was the life of a song prior to 1923?

A. Oh, a year, a year and a half.

Q. Can you tell us what factors have been responsible for the shortened life of a song?

A. The same fact, continuous use on the radio.

Q. You say the constant repetition on the radio affects the life of a song. Will you tell us how that happens?

A. What do you mean, how that happens?

Q. From your knowledge of music and the factors that make music popular, and so forth, please tell us why.

A. The fact that they are repeated so often, pounded so often. The orchestra leader himself gets sick of playing it too long.

[fol. 653] Q. Does the constant repetition of songs affect the desire of the listener to have the song played?

A. It must, because they don't buy it.

Q. Under your practice with the publishers of your compositions, does your publisher agree to pay you anything for the right of public performance for profit?

A. No.

Q. Do you assign that right to your publisher?

A. No.

Q. Have your contracts with your publisher been oral, in writing, or will you tell us how your contracts have been made?

Mr. Bennett: I object. The contract is the best evidence.

A. When I was with Watterson, Berlin & Snyder, I never had a contract; we just did business on our word. I was with him two or three years.

Q. Approximately how many songs did you turn over to Watterson, Berlin & Snyder on that basis?

A. I should say between 30 and 40.

Q. Is Watterson, Berlin & Snyder still in business?

A. No, Watterson is no longer alive.

Q. Is Watterson, Berlin & Snyder a corporation?

[fol. 654] Were they?

Q. Yes.

A. I could not say.

Q. What happened to that business?

A. Their catalogue is now in the possession of Jack Mills, except the numbers that Berlin wrote, which he bought from Watterson.

Q. Do you know whether they went into bankruptcy?

A. Yes, they went into bankruptcy.

Q. Have you turned over compositions to any other publisher under an oral agreement?

A. Very often.

Q. Have you transferred to any of your publishers your right for public performance for profit?

A. No.

Mr. Bennett: Same objection.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Mr. Finkelstein: May we stipulate that the contract between Mr. Meyer and the American Society of Composers, Authors and Publishers is identical with Plaintiffs' Exhibits 2 and 4 in evidence.

Mr. Boggs: Yes.

[fol. 655] Q. Have you ever been in the State of Florida?

A. In 1923.

Q. Did you hear your compositions played in that State?

A. I'll tell you truth, I didn't pay much attention; I was very ill at the time.

Mr. Bennett: There wasn't any broadcasting at that time.

Mr. Finkelstein: I didn't say broadcasting.

The Witness: I was laid up most of the time.

Q. Are your compositions being performed by the national networks of the National Broadcasting Company and the Columbia Broadcasting System and the Mutual Broadcasting System?

A. They are.

Q. Are those performances being made constantly?

A. They are.

Q. Can you at the time your compositions are written or published determine a price for performances and for all uses in the State of Florida?

Mr. Boggs: The question is objected to as incompetent and irrelevant, and not being required by the terms of the statute.

A. I have to give it under oath, but I don't know now [fol. 656] I could do it, offhand. I think I would have to consult an attorney and the collaborators of my songs and the publishers.

Q. Do you know when a song is written or published what popularity that song will attain?

A. I do not.

Q. Would the prices you would charge for the performances be the same in all 367 places that now are licensed by the American Society of Composers, Authors and Publishers in the State of Florida? Or would your price, if you could fix one, be different for each of those places?

A. I think it would have to be different.

Q. Would you have to make an investigation of each of those places to determine the price to be charged?

A. I certainly would.

Q. Would you have to consult with your collaborators and publishers after having made that investigation to attempt to fix a price?

A. I would have to.

Q. Could you, after that investigation was made, fix a price that would be effective for the future, or would your price have to be limited to the conditions that your investigations determined at the time of your particular investigation?

[fol. 657] A. To the investigations I made at that particular time; and by that time my song might not be of any value; and when I finished with that I would have to go through with it again on a new song.

Q. Would you take into consideration the number of persons present at the performances?

A. Certainly.

Q. In fixing a price?

A. Certainly.

Q. Would you want to take into consideration the admission charged, if any?

A. Yes.

Mr. Boggs: The question is objected to on the ground that the questions are obviously leading.

Q. Can you state some of the other factors that would have to be taken into consideration?

A. I would have to take into consideration the type of performance, the type of band, the size of the place and, as you said, the price of admission, and I would have to give that under oath. I know that I would have to have an organization of some kind; I would have to organize something, I wouldn't know how I could do it alone.

Q. Are you financially able to establish the organization that would be necessary?

[fol. 658] A. No, I am not.

Q. Have you had any experience in the business field in licensing your works?

A. No, I haven't.

Q. Has your occupation been solely that of a composer?

A. That is all.

Q. What is your main source of income at this time?

A. The American Society of Composers, Authors and Publishers, is almost the only source that I have. Without the American Society of Composers, Authors and Publishers I guess I'd be driving a cab or something. I may be too old for that, though.

Q. Are you financially able to send an investigator into each of the establishments in the State of Florida to determine whether or not they are performing your works?

A. Heavens, no.

Mr. Boggs: I object to the question on the ground it is irrelevant and immaterial.

Q. When did you become a member of the American Society of Composers, Authors and Publishers?

A. In 1914.

Q. Prior to that time did you receive any income from the licensing of public performances for profit of your [fol. 659] musical compositions?

A. No.

Mr. Boggs: The question is objected to on the ground it is irrelevant and immaterial.

Q. Did any user of your compositions for public performance for profit ever ask you for a license to perform your works?

A. Never.

Mr. Boggs: The same objection.

Q. Or offer to compensate you for receiving such a license?

Mr. Boggs: Same objection.

A. No.

Q. Did you ever know of any users to ever offer any compensation to any composer, author or publisher for the

public performance for profit of any musical composition prior to 1914?

A. No, never; I have never known of any.

Mr. Boggs: Same objection.

Q. When for the first time did you begin receiving any compensation for the public performance for profit of any of your compositions?

A. 1921.

Q. From whom did you receive such compensation?

[fol. 660] A. ASCAP.

Q. Have you been in receipt of such compensation regularly from ASCAP since 1921?

A. Every quarter.

Q. What did you receive from the Society on an average annually for the last five years?

A. I guess on an average of $14,000 a year.

Q. What have been your average royalties from the sale of sheet music during each of those five years?

A. Oh, some years nothing; some years a thousand or two; average two or three hundred dollars a year for the five years.

Q. In mechanical royalties?

A. Oh, much less; maybe $40 a year.

Q. What did you receive on an average per year before 1923 from the sales of sheet music?

A. Well, that would vary greatly. If a song sold 3,000,000, if you had that in one year, then you had a million copy song the year before, or two million copy song—I have earned as high as $250,000 on one song, "Tuck Me to Sleep," and that was three ways—there were three writers on that, two lyric writers and a composer.

Q. So that the total receipts by the composer and authors for that one song was $150,000?

[fol. 661] A. Right. Of course, that includes mechanicals.

Q. What would you say was the minimum that you would receive annually around that period prior to 1923?

A. Oh, about $30,000.

Q. Would you be willing to permit a publisher of your compositions to determine and fix a price to be charged for the use and rendition of your musical copyrighted compositions for the use of public performance for profit?

Mr. Boggs: That is objected to as irrelevant and immaterial.

A. No, I would not.
Q. Does your publisher have that right?
A. No.

Mr. Boggs: I object to that on the ground as stated above, and on the further ground that it involves a conclusion of law.

Q. Do you consider your contract with the American Society of Composers, Authors and Publishers a valuable contract?
A. Very valuable.
Q. Are you willing to have that contract cancelled?
A. No, No, I should say not.
Q. Have you renewed any of the copyrights for any of the compositions that you have published?
[fol. 662] A. Yes, I have.
Q. Have you any idea of the number that you have renewed?
A. Oh, possibly 50 or 60; none of the really important ones yet.
Q. Do you expect to enter into negotiations with respect to the renewal rights of your compositions as and when those renewals come into existence?

Mr. Boggs: I object to the question as conjectural, and irrelevant and immaterial.

A. I do.
Q. If under the provision of this Florida statute the purchaser of any sheet music during the original term of copyright acquired the right to perform and make other uses of that composition upon buying a sheet of music, and that interefered with your renewal term of copyright, if the right acquired by the purchaser of sheet music in Florida extended to the entire renewal term as well as the original term——

Mr. Bennett: I object to the question on the ground it calls for a conclusion of law.

A. I don't know what that means.

Mr. Bennett: Further, that the statute does not provide any such procedure.

[fol. 663] Q. I call your attention to Section 2-A of the 1939 Florida Law, Senate Bill No. 679, reading as follows:

"Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall spcecify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or uses acquired the same within this state and pays the selling price so specified thereon to the seller or publisher of such musical compositions, then said purchaser may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such [fol. 664] event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit."

Now, bearing in mind the provisions of Section 2-A, which I just read to you, which permits the purchasers of any copy of a musical composition upon paying the price specified on the composition to use it, render it, cause or permit to be used or rendered, the copyrighted composition without further license fees or other exactions: would that affect your negotiations for the renewal of the contract, the fact that purchasers in Florida have the right to continue to make performances without payment of any further fee on copies of sheet music bought before the expiration of the original term, would that affect your negotiations with respect to the second term of copyright secured by you under your renewal?

Mr. Boggs: It is objected to on the ground that it is incompetent and calling for a conclusion of law.

A. Well, I don't know whether I understand the question, but it would not affect renewal or affect the renewal in any way. The songs come back to me after 28 years, but mak-

ing a price on that sheet of music from then on, I would [fol. 665] not know what to charge for the thing.

Q. Does your publisher at this time have any right to grant any rights whatsoever that extend into the renewal term of copyrights? Do you understand the question?

A. No.

Q. Does the publisher of any of your compositions during the original term of copyright have any right to enter into any transactions which affect the rights under the copyright for the renewal term, for the second term of 28 years?

Mr. Boggs: Same objection, calling for a conclusion.

A. Do you mean before the copyright is out, before the first term?

Q. Before the first term expires.

A. He still has the rights on the contract, hasn't he, the right to print?

Q. Why?

Mr. Finkelstein: Off the record.

(Question read by the reporter.)

A. Of course not.

Q. Can you estimate the value of all of your renewal rights on all of your compositions?

A. I have never thought about it, but I consider them [fol. 666] invaluable. You mean you want me to put a figure in dollars and cents?

Q. Yes, based upon the advance royalties currently being paid for renewals and considered valuable in your catalogue.

A. It must be between $100,000 and $150,000; I would value them to be that.

Q. Now, I call your attention to Section 2 of the 1939 law, which reads as follows:

"Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the [fol. 667] copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

"(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, [fol. 668] the name, occupation and residence of his principal."

Bearing that section in mind, I wish to ask you some questions.

A. That would take me the rest of my life to do, if I went through this and gave you the history of each song and everything.

Q. Have you composed any dramatico-musical works?

A. No.

Q. Have any of your songs been incorporated or interpolated into dramatico-musical compositions?

A. Yes, a few dramatico-musical compositions for use with pictures.

Q. Have some of your songs been incorporated in motion pictures?

A. Yes, quite a lot.

Q. Can you name some of the songs that have been incorporated in pictures?

A. "Song of the Nile," "Maybe It's Love." Those were the only two that were hits. The others were written just specially for the picture.

Q. Can you make an affidavit that you have full authority to sell, license or otherwise dispose of the performing rights of your compositions?

Mr. Boggs: I object to that on the ground that the wit-
[fol. 669] ness has testified that he transferred his copyrights to his publishers.

A. I have already transferred my performing rights to the ASCAP. Is that your question?

Q. That is your answer?

A. I mean—I hope I got your question right.

Q. Yes, you got the question right.

A. Pardon me. Can I elaborate on that a little? Any song that I give the publisher, the contract that I sign with them, states that they have all rights except that which has been given to ASCAP, which are the performing rights.

Q. Is that pursuant to the provisions of the standard form of contract?

A. The standard form of contract.

Q. Was such an understanding made with respect to those compositions?

A. Which were published under——

Q. Oral contracts. Did the publishers of your compositions who obtained publication rights under oral contracts receive any interest in the performing rights?

A. No, they did not.

Q. Does anyone other than your publisher and yourself and sometimes the Society have any interest in your copy-
[fol. 670] rights?

A. No.

Q. Your collaborator?

A. Oh, my collaborators have, yes.

Q. Do you know where all of your collaborators are located at this time?

A. No, I do not.

Q. Have you had a great number of them over the years?

A. Yes; some of them are dead.

Q. Do you know who their heirs are or who the people are who succeeded to their rights in all cases?

A. No, I do not.

Q. Would you be able as an individual to issue licenses for the public performances of your works in the State of Florida, as an individual, apart from the American Society of Composers, Authors and Publishers?

A. I don't see how.

Mr. Boggs: I object to that on the ground that it calls for a conjecture, and also that it is irrelevant and immaterial.

Q. I believe I asked you whether you had the means to investigate infringements of your works in the State of Florida.

[fol. 671] A. I have not.

Q. Are you willing to have your works which are broadcast from outside of the State of Florida into the State of Florida rebroadcast within that State without payment of any fee to you?

A. I certainly am not.

Mr. Boggs: I object on the ground that the statute does not so require.

Q. Are you willing to have any user of music in the State of Florida, in performing from phonograph records which are sent into that State from without the State, do so without a payment of a fee to you?

A. No.

Q. Are you willing to have the manufacturer of phonograph records affix a price which includes the right of public performance for profit in the State of Florida?

Mr. Boggs: I object.

A. By no means.

Mr. Boggs: The statute does not so require.

Q. Does the manufacturer of phonograph records have any right of public performance for profit in your works?

A. No.

Q. Are you willing to permit that manufacturer to have [fol. 672] any such rights?

A. No.

Mr. Boggs: The same objection.

Q. Are you willing to permit the owners of motion picture theatres to exhibit motion pictures containing your musical compositions from films received in the State of Florida from without the State without the payment of a license fee to you?

A. No.

Mr. Boggs: The same objection.

Q. I call your attention to Section 4-A of the 1939 Law, which reads as follows:

"Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty fee covering more than one, or all, or such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such com- [fol. 673] positions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright

owner may at his election fix one price which shall be ap-
[fol. 674] plicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof, and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof."

Does the owner of the copyrights of your compositions have any right to fix a price for the public performance for profit in the State of Florida?

Mr. Boggs: I object on the ground that it calls for a conclusion of law.

Q. Are you willing to have the owner of a copyright exercise such a right?

A. No.

Q. Are you willing to have blanket licenses issued in the
[fol. 675] State of Florida only upon the condition that if any such license be issued all users in the State of Florida shall have an opportunity to perform at a specific price apiece?

A. No.

Q. Could you as a practical matter prepare a list of prices to be paid for each performance of each composition by all the users in the State of Florida?

A. No, I could not.

Q. What would prevent you from preparing such a list?

Mr. Bennett: The objection calls for—the question calls for a conclusion.

A. I would have to get the right of every collaborator in the song and the publisher, where I have never thought in that direction. I know it would be almost impossible for me to do it. I would have to hire a lawyer. I would let you do it if I had to.

Q. Do you have to pay a lawyer if you engage one?

A. Would I have to pay one? Of course I would pay one if I engaged him.

Q. Would you have to engage a corps of investigators for the State of Florida?

A. Certainly would.

Q. Would you have to hire a clerical staff?

[fol. 676] A. I imagine I would.

Q. Are you in a financial position to do those things?

A. By no means.

Mr. Bennett: I call attention to the fact that the questions are obviously leading.

Mr. Finkelstein: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. Mr. Meyer, are you a member of the Board of Directors of ASCAP?

A. I am.

Q. Are you a member of any committee, such as the Membership Committee?

A. No; I am a member of the Foreign Relations Committee.

Q. Are you a member of any other committee?

A. No other committee.

Q. In connection with your direct testimony that you entered into contracts with various publishers, I hand you Plaintiffs' Exhibit No. 7, which is the standard uniform contract with popular songwriters, and ask you whether that is representative of the contracts which you have entered into with your publishers.

[fol. 677] Mr. Finkelstein: Is that the written contract that you are asking him about?

Mr. Bennett: Yes.

A. That was up to this year. We have a new one.

Q. This Plaintiff's Exhibit 7 is representative of the contracts you had with your publishers and which have been entered into up to about three months ago, is it not?

(Last two questions and answers were read.)

A. Yes.

Q. Now, have you entered into any different contract subsequent to three months ago?

A. Yes.

Q. Can you state how many?
A. How many what?
Q. How many of those contracts you have entered into in the last three months?
A. How many songs?
Q. Yes.
A. About three or four.
Q. Can you furnish a copy of the form of contract used?
A. Yes.
Q. Will you do that?
A. I certainly will.

[fol. 678] Mr. Finkelstein: May I attach that contract as an exhibit when produced?
Mr. Bennett: Yes.

(By Consent the contract was deemed marked Defendants' Exhibit A of this date.)

Mr. Bennett: That is all.
Mr. Finkelstein: That is all.

(Witness excused.)

(An adjournment was taken to the following day, Friday, February 9, 1940, at 10:30 o'clock a. m.)

[fol. 679] New York, February 9, 1940,
10:30 o'clock a. m.

Met pursuant to adjournment.
Appearances: As before.

HERMAN GREENBERG, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Where do you reside?
A. 15 West 81st Street, New York City.
Q. What is your occupation?
A. I am the assistant general manager of the American Society of Composers, Authors and Publishers.

Q. How long have you been so employed?

A. Oh, for all the years that I have been employed with the Society, for approximately 20 years I have been employed by the Society.

Q. In various capacities?

A. Yes, sir.

Q. What is the home office of the Society?

[fol. 680] A. The address of the home office of the Society is 30 Rockefeller Plaza, New York City.

Q. What is the American Society of Authors, Composers and Publishers?

A. The American Society of Composers, Authors and Publishers is an unincorporated association, organized under the Laws of the State of New York.

Q. I show you this document and ask you whether you recognize it.

A. I do.

Q. What is it?

A. It is the Articles of the Association of the American Society of Composers, Authors and Publishers.

Q. And is that presently in force and effect?

A. Yes, sir.

Mr. Frohlich: I will offer it in evidence.

Mr. Boggs: There is no objection to it.

(Articles received in evidence and marked Complainants' Exhibit 11 of this date.)

Mr. Frohlich: I will offer in evidence certified copy of Chapter 609 of the Laws of New York, known as the General Association Law, and particularly Section 12 of that Law.

Mr. Boggs: No objection.

[fol. 681] Mr. Frohlich: May it be stipulated that in place of the original I can substitute a photostatic copy of that and the certification.

Mr. Boggs: It is so stipulated.

(Photostatic copy of Chapter 609 received in evidence and marked Complainants' Exhibit 12 of this date.)

Q. I show you this document and ask you whether you recognize it.

A. Yes.

Q. What is it?

A. It is a printed list of the members of the Society and the foreign associates with whom the American Society is affiliated.

Q. Is that the latest list of members of the American Society of Composers, Authors and Publishers?

A. It is the latest printed list.

Q. What is the date of the printing of that?

A. April 1, 1939.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(List of members received in evidence and marked Complainants' Exhibit 13 of this date.)

Q. Now, Mr. Greenberg, I show you this document and [fol. 682] ask you what this is.

A. This is a document authorizing suits to be instituted in the name of Gene Buck, in the name of the Society.

Q. Do you recognize the signatures on that resolution?

A. Yes.

Q. Whose signatures are they?

A. George W. Meyer, secretary of the American Society of Composers, Authors and Publishers, and Gene Buck, its president.

Q. Is Mr. Meyer presently the secretary of the Society?

A. Yes.

Q. And is Mr. Gene Buck the president?

A. Yes, sir.

Q. Was this resolution duly adopted at a meeting of the Board of Directors?

A. Yes, sir.

Q. And have you taken this from your files?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

Q. One thing more. Is this the seal of the American Society of Composers, Authors and Publishers affixed to Mr. [fol. 683] Buck's signature?

A. Yes, sir.

Mr. Frohlich: May we substitute a duplicate—original, as a matter of fact?

Mr. Boggs: No objection.

(Resolution received in evidence and marked Complainants' Exhibit 14 of this date.)

Q. Mr. Greenberg, I show you a number of agreements, documents purporting to be agreements between the American Society of Composers, Authors and Publishers and various foreign societies, and let me enumerate them specifically:

1. Document called an agreement between the American Society of Composers, Authors and Publishers and Circulo Argentino de Autores Cireulo de Autores Y Compositores de Musica Argentores; known as the Argentino Society, dated January 1, 1935;

2. I show you a similar document with the Austrian Society, dated January 1, 1933, known as Gesellshaft der Autoren Komponisten und Musikverleger;

3. I show you a document and agreement between the American Society of Composers, Authors and Publishers and the Belgian Society, dated January 1, 1934, and known as the Nationale Vereenigung voor Auterecht (Navea);

[fol. 684] 4. I show you a document purporting to be an agreement between the American Society of Composers, Authors and Publishers and the Bulgarian Society, dated January 1, 1936, known as the Association Cooperative Bulgare pour la Portection des droits d'auteurs;

5. I show you a document purporting to be a contract dated January 1, 1933, between the American Society of Composers, Authors and Publishers and the Czecho-Slovakian Society, known as Ochranme Sdruzeni Autorske cse Skladatelu Spisovatdua Nakladatelu;

6. I show you a document purporting to be an agreement dated January 1, 1932, between the Danish Society and the American Society of Composers, Authors and Publishers, which Danish Society is known as Internationalt forbund Til Beskyttelse Af Komponistrettigheder Koda;

7. I show you a document purporting to be an agreement dated January 6, 1933, between the English Society and the American Society of Composers, Authors and Publishers, which English Society is known as the Performing Right Society, Ltd.;

8. I show you a document dated January 1, 1932, between the American Society of Composers, Authors and Com-
[fol. 685] posers, and the Finnish Society, known as Saveltajain Tekyanoikeustoimisto Teosto;

9. I show you a document purporting to be an agreement dated January 1, 1933, between the American Society of Composers, Authors and Publishers and the French Society, known as La Societe des Auteurs, Compositeurs et Editeurs de Musique;

10. I show you a document purporting to be an agreement dated January 1, 1933, between the American Society of Composers, Authors and Publishers and the German Society, known as Genossenschaft Zur Verivertung Musikalischer Auffuhrungsrechte;

11. I show you an agreement between the American Society of Composers, Authors and Publishers dated January 1, 1932, and the Hungarian Society, known as Magyar Szovegirok Zeneszerzok Es Zenemukiadok Szovetkezete;

12. I show you a document purporting to be an agreement dated January 1, 1939, between the American Society of Composers, Authors and Publishers and the Italian Society, known as Societa Italiana Delgli Autori Ed Editor;

13. I show you a document purporting to be an agreement dated January 1, 1930, between the American Society of
[fol. 686] Composers, Authors and Publishers and the Norwegian Society, known as Norsk Komponistforeningo Internationale Musikbyrd-Tone-Norway;

14. I show you a document purporting to be an agreement dated January 1, 1933, between the American Society of Composers, Authors and Publishers and the Portugese Society, known as the Sociedade De Escritores E Compositores Teatrais Portugueses;

15. I show you a document purporting to be an agreement dated January 1, 1932, between the American Society of Authors, Composers and Publishers, known as the Rumanian Society, known as Societatea Compozitorilor Roman;

16. I show you this agreement dated January 1, 1936, purporting to be agareement between the American Society of Composers, Authors and Publishers and the Spanish So-

ciety, known as Sociedad General de Autores de Espana (SGAE); on behalf of the Sociedad De Autores Cinematograficos (SAC), of the Sociedad Espanola Del Derechos De E Jecucion (SEDE), and of the Socieded De Autores De Variedades (SAV);

17. I show you this document purporting to be an agreement dated January 1, 1932, between the American So-
[fol. 687] ciety of Composers, Authors and Publishers and the Swedish Society, known as Foreningensvenska Tonsattares Internationalla Musikbyra (STIM);

18. I show you this document dated January 1, 1932, between the American Society of Composers, Authors and Publishers and the Swiss Society, known as Association Suisse Pour La Representation Des Droits D'Execution (GEFA);

19. I show you this document purporting to be an agreement between the American Society of Composers, Authors and Publishers and the Brazilian Society, known as Sociedade Brasileira de Autores Theatraes.

(Discussion off the record.)

Mr. Frohlich: It is conceded that each and every one of the foregoing documents were executed respectively by the American Society of Composers, Authors and Publishers and the respective officers or representatives of the respective foreign societies.

These are offered in evidence, and they are received without objection, and it is further stipulated that photostatic copies of each and every one of these agreements with foreign societies will be received in place of the originals as
[fol. 688] Plaintiffs' Exhibits 15-A to 15-T, inclusive.

(19 agreements received in evidence and marked Complainants' Exhibits 15-A to 15-T, inclusive, of this date.)

By Mr. Frohlich:

Q. Now, Mr. Greenberg, these contracts have been put in evidence as Plaintiffs' Exhibits 15-A to 15-T, inclusive. Are they presently in force and effect?

A. They are.

Q. Does the American Society of Composers, Authors and Publishers issue any licenses to radio broadcasting stations throughout the United States gratis?

A. There are some that receive gratuitous licenses from the American Society of Composers, Authors and Publishers.

Q. Are you able to state the particular radio broadcasting stations which receive such licenses from the American Society of Composers, Authors and Publishers?

Mr. Bennett: I object unless the witness is able to demonstrate that the broadcasting stations are engaged in broadcasting publicly for profit and are not merely eleemosynary or other non-profit organizations, not covered by the public performance provisions of the copyright Act.

(The question was read.)

[fol. 689] Mr. Frohlich: Will you answer that, please.

A. I cannot recall them from memory; I know that there are quite a few stations that have received gratuitous licenses in the United States.

Q. Could you refresh your recollection from any document?

A. Yes, sir.

Q. I hand you this document and ask you whether you are able to refresh your recollection from it.

A. Yes, sir; definitely.

Q. Now will you please tell us—Have you refreshed your recollection?

A. Yes, sir.

Q. Now, can you state the various radio broadcasting stations that receive such licenses?

Mr. Boggs: The objection is renewed.

Q. You may answer.

A. Station KFGO, operating in Boone, Iowa.

Q. This list of stations which I have shown you, from which you refreshed your recollection, is that an accurate, true list of the stations that receive a free license from ASCAP?

A. Yes.

Q. Was that prepared from your own office files?

[fol. 690] Mr. Frohlich: I offer it in evidence.

Mr. Boggs: Subject to the same objection as heretofore made by the defendants.

(List of stations received in evidence and marked Complainants' Exhibit 16 of this date.)

Q. Are these stations in Plaintiffs's Exhibit 16 commercial or non-commercial stations?

A. Non-commercial stations.

Mr. Bennett: I move to strike the exhibit on the ground that the witness has testified that the stations itemized on Exhibit 16 are non-commercial stations; therefore they are not subject to the public performance for profit provisions of the Copyright Act of 1909.

Q. I show you a group of contracts between the American Society of Composers, Authors and Publishers and certain radio broadcasting stations located in the State of Florida, and ask you whether you will be good enough to look at each one of them and see if you recognize the signatures on them. Take this one, Wonderful Isle Of Dreams broadcasting station, what is the station?

A. Operating station WIOD, Miami Beach, Florida. The original contract was issued as of September 1, 1932, and was extended as of its termination date for an additional [fol. 691] period ending December 31, 1940.

Mr. Frohlich: It is conceded by counsel that this group of 16 contracts is all executed by the respective parties named therein and that said contracts have been in force since the dates contained therein and are presently in force in the State of Florida.

Mr. Boggs: The concession is made subject to the claim of the defendants in this case that said contracts are invalid under Section 1 of the Florida State statute of 1937, involved in this litigation.

Mr. Frohlich: It is also stipulated that photostats of each one of these 16 contracts may be received in evidence in place and instead of the originals, with the same force and effect.

Mr. Boggs: That concession is made.

(16 photostatic copies of contracts received in evidence and marked Complainants' Exhibits 17-A to 17-P inclusive, of this date.)

By Mr. Frohlich:

Q. Now, Mr. Greenberg, are all of these contracts which have been received in evidence as Plaintiffs' Exhibits 17-A to 17-P, in full force and effect at the present time?

A. No, sir.

Q. Which are not?

[fol. 692] A. WMFJ and WTAL.

Q. That is to say, Plaintiffs' Exhibit 17-G and Plaintiffs' Exhibit 17-F?

A. Yes, sir.

Q. Now, what has happened to those contracts?

A. Those contracts were cancelled, due to the failure of the licensee to comply with the terms of the license.

Q. And are the other contracts in this group, Plaintiffs' Exhibits 17-A to 17-P, in full force and effect at the present time?

A. Yes, sir.

Q. And are being performed by both sides?

A. Yes, sir.

Q. Have you made a tabulation of those contracts, Plaintiffs' Exhibit 17-A to 17-P, which were in force and effect on June 9, 1937?

A. Yes, sir.

Q. Will you please look at this tabulation and state whether it is correct.

A. Yes, sir; this is the tabulation.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Tabulation of contracts received in evidence and marked Complainants' Exhibit 18 of this date.)

[fol. 693] Q. Have you made a tabulation of those contracts which were in force and effect on June 12, 1939?

A. I did.

Q. I show you that tabulation and ask you whether that is true and correct?

A. That is true and correct, as radio contracts in effect June 12, 1939.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Tabulation received in evidence and marked Complainants' Exhibit 19, of this date.)

Q. Mr. Greenberg, have you made a tabulation of the contracts which were in force and effect on June 9, 1937, between the American Society of Composers, Authors and Publishers and the owners and operators of motion picture theatres in the State of Florida?

A. I did.

Q. I show you this tabulation and ask you whether it is correct?

A. It is, sir.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Tabulation of contracts received in evidence and marked Complainants' Exhibit 20, of this date.)

Q. Mr. Greenberg, have you made a tabulation of the [fol. 694] contracts between the American Society of Composers, Authors and Publishers and the owners and operators of motion picture theatres in the State of Florida which were in force and effect on June 12, 1939?

A. I did.

Q. I show you this list and ask you whether that is a true and correct compilation of those contracts.

A. It is.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Tabulation received in evidence and marked Complainants' Exhibit 21 of this date.)

Q. I show you agreement between the American Society of Composers, Authors and Publishers and one R. L. Bailey, operating the Eagle Theatre at Blountstown, Florida, dated April 10, 1934, and ask you whether you recognize the signatures on the contract.

A. I recognize the signature of Mr. Henry L. Bouten.

Q. And was he a representative of the American Society of Composers, Authors and Publishers down in Florida?

A. Yes.

Mr. Frohlich: I offer it in evidence, and it is stipulated that a photostatic copy of that contract may be received in evidence instead of the original; it is also stipulated that [fol. 695] this contract with Bailey is typical of the other contracts between the American Society of Composers, Authors and Publishers and the owners or operators of motion picture theatres which are mentioned and described in Plaintiffs' Exhibits 20 and 21.

Mr. Boggs: No objection.

(Contract received in evidence and marked Plaintiffs' Exhibit 22 of this date.)

Q. Mr. Greenberg, did you make a compilation of the contracts between the American Society of Composers, Authors and Publishers which were in force and effect on June 9, 1937, with the owners and operators of hotels in the State of Florida?

A. I did.

Q. I show you this compilation and ask you whether that is true and correct.

A. Yes.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 23 of this date.)

Q. Did you make a compilation of the contracts between the American Society of Composers, Authors and Publishers and the owners and operators of hotels in the State of [fol. 696] Florida, which were in full force and effect on June 12, 1939?

A. I did.

Q. I show you this compilation and ask you whether it is true and correct.

A. It is.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Plaintiffs' Exhibit 24 for this date.)

Q. I show you this document, Mr. Greenberg, purporting to be a contract between the American Society of Composers, Authors and Publishers and William Urney, manager of the Urney Hotel in Miami, Florida, dated January 23, 1935, and ask you whether you recognize the signatures?

A. I recognize the signature of William E. Arnaud.

Q. Who was he?

A. Our representative for the State of Florida.

Q. And this contract was taken from your files?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence; and it is stipulated that a photostat of this contract may be received in place of the original; it is further stipulated that this contract [fol. 697] is typical in form of the other contracts between the Society and the owners and operators of hotels in the

State of Florida, which are contained in the compilations in evidence, Plaintiffs' Exhibits 23 and 24.

Mr. Boggs: No objection.

(Photostatic copy of contract received in evidence and marked Complainants' Exhibit 25 of this date.)

Q. Mr. Greenberg, did you make a compilation of the contracts which were in force and effect between the American Society of Composers, Authors and Publishers and the owners and operators of restaurants in the State of Florida on June 9, 1937?

A. I did.

Q. I show you this document and ask you whether that is such compilation.

A. It is.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 26 of this date.)

Q. Did you make a compilation of the contracts between the American Society of Composers, Authors and Publishers and owners of restaurants on June 12, 1939?

[fol. 698] A. Yes, sir.

Q. I show you this compilation and ask you whether that is true and correct.

A. It is.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 27 of this date.)

Q. I show you this contract, Mr. Greenberg, between the American Society of Composers, Authors and Publishers and Jack Broome, operator of the Reef Grill at Miami, Florida, dated January 30, 1936, and ask you whether you recognize the signatures.

A. Yes, sir; I recognize the signature.

Q. How do you spell that?

A. Mr. Henry L. Bouten.

Q. Is this contract taken from your files?

A. Yes, sir.

Q. Who was Bouten?

A. He was associated with our office, supervising in the State of Florida.

Mr. Frohlich: It is stipulated that a photostat of the same may be received in place of the original. It is also [fol. 699] stipulated that this contract is typical in form with the other contracts made between the American Society of Composers, Authors and Publishers and operators of restaurants in the State of Florida as taken from compilations in evidence as Complainants' Exhibits 26 and 27.

Mr. Boggs: No objection.

(Photostatic copy of contract received in evidence and marked Complainants' Exhibit 28, of this date.)

Q. Mr. Greenberg, did you make a compilation of the contracts between the American Society of Composers, Authors and Publishers and the owners and operators of dance halls in the State of Florida?

A. Yes, sir.

Q. In force and effect June 9, 1937?

A. Yes, sir.

Q. I show you this compilation and ask you whether that is true and accurate.

A. It is.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 29 of this date.)

Q. Did you make a compilation of the contracts in force [fol. 700] and effect on June 12, 1939, between the American Society of Composers, Authors and Publishers and the owners and operators of dance halls in the State of Florida?

A. Yes, sir.

Q. I show you this compilation and ask you whether that is true and correct.

A. It is.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 30 of this date.)

Q. I show you this contract between the American Society of Composers, Authors and Publishers and one H. W.

Diaz, operating the Sulphur Springs Altus Ballroom at Tampa, Florida, dated May 6, 1939, and ask you whether you recognize the signatures on that contract.

A. Yes, sir. I recognize the signature of I. T. Cohen.

Q. And who is Mr. Cohen?

A. Mr. Cohen is the present representative of the Society representing the State of Florida.

Q. And is this contract taken from your files?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence. It is stipulated that a photostat of the same may be received in place and stead [fol. 701] of the original, and it is also stipulated that this contract is typical in form of the contracts between the American Society of Composers, Authors and Publishers and the owners and operators of dance halls in the State of Florida, which are compiled on the lists in evidence as Plaintiffs' Exhibits 29 and 30.

Mr. Boggs: No objection.

(Photostatic copy of contract received in evidence and marked Complainants' Exhibit 31 of this date.)

Q. Where does I. T. Cohen reside?

A. In the South; Atlanta, State of Georgia.

Q. And where is his office located?

A. In the City of Atlanta, State of Georgia.

Q. Where does Bouten reside?

A. City of Atlanta, State of Georgia.

Q. Where is his office?

A. City of Atlanta, State of Georgia.

Q. Where does Arnaud reside?

A. The same place, City of Atlanta, Georgia.

Q. Where is his office?

A. In the City of Atlanta, Georgia.

Q. Did you make a compilation of the contracts which [fol. 702] were in force and effect on June 9, 1937, between the American Society of Composers, Authors and Publishers and various miscellaneous places of amusement and entertainment in the State of Florida?

A. I did.

Q. I show you this compilation and ask you whether that is true and accurate.

A. It is, sir.

Mr. Frohlich: I offer it in evidence.
Mr. Boggs: No objection.

(Compilation received in evidence and marked Plaintiffs' Exhibit 32 of this date.)

Q. Mr. Greenberg, did you make a compilation of the contracts which were in force and effect between the American Society of Composers, Authors and Publishers and various miscellaneous establishments of amusement and entertainment in the State of Florida on the 12th of June, 1939?
A. I did.
Q. I show you this document and ask you whether that is true and correct.
A. It is.

Mr. Frohlich: I offer it in evidence.
Mr. Boggs: No objection.

(Compilation received in evidence and marked Complain-
[fol. 703] ants' Exhibit 33 of this date.)

Q. I show you this contract, Mr. Greenberg, between the American Society of Composers, Authors and Publishers and Barnum & Bailey Combined Shows, Sarasota, operating Ringling Brothers Circus at Sarasota, Florida, dated June 13, 1934, and ask you whether you recognize the signatures at the foot.
A. I do, the signature signed on behalf of the Society is my own, and that for Ringling Brothers is John Kelly.
Q. Was this taken from your files?
A. Yes, it was signed in my office.
Q. In your presence?
A. Yes, sir.

Mr. Frohlich: It is stipulated that a photostat of the same may be received in place and stead of the original, and it is also stipulated that this contract is typical in form with the other contracts for miscellaneous establishments *establishments* which are enumerated in the compilations in evidence as Plaintiffs' Exhibits 32 and 33.
Mr. Boggs: No objection.

(Photostatic copy of contract received in evidence and marked Complainants' Exhibit 34 of this date.)

[fol. 704] Q. Mr. Greenberg, are you generally in charge of the active supervision of the American Society of Com-

posers, Authors and Publishers with respect to infringements?

A. Yes, sir.

Q. And can you tell us the practice with regard to infringements on the copyrights of its members?

A. The contracts with regard to what procedure is followed before an infringement action is instituted by this Society and its representatives throughout the country is, generally where infringements have been taken on the works of the members, before infringements are taken, there is usually a routine that is followed by the Society, in that when they ascertain an establishment is performing music and is using copyrighted musical works of our members, they forward to such establishment or its proprietor a notice calling to their attention the necessity of our protecting the rights of the copyrighted music of our members.

Q. I show you this document and ask you if you recognize it?

A. Yes, sir.

Q. What is it?

A. Our usual first notice to unlicensed establishments.

Q. And that is sent after you obtain evidence of the——

[fol. 705] A. No, that is sent when we ascertain that music is being performed in the establishment, calling to their attention the necessity to secure our license; this communication has an application to submit if an operating license is desired.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Notice received in evidence and marked Complainants' Exhibit 35 of this date.)

Q. Now, what do you do after that first notice is sent?

A. If no application or response is received to that first notice, a second notice is sent within a period of a week or ten days.

Q. I show you this document and ask you whether you recognize it?

A. Yes, sir; this is what we call our second notice to unlicensed establishments.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Second notice received in evidence and marked Complainants' Exhibit 36, of this date.)

Q. What happens after you send your second notice?

A. If no response is received to either the first or second [fol. 706] notice, a third notice is sent by United States registered mail.

Q. I show you this document and ask you whether you recognize it.

A. Yes, sir; this is our third notice.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Third notice received in evidence and marked Complainants' Exhibit 37 of this date.)

Q. What happens after a third notice is sent?

A. If there is no response to either first, second or third notices, a representative of our office will visit the establishment and definitely ascertain as to whether or not the copyrighted music works of our members are being performed.

Q. If he obtains evidence that works of members are being performed, then what do you do?

A. The proprietor of the establishment is so informed and given an opportunity to secure a license if he so desires at such time. On his failure to secure the license, arrangements are made to proceed to redress the infringement as provided by the Copyright Law.

Q. In other words, do you bring suit?

A. Yes, sir.

[fol. 707] Q. Now, after these suits are brought, Mr. Greenberg, does the Society in many cases obtain judgments in its favor?

A. Yes, sir.

Q. From your own knowledge and experience, how much has the Society obtained in the way of judgment against a man for one infringement?

Mr. Boggs: The question is objected to as incompetent and immaterial.

(Pending question read.)

Mr. Frohlich: You may answer.

A. Actual collection is two dollars.

Q. For damages?

A. Oh, an insignificant amount.

Q. What does it usually obtain by way of judgment for one infringement?

Mr. Boggs: The same objection.

A. $250.00.

Q. Now, does the Society attempt to collect that $250.00 as damages?

A. No, sir.

Q. And if the defendant thereafter comes in and asks for a license, what is the practice of the Society in that respect?

[fol. 708] Mr. Boggs: I object on the ground that it is immaterial and irrelevant.

A. To issue the license and waive the damages secured through the litigation.

Q. Have you at my request made a compilation of the number of licenses that have been in force each year throughout all the states of the Union, from 1922 to 1939, inclusive?

A. Yes, sir, I have made such a compilation.

Q. And where did you obtain the information from which you made this compilation?

A. From our records.

Q. The records of the Society?

A. Yes, sir.

Q. Kept in the usual course of ordinary business?

A. Yes, sir.

Q. Are they kept under your own supervision?

A. Yes, sir.

Q. And you know generally what is in those records?

A. Yes, sir.

Q. And is this compilation that you have made a truthful and accurate resume made from those records and kept by you?

A. Yes, sir.

[fol. 709] Mr. Frohlich: I offer it in evidence.

Mr. Boggs: I object to it on the ground it is irrelevant and immaterial.

(Compilation of licenses received in evidence and marked Complainants' Exhibit 38 of this date.)

Q. Mr. Greenberg, are you in charge of the books of account of your office?

A. Yes, sir.

Q. And are they kept under your own personal supervision?

A. That's right.

Q. Have you at my request made a compilation of the revenue that the American Society of Composers, Authors and Publishers has received annually from the State of Florida from its various licensees, for the years 1935, 1936, 1937, 1938 and 1939?

A. I have.

Q. And have you also made a compilation of the expenses that were incurred by the Society in the State of Florida in collecting that revenue?

A. Yes, sir.

Q. Have you also made a compilation of the net amount that was received by the Society from the State of Florida for those years?

[fol. 710] A. Yes, sir.

Q. Has that compilation been made from your books of account?

A. Yes, sir.

Q. Is it true and accurate?

A. Yes, sir.

Q. Now, I show you on this compilation the column entitled "Expenses."

A. Yes, sir.

Q. Will you please look at this column commencing with the item $12,371.16, 1935, and tell us how you arrive at and what you mean by expense, what does that include?

A. It is a very simple matter. The fact of the matter is that under the year 1935 the representative supervising that territory received a commission against gross collections of the operating cost.

Q. What commission did he receive?

A. I think it was 25 per cent at that date.

Q. Of the gross? Does that item of expense include other items in addition to his commission?

A. I doubt it in that year.

Q. That would be simply the expense, the commission paid to Mr. Arnaud. Was he then your representative?

A. He was then our representative in that territory.

[fol. 711] Q. In conjunction with the document you have now identified, I show you another document and ask you what this document represents.

A. There is an item of legal expense involved, on general overhead expense for the operation of that office.

Q. Well, now, for 1935 what is the general expense?

A. The general expense amounts to $5,217.59.

Q. Does that merely mean commissions paid to Mr. Arnaud?

A. No, sir; the commission amounts to $6,835.47.

Q. Just what is the general expense paid that is not commission?

A. The general expense of the operation of the Florida territory as against the general expense of the home office.

Q. In other words, you have here the general expense of the Society throughout the country for that year?

A. And I have allocated the share——

Q. That Florida bears to that general expense, to that figure, is $5,217.59?

A. That is correct.

Q. And this commission that you actually paid to Arnaud for the year is $6,835.47?

A. That's correct.

[fol. 712] Q. Then did you have some legal expense that year in that State?

A. $318 and some odd cents.

Q. A total of $12,371.16?

A. Yes.

Q. That $12,371.16 represents complete expenses from the entire operation of the Society with respect to the amounts collected in the State of Florida?

A. That is correct.

Q. Now, I direct your attention to 1936, in this document you have here. Does that represent some breakdown of the expenses?

A. That is so.

Q. The general expenses that you have here is $6,728.58.

A. That is right.

Q. Is that again an allocation of all of the expenses of the Society with respect to the State of Florida for that year?

A. That is right.

Q. In addition to that allocation, have you also actual commissions paid to your representative in that State?

A. Yes.

[fol. 713] Q. And that amounts to $7,672.33?

A. That is correct.

Q. In addition to that, did you have some legal expenses that year?

A. The legal expenses amounted to $550.57.

Q. In the State of Florida?

A. Yes, sir.

Q. So that the total expenses for the State of Florida for that year were how much?

A. $14,550.78.

Q. Now, I direct your attention to 1937. You have here an item of $8,491.39. Does that represent an allocation to the State of Florida of the general expenses of the Society for all its operations throughout the country that year?

A. That is correct.

Q. In addition to that allocation, I direct your attention to the column entitled Commissions, $5,958.59, does that represent commissions actually paid to your representative in that State?

A. That is correct.

Q. In addition to that you have some legal expenses in that State, $273.92?

A. That is correct.

[fol. 714] Q. What is the grand total for the year?

A. $14,724.26.

Q. I direct your attention to general expenses of $14,612.34. Does that represent again the allocation to the State of Florida of the entire expenses of the Society in its operation for the year?

A. In addition to the expenses allocated to the State of Florida.

Q. No. I mean does it represent an allocation to the State of Florida for the general expenses of the Society's operations that year throughout the country?

A. Yes, sir.

Q. Now, in addition to that allocation, I direct your attention to the column "Commissions, $8,874.71." Does that represent commissions actually paid by the Society to its representative for the collection of revenue from the State of Florida that year?

A. That is correct.

Q. In addition to that, I direct your attention to the column Legal Expenses, $91.40. Does that represent moneys paid by you for legal expenses in that State?

A. That is right.

Q. What is the grand total?

A. $23,481.45.

[fol. 715] Q. Now, take the year 1935. I direct your attention to the column General Expenses, $15,702.40. Does that again represent an allocation to the State of Florida of all of the general expenses for its operations in the United States for that year?

A. That is right.

Q. I direct your attention to the column entitled Commissions $5,763.29. Does that represent the actual commissions paid by the Society for the revenue received from that State that year?

A. Yes, sir.

Q. Did you have any legal expenses that year?

A. No, sir.

Q. I direct your attention to the grand total, what is that?

A. $21,465.69.

Q. That represents all of the expenses incurred for the collection of revenue from the State of Florida that year?

A. Yes, sir.

Mr. Frohlich: I now offer in evidence these two documents with the compilations.

Mr. Boggs: May I inquire of the witness—I think it will save a little time.

[fol. 716] Mr. Frohlich: Go right ahead. I want you to.

By Mr. Boggs:

Q. Mr. Greenberg, as I understand your testimony, the item which you have termed General Expenses is computed by taking the entire expenses of operation of the Society all over the United States and pro rating it in proportion to the revenue received: is that the method of computing that General Expense?

A. Yes, approximately.

Q. You say approximately; just what do you mean by that?

A. I mean that is the way it was computed, just as I have stated it.

Q. There is then no charge under the head of General Expenses for any particular burden which your office might have considered the operations in the State of Florida as entailed upon your general office?

A. No, sir.

Mr. Finkelstein: If you could be more specific—I don't know what you have in mind.

By Mr. Boggs:

Q. In other words, to make my question more clear: Let's suppose in a given year, for some reason, the direction of your business in the State of Florida had proved considerably more troublesome than in some other States. [fol. 717] Under this compilation would you make an allowance for that in computing the amount of the expenses that you allocated to the State of Florida?

Mr. Finkelstein: I object to the question on the ground that it is hypothetical.

By Mr. Boggs:

Q. Do you understand the question?

A. I think I do, but I told you that the general expense was computed and that answers that questions as well as this question here.

Q. In other words, it is computed on no factor except the ratio which the gross receipts bear, the gross receipts of the Society's entire operations——?

A. As against its operating cost.

Mr. Boggs: I will now withdraw the objection as to the competency of the exhibit, and substitute only the following objection: One is that it is immaterial and irrelevant, and the second is that the mode of computing the expense is not accurate.

Mr. Frohlich: I offer it in evidence.

(Compilation of revenue and expenses received in evidence and marked Complainants' Exhibit 39 of this date.)

[fol. 718] By Mr. Frohlich:

Q. Mr. Greenberg, did you at my request examine a magazine entitled "Radio To-day"?

A. Yes.

Q. What issues, the issue of January 1, 1936; the issue of January 1, 1937; the issue of January 1, 1938; the issue of January 1, 1939; the issue of January 1, 1940?

A. Yes, sir.

Q. Now, what is this magazine "Radio To-day"?

A. It is a radio publication giving statistical information with regard to the radio industry.

Q. Is it generally regarded in the industry to be a true statistical report of the figures in the industry?

A. Yes, sir; it is so accepted.

Q. And is it widely circulated in the industry?

A. Yes, sir.

Q. Now, did you from that magazine make a compilation of the time sales for the respective years, January 1st, 1936, down to January 1, 1940, and the population and the number of radio sets sold, and the number of tubes sold in those years?

A. I did.

Q. Is this list that I hand you a true and accurate compilation made from those magazines?

[fol. 719] A. It is, sir.

Mr. Frohlich: I will offer this document in evidence. It is stipulated that in the column entitled "Time Sales" the figures therein appearing are gross figures and do not take into consideration the discounts that were granted by the radio industry on those time sales. It is further stipulated that the defendants may upon the trial offer in evidence the figures showing the discounts on those time sales in the form of a separate compilation.

Mr. Boggs: Subject to the defendants' objection that it is irrelevant and immaterial.

Mr. Frohlich: They are not objected to on the ground of incompetency?

Mr. Boggs: No, sir.

Mr. Frohlich: It is also stipulated that the figures contained in this compilation are approximate figures, in round numbers.

(Radio compilation received in evidence and marked Complainants' Exhibit 40 of this date.)

Mr. Boggs: Let us clear it up, just that simple thing. When it says January 1, 1936, it means for the previous year.

Mr. Frohlich: It is further stipulated that on this exhibit, [fol. 720] Plaintiffs' Exhibit 40, where the dates are January 1, 1936, the figures following that date are for the previous year, and that the same is true of each succeeding January 1st date on that compilation.

By Mr. Frohlich:

Q. Mr. Greenberg, did you at my request examine the magazine "Radio Today," January issues of 1935 to 1937?

A. Yes, sir.

Q. And did you also examine the magazine entitled "Broadcasting Year Book," 1935 to 1937?

A. Yes, sir.

Q. What is that Broadcasting Year Book?

A. The Broadcasting Year Book is a publication distributed by the Broadcasting Magazine giving statistical and other information relative to the radio industry.

Q. Is that magazine generally circulated in the trade?

A. Yes, sir.

Q. And is it generally accepted as an accurate and truthful representation of the statistical information of that trade?

A. It is.

Q. Have you prepared a compilation from those magazines for the years mentioned, showing the homes in the [fol. 721] State of Florida in which radios are used?

A. I have.

Q. And is that compilation true and accurate?

A. It is.

Q. And does that compilation also refer to the issues of the magazine from which it is taken?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: I object on the ground that it is immaterial and irrelevant.

Mr. Frohlich: It is not objected to on the ground of incompetency?

Mr. Boggs: There is no objection to its competency; but the defendants are privileged to put in other figures than here shown if they desire to do so.

Mr. Frohlich: That is right.

(Radios in Florida, compilation received in evidence and marked Complainants' Exhibit 41 of this date.)

Q. Did you, Mr. Greenberg, examine the Broadcasting Year Book for 1938?

A. I have.

Q. Did you from that year book make a compilation of [fol. 722] the statistics contained in that Year Book on retail radio sales in the United States from 1922 to 1937?

A. I did.

Q. And did you make that in the form of a compilation on a sheet of paper?

A. I did.

Q. I show you this compilation and ask you whether that is true and accurate as taken from that magazine?

A. Yes, sir; it is true, accurate, and taken from the publication mentioned.

Mr. Frohlich: The same is offered in evidence, subject to any further statistics or documents that the defendants may produce at the time of the trial.

Mr. Boggs: Subject to the objection of it being immaterial and irrelevant.

Mr. Frohlich: There is no objection to its competency?

Mr. Boggs: No.

(Compilation of radio sales received in evidence and marked Complain. nts' Exhibit 42 of this date.)

Mr. Frohlich: I offer in evidence a document entitled "Federal Communications Commission, Washington, D. C.," dated June 28, 1939, numbered 34845, containing certain [fol. 723] tabulations with respect to the 660 broadcasting stations in the United States and certain statistics with reference to such stations.

Mr. Boggs: That is objected to on the ground of it being immaterial and irrelevant; no objection as to competency.

Mr. Frohlich: There is no objection to competency.

(Tabulation, 660 stations, received in evidence and marked Complainants' Exhibit 43, of this date.)

Mr. Frohlich: I offer in evidence a document entitled "Federal Communications Commission, Washington, D. C.," dated January 6, 1939, numbered 34977, containing certain statistics with regard to income statements of the Columbia Broadcasting System, Inc., the National Broadcasting Company, and the Mutual Broadcasting Company, Inc.

Mr. Boggs: The defendants object solely on the same ground as that interposed to Exhibit 43.

(Income statements received in evidence and marked Complainants' Exhibit 44, of this date.)

Mr. Frohlich: I offer in evidence the list of the broadcasting stations in the State of Florida, showing the frequency in kilocycles, dated January 15, 1940.

[fol. 724] Mr. Boggs: It is objected to on the ground of it being immaterial and irrelevant.

Mr. Frohlich: It is not objected to on the ground of its competency?

Mr. Boggs: It is not objected to on the ground of being incompetent.

(It was stipulated that the list of broadcasting stations in the State of Florida be copied into the record, as follows:)

City	Frequency in Kilocycles	Day Power Watts	Night Power Watts
Daytona Beach			
WMFJ	1420	250	250
Ft. Lauderdale			
WFTL	1370	250	100
Ft. Myers			
WFTM	1210	250	250
Gainesville			
WRUF	830	5000	L-5000
Jacksonville			
WJAX	900	5000	1000
WJHP	1290	250	250
WMBR	1370	250	250
Lakeland			
WLAK	1310	250	250
Miami			
WIOD	610	1000	1000
WQAM	560	1000	1000
Miami Beach			
WKAT	1500	250	250
[fol. 725]			
Ocala			
WTMC	1500	100	100
Orlando			
WDBO	580	5000	1000
Panama City			
WDLP	1200	250	100
Pensacola			
WCOA	1340	1000	500
St. Augustine			
WFOY	1210	250	250
St. Petersburg			
WSUN	620	5000	1000
WTSP	1370	250	250
Sarasota			
WSPB	1420	250	100
Tallahassee			
WTAL	1310	250	100
Tampa			
WDAE	1220	5000	1000
		5000	*5000
WFLA	620	5000	1000
West Palm Beach			
WJNO	1200	250	250

Mr. Frohlich: I would like to offer photostats from Radio Magazine, "Radio Today" of January 1939, showing two

pages of statistics on radio, entitled "Uncle Sam's bill for radio, radio sets in use, the growth of radio from 1922 to 1939, actual sales, homes with radios, radio sets and tube sales for the year 1938, homes with radios by States, roll-call of radio industry, January 1, 1939, sales of replace-
[fol. 726] ment cost, 1938, sound sales, 1938."

Mr. Boggs: There is no objection to competency; it is object-- to as immaterial and irrelevant.

(Statistics on Radio received in evidence and marked Complainants' Exhibit 45 of this date.)

Mr. Frohlich: I offer in evidence the photostat of page 11 of the issue of "Radio Today" for January 1940, entitled "Statistics of the Industry, United States Annual Radio Bill, Radio sets in use, radio receivers sales and volume in 1939."

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 46 of thi- date.)

By Mr. Frohlich:

Q. Mr. Greenberg, did you at my request examine the magazine entitled "Radio Advertising Rates and Data" for January 1, 1940, particularly pages 59 to 63?

A. I did.

Q. What is that magazine?

A. That is a magazine used by the radio industry, containing detailed information with regard to the broadcasting stations operating in the United States, furnishing their rate accordingly, and offering information pertaining to
[fol. 727] their operation.

Q. And did you from that magazine compile a list of the broadcasting stations in the State of Florida who are members of the National Association of Broadcasters?

A. I did.

Q. Will you please look at this list and see if it is an accurate compilation of those stations.

A. Yes, sir.

Mr. Frohlich: I offer this document in evidence subject to correction, with respect to the membership of any of the stations listed thereon with the National Association of Broadcasters.

Mr. Bennett: That is objected to on the ground that it is immaterial and irrelevant.

Mr. Frohlich: No objection as to competency?

Mr. Bennett: No.

(Received in evidence and marked Complainants' Exhibit 47 of this date.)

(A recess was taken until 2:30 o'clock p. m.)

[fol. 728] After recess.

Irving Berlin, called as a witness in behalf of the Complainants, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Where do you live, Mr. Berlin?
A. New York.
Q. And what street?
A. 17 East 78th Street.
Q. What is your occupation?
A. Author and composer.
Q. And are you connected with any corporation or firm?
A. I am.
Q. What is the name of the firm?
A. Irving Berlin, Inc.
Q. How many years have you been connected with that firm?
A. I think since 1919; yes, I think that is the year.
Q. Are you a stockholder and also a Director in that company?
A. Yes, sir.
Q. And that is the same company that Mr. Saul Bornstein [fol. 729] is connected with?
A. That is right.
Q. Now, when did you first commence to write music?
A. In 1907.
Q. Have you been writing music ever since?
A. Yes, sir.
Q. And that is your complete occupation today?
A. That is right.

Q. And has been over the years?

A. That is right.

Q. Now, you also write the lyrics of musical compositions?

A. That is right.

Q. Do you as a rule write the words and compose the music for the compositions that you produce?

A. Completely.

Q. And prior to 1923 did you write a considerable number of musical compositions?

A. That is right.

Q. And were some of those compositions successful?

A. They were.

Q. And were some of those compositions known as hits?

A. That is right.

Q. Can you name some of the hits that you wrote prior [fol. 730] to 1923?

A. Yes, sir.

Q. Will you please name them.

A. "Alexander's Ragtime Band." "Everybody's Doing It." "A Pretty Girl is Like a Melody." "Oh, How I Hate to Get Up in the Morning." "Say it with Music." "When I Lost You." "My Wife's Gone to the Country." "International Rag." "Crinoline Days." "This is the Life." "When the Midnight Choo-Choo Leaves for Alabam'." Have you had enough?

Q. Yes. Now, did you publish those compositions with your firm?

A. Those that I have mentioned, not all, some were written for a firm called Watterson, Berlin & Snyder. This is before I went into the business for myself.

Q. And have some of the songs that you have just mentioned sold large quantities of sheet music?

A. They did.

Q. Did some of the songs sell as high as a million copies?

A. Yes, and some sold more.

Q. Now, did you receive moneys from the mechanical reproduction of those songs prior to 1923?

A. Yes, sir.

Q. And were those sums substantial?

[fol. 731] A. Very substantial.

Q. What would you say was the percentage of the sale of sheet music that you received as compared with mechanical royalties?

A. I am sorry.

Q. Perhaps I had better put the question in another way. About what did you receive on any particular hit number for mechanicals in proportion to what you received from the sale of sheet music?

A. Well, many of the mechanical statements amounted to more than they did for the sheet music.

Q. You actually received more money from that source than you did for sheet music?

A. That is true, in some cases.

Q. Now, can you mention some of the hit songs that you wrote subsequent to 1923?

A. Yes.

Q. Will you please name them?

A. "Cheek to Cheek"; "Top Hat, White Tie and Tails"; "Easter Parade"; "Heat Wave"; "I Poured My Heart Into A Song"; "It's a Lovely Day to be Caught in the Rain"; "God Bless America"; "I Am Putting All My Eggs In One Basket".

Q. Now, those songs you have just mentioned, Mr. Berlin, were also hit numbers?

[fol. 732] A. They are what we call hits; they were very popular.

Q. They were very popular?

A. Very.

Q. And performed over the air and other places of entertainment?

A. Yes, sir.

Q. Now, did any of those songs sell as high as a million copies?

A. No.

Q. Did you receive from the mechanical royalties from those songs as much as from the sale of sheet music?

A. No.

Q. Was there a great diminution in the amount you received from mechanical royalties and sheet music on those last mentioned songs with respect to the first mentioned songs?

A. Oh, I should think there would be—I think they would be about 10 per cent today as against—Are you speaking now of mechanical royalties?

Q. Mechanical royalties over sheet music.

A. Well, to give you actual figures, the socalled hit songs that sold a million copies would sell 200,000 copies today,

if that; in other words, a 200,000 song today is considered a big hit. If you are selling 200,000 or 250,000 today it is very exceptional, as an exceptional song may have been [fol. 733] in other days. Mechanical rights, I know I have checked up, and I would say they range from 8 to 10 per cent of what they used to be.

Q. Now, to what do you attribute that difference in the revenue, Mr. Berlin?

A. Well, I think it is the over-exploitation, if that is the right word, or the overplay of music. People do not get a chance to become acquainted with a song before it is over.

Q. Where is that music overplayed?

A. I would say almost entirely on the radio.

Q. Now, in addition to writing musical compositions, have you also written and composed musical plays?

A. That is right.

Q. Known as dramatico-musical works?

A. Yes, sir.

Q. Can you name some of the more important plays that you have written over the years?

A. Well, for the theatre, for the Music Box Revenue, recently—or, not recently, a few years—"As Thousands Cheer"; "Face the Music"; "Coconuts" for the Marx Brothers. And for the Ziegfeld Follies, that is, not in their entirety, "Watch Your Step"; "Stop, Look and Listen"; and several others that I can't think of just now.

[fol. 734] Q. Have you also written songs for motion picture productions in the past few years?

A. I have.

Q. Can you name some of those pictures?

A. Yes. "Top Hat" for Astaire and Rogers. "Carefree" for the Twentieth Century Fox. I wrote for the picture called "On the Avenue," and for the picture called "Alexander's Ragtime Band," which included mostly old songs; and recently for a picture for Sonja Heine, called "Second Fiddle."

Q. With respect to the compositions that were contained in your musical plays, were any of those compositions restricted with respect to public performance for profit?

A. Yes, they were all restricted.

Q. Can you tell us why they were restricted?

A. Well, the producers of the shows and the producers of the pictures pay royalties on these, and if we could not

restrict them, and if they were played just promiscuously with the—I think eventually it would interfere with the gross receipts of the picture or the musical comedy. I mean we could not afford to take something that the producers were paying for and just let them all down without having some kind of a restriction on it. I mean, we would be in that position, whether we wanted them played or not.

Q. Would the indiscriminate playing of your composi-
[fol. 735] tions interfere with the attendance of the public to the theatre where your shows were being played?

A. I believe that definitely.

Q. Would that hold true likewise with respect to your motion pictures?

A. I should think so, if they were over-exploited.

Q. In other words, a man would not want to pay $3 to come to see your show if he could hear all of the music at the same time, would he?

A. If he heard too much of it it would become an old story. You see, in a play there is a role, there are other sets to play; if the music became old by the time we got around to playing the show out of town, it would be an old story, very often we would have to replace some of the songs, some of the very big hits in the old days, I remember a show would open in Chicago, such as—well, one shining example is "No, No, Nanette." It had three or four songs in it and that music was restricted until the show got to New York. They wouldn't even let the cabarets play it, for the reason I gave.

I remember particularly some man had another show, and the music was so plugged before it got to New York, that by the time the show got to New York it was not a big success at all, and they blamed it on the fact that the music
[fol. 736] had become too popular.

Q. As a rule, what does it cost to put on one of your musical shows?

A. Well, the music of the Music Box Revue cost as high as a quarter of a million dollars. I think it is possible to do a Broadway Musical for less than $125,000 to $150,000; some of them are done much cheaper.

Q. When you write for a musical show, you receive royalties from the management of that show, don't you?

A. That is right.

Q. Those royalties are based upon a box office figure, are they not?

A. That is right.

Q. You receive a certain percentage of that; is that right?

A. That is right.

Q. And taking some of your shows, like the Music Box Revue, what percentage did you receive from the box office while the show was playing?

A. Well, in those days I received three per cent of the gross of the show and the authors would receive—I forget what—I forget what it was now, a certain percentage, but they were very expensive shows to put on, in a revue, and did not pay as big a percentage as a straight show.

Q. What did you receive as a weekly revenue, say, for [fol. 737] one of your box office revues, from that source?

A. Well, the show would play, we were charging around $5.50 at the time, and I should think it would play a $30,000 week, so it would average close to $1,000 a week.

Q. And what was the average run of your Music Box Shows?

A. Oh, they played two years.

Q. In New York?

A. In New York they played a year, and then we would send it on tour a year.

Q. You received weekly royalties based upon the box office in-take wherever the show played?

A. That is right.

Q. That holds true with respect to the Ziegfeld Follies, for which you wrote the music?

A. Yes.

Q. And every other show?

A. The Ziegfeld Follies, as a matter of fact, paid more. You see. I own 50 per cent of the Music Box Revues, the show, so I would put myself down for lesser royalties. The Ziegfeld Follies Revue paid me 5 per cent.

Q. And did that go on for a long period of time?

A. Yes.

Q. Is that a substantial part of the revenues that you [fol. 738] received from the writings of your compositions?

A. Very substantial.

Q. What did you receive for writing some of these moving pictures?

A. Well, the first one I did, "Top Hat," paid me a flat sum against 10 per cent of the gross, and I would say—I

haven't the figures here, but I would say "Top Hat" made close to $255,000 to $275,000.

Q. What did you obtain for writing "Alexander's Ragtime Band"?

A. The picture, you mean?

Q. For the picture, yes.

A. Well, the final figures are not in, but I think eventually the picture will gross $4,000,000, and my end of that picture should be anywheres from $325,000 to $350,000, I should think.

Q. Now, you consider that right of restriction of your musical compositions a very valuable right?

A. Very valuable.

Q. If that right were lost to you, would you continue to write for music productions for the stage and for pictures?

A. I doubt very much that the producers of musical shows or even pictures would enter into these contracts unless [fol. 739] we had some kind of a restriction on the songs. In other words, I mean if all that I could give the producer of a musical show is just the right to use the music, without the right of restriction, if I didn't have the right of control over the work and to restrict them, what would stop any cabaret or Billy Rose, instead of paying writers to write stuff for them, from using new production numbers? Take "Easter Parade," they could say "It's a very nice song; I figure we'll do it in our cabaret." They have tried to do it and we have stopped them.

Q. When did you join the American Society of Composers, Authors and Publishers, Mr. Berlin?

A. I am one of the founders.

Q. Can you give us the year that was founded?

A. Yes, I think it was 1914.

Q. And have you been a member of the Society ever since?

A. Yes, sir.

Q. You are not on the Board of Directors, are you?

A. No, sir.

Q. Now, did you ever in your life receive a penny for the public performance for profit of any of your musical compositions prior to 1914?

Mr. Boggs: I object to the question on the ground that [fol. 740] it is immaterial and irrelevant.

Mr. Frohlich: You may answer.

A. No.

Q. When for the first time did you ever receive any compensation for the public performance for profit of any of your musical compositions?

A. Well, I don't know the exact year; I think it was in 1921. I mean, the records would show that.

Q. From whom did you receive those moneys?

A. From ASCAP.

Q. Have you been getting those moneys ever since from ASCAP?

A. Yes, sir.

Q. On a quarterly basis?

A. That is right.

Q. If you know, what were the conditions prior to 1914 that made it necessary to found the American Society of Composers, Authors and Publishers?

A. Well, they just played our music promiscuously, they never paid anything for it.

Q. In those days did any writer, to your knowledge, obtain any compensation for the public performance for profit of his musical compositions?

Mr. Boggs: That is objected to as being irrelevant and [fol. 741] immaterial.

Mr. Frohlich: You may answer.

A. No, not that I know of.

Q. Did any publisher or any other owner of music, copyrighted or otherwise, receive anything for those compositions to your knowledge?

Mr. Boggs: That is objected to as irrelevant and immaterial.

A. No.

Q. Well, suppose you search your memory for a moment and tell us, if you can recall, any performance, right here in the City of New York, which played your musical compositions prior to 1914, without paying you any money.

A. Well, they all did.

Mr. Boggs: Same objection.

Q. Were there cabarets in New York at that time?

A. Yes, very many.

Q. Did cabarets play your music?

A. All of them played it.

Q. Was your music played in places of entertainment outside of New York City?

A. Yes.

Q. You heard it played yourself?

A. Yes.

[fol. 742] Q. Was it played in motion picture theatres?

A. That is right.

Q. Was it played in dance halls?

A. That is right.

Q. In hotels?

A. Yes, sir.

Q. Were you able to collect any compensation for the public performance of those compositions?

A. No, sir.

Mr. Boggs: The same objection.

Q. Did the situation prevailing in New York City with respect to this playing of compositions also prevail in other cities of the United States?

A. Yes, sir.

Q. And you have traveled extensively throughout the United States?

A. I did in those days, yes, sir.

Q. And you heard your music played and performed in various establishments prior to 1914 all over the country, and you received no compensation for such performances?

A. Yes, sir, that is right.

Mr. Boggs: The same objection.

Q. Now, would you tell us what you received since say, [fol. 743] for the past five years, on an average, from the American Society of Composers, Authors and Publishers for your public performance rights.

Mr. Boggs: Will you bring out whether he is talking about himself personally or as a member of his firm.

Mr. Frohlich: No, I am talking about him personally. I will preface that before I ask that question:

Q. Are you a member personally of the American Society of Composers, Authors and Publishers?

A. As a writer, yes.

Q. Apart from your organization of Irving Berlin, Inc.?

A. Yes.

Q. And as a personal writer or member, are you classified as a writer member?

A. Yes.

Q. Do you receive compensation as a non-personal writer?

A. Yes.

Q. Can you tell us what you personally received as a writer from ASCAP for the past five years on an average?

A. Well, I would have to examine the records; they have [fol. 744] changed.

Q. You can give us approximate figures; we do not care for the actual figures.

A. Well, I should think about on an average possibly of $12,000 to $15,000 a year.

Q. You are classified in Class A?

A. AA.

Q. AA?

A. Yes.

Q. Are there any other writers in that classification?

A. Yes, sir.

Q. Now, is the money you receive from ASCAP a substantial part of your revenue as a writer?

A. No, sir.

Q. What is the most substantial part?

A. My receipts from the ASCAP and box office royalties and the percentages from the showing of motion pictures.

Q. Now, do you keep yourself informed on the customs and usages in the business generally, in the music business?

A. Will you be a little more specific?

Q. Well, now, for instance, is it the custom for music publishers to make contracts with various users of music [fol. 745] for the purpose of interesting them in their musical compositions?

A. That is right.

Q. Does your firm, Irving Berlin, Inc., follow that custom?

A. Yes, sir.

Q. Does it employ men for that purpose?

A. Yes, sir.

Q. What do you call those men?

A. Contact men.

Q. And to your knowledge, do these men go around to various radio stations from time to time?

A. That's right.

Q. Can you tell us whether or not those men contact these

radio stations for the purpose of interesting them in your music?

A. That is right.

Q. I mean music of your corporation?

A. That is right.

Q. And do you know what they do, how they go about it?

A. Well, the usual procedure is, when a new song is published, the custom is to print up copies and make it available for them, and they come and demonstrate them. Some- [fol. 746] times they come to my office and demonstrate it in my—rather, for my personal compositions, when a so-called new Berlin score comes out, they contact us in many cases.

Q. Now, does your firm make a practice of urging radio broadcasters to perform the music published by your firm?

A. To urge them?

Q. To urge them.

A. No.

Q. As a matter of fact, if there is any urging, where does it come from?

A. Well, I am sorry, I don't understand the question. I am trying to answer it, and I would like to answer.

Q. Answer it any way you can.

A. Well, we have an enormous catalogue of music; I mean, you can't possibly treat one song as you would another. For instance, we have a catalogue of thirty-odd years of work. I have bought up all of my old copyrights from the firm of Watterson, Berlin & Snyder, and we have requests every day, and some of them we have to refuse because they are calling for your valuable copyrights. For instance, one broadcast comes next Monday, one of many such broadcasts by Andre Kostelanetz. He is doing a half hour of a Berlin broadcast, finishes with "God Bless America." [fol. 747] Q. On what station?

A. It is on a Columbia station.

Q. Columbia Broadcasting System?

A. Columbia Broadcasting System. Because it is Lincoln's Birthday he is using that as his closing number. Well, certainly we don't contact him to get that; he would come for that. We have dozens of old valuable songs that they are very glad to get.

If we publish a new song we show them the new song, and of course a well known writer will get the preference through his reputation. They will favor—there are some

songs that they will favor in the face of others. But to boil it down to answering the question of who urges who, I think it is a little difficult. Certainly a contact man can't make anyone play a song that he doesn't want to play.

Q. Now, you testified with reference to the Berlin half hour which is going to be played next week by the Columbia Broadcasting System over the air. Now, does the Columbia Broadcasting System, or any broadcasting system, pay you any separate royalty for the use of your numbers on that half hour?

A. No, sir.

Q. Now, isn't it a fact that a half hour is equivalent to [fol. 748] practically an entire stage production or a motion picture of your music?

A. It is a most valuable right. It would be equivalent to a half hour of what they did in "Alexander's Ragtime Band." The picture ran for an hour and fifteen minutes. It included biographical sketches of the song, and it contained biographical material about the composer.

Q. And that half hour is hooked up with various stations throughout the country affiliated with the Columbia Broadcasting System?

A. Yes.

Q. Over their national hookup?

A. Over their national hookup.

Q. And for that half hour of your music the Columbia Broadcasting System pays you nothing except the royalties that it pays to the American Society of Composers, Authors and Publishers?

A. That is right.

Q. So that you are receiving for that half hour just your proportion from the American Society of Composers, Authors and Publishers, whereas, for a half hour of your songs from stage productions or motion pictures you receive all the way from $100,000 to $400,000; is that right?

A. Well, I don't know whether you mean——

[fol. 749] Q. You received as high as $325,000?

A. That's right, but I don't know whether you could make that comparison; but certainly in a smaller sense, this is exactly the same right without getting paid a percentage. In other words—I will go further: if there were no ASCAP they would definitely have to pay a percentage on these performances, all stage performances.

Q. And do you consider that radio is paying you today an adequate compensation for the public performance for profit on your musical compositions?

Mr. Boggs: The question is objected to as immaterial and irrelevant.

Mr. Frohlich: You may answer.

A. Oh, definitely not.

Q. Is "God Bless America" on the restricted list today?

A. Yes, sir.

Q. And can you state why it was placed on the restricted list?

A. I may say "God Bless America," to my way of thinking, is a shining example of why we restrict songs. If "God Bless America" had not been restricted, by now it would have been dead as a song. As it is, it has just been done by Kate Smith, who introduced it, and through her single [fol. 750] performance it is being sung in hundreds of schools and educational groups and churches. And I venture to say that "God Bless America" will be the most important song I have in my catalogue. That is, as I said, a shining example of what restriction of a song means.

Q. Would you permit any swing orchestra to perform it today?

A. No, sir. If a swing orchestra performed "God Bless America," it would place a completely different construction and character on the song.

Q. Would it cheapen the song?

A. Completely. Not only cheapen it, but kill it.

Q. Would it destroy the educational quality of the song?

A. It would destroy the educational quality and everything the song was intended for.

Q. Would you permit a song like that to be performed over the radio sponsored by an advertiser who sells liquor or other beverages?

A. No, sir.

Mr. Boggs: The question is objected to as immaterial and irrelevant.

Q. Do you want to retain the right to restrict this particular song?

[fol. 751] A. I certainly do.

Q. Do you deem that right valuable to you for your repu-

tation and your prestige, as well as commercial valuability; do you deem that right valuable?

A. The most valuable right I have, much more than what the song earns.

Q. Going back to those hits that you used to write prior to 1923, how long a period were those songs popular?

A. They are still popular.

Q. Well, take some of your songs that sold as high as a million copies, for how long a period were they actually selling?

A. They sold for a period of two or three years.

Q. Two or three years?

A. May I answer in my own way?

Q. I think I understand what you are trying to get at, and I will make a comparison. Well, you take a song like "Alexander's Ragtime Band," it was written in 1911, and it took two or three months, it was not an instantaneous success, it was a difficult song to play, it had a long range, and it had something a little different for that particular time, and the result was it took two or three months to get on, as we say, but once it did get on, it stayed there, [fol. 752] stayed there for two years. And so I would say the first sales of "Alexander's Ragtime Band" during that particular time—I haven't the figures—but the sales were around 1,500,000 copies, and the sales kept close—it's like a favorable chart; once I finally got it there it kept on an even line, up on top, for possibly six months, and then gradually came down to the bottom, and then was up for a long time, until it was revived.

Now, if you want a comparison as to what happens today——

Q. Yes, that is what I mean.

A. Take the outstanding songs that I have had since radio, say, in the "Top Hat" Astaire-Rogers picture; it was introduced by Fred Astaire and was immediately liked, apart from the picture. It was introduced before the picture opened, and immediately the song, everyone wanted to do it. They all had it, they did it for two months, I would say three months. The sales went up immediately, reaching a peak, and when up there immediately sold, I should think, about 200,000 copies; and then overnight dropped from up there to here.

Then "Cheek to Cheek" is very rarely played now, un-

less they play a return program, and they will include it because it happens to be one of my songs.

I am trying to make a comparison of two socalled hit [fol. 753] songs.

Q. Would you say, Mr. Berlin, from your knowledge of the business, that this comparison holds good generally on hit songs prior to 1923 and hit songs after 1923?

A. Definitely.

Q. What is that due to today?

A. Forgive me if I can't answer that. In my opinion, the most important thing is that music is over-exploited today, as it has killed the possibility of a song living after its natural life. By that I mean, the songwriters of today haven't got a chance, haven't got the chance that the old fellows had, who had an opportunity to build up a socalled catalogue, the thing to leave to their estate, to their children, because songs are killed off today. And history will show that is the record, it will show there are very few songs that have been made popular through radio that have a socalled lasting quality.

There are shining examples, such as "I'm Heading for the Last Roundup," and a few others. So, in my opinion, I think one of the most important things that has happened in the way of hurting the popular song of today, is that it hasn't a chance to become part of the American people.

Q. Now, take the popular songs that you wrote many years ago: have you renewed any of those songs when the [fol. 754] original term expired?

A. Yes, sir; I have renewed them all.

Q. And do you expect to renew all your other songs when the original term expires?

A. Yes.

Q. And has that renewal right been very valuable to you?

A. Very valuable.

Q. In your own case, when you renew your songs, you turn them over to your own company for a period of 28 years, don't you?

A. Exactly.

Q. Have you taken any of the songs that you renewed and turned them over to any other publisher?

A. No, sir.

Q. Do you think, in your opinion, that the renewal rights of the new songs that you have been writing in the past few years will be as valuable to you?

Mr. Boggs: The question is objected to as irrelevant and immaterial.

Mr. Frohlich: You may answer.

A. No, I do not.

Q. Do you think that the new songs that you have written, including all of your hits, within the past ten years, [fol. 755] will have that parental value that your old songs had?

Mr. Boggs: The same objection.

A. Definitely not.

Q. To what do you attribute that change?

A. As I said, I think it is due to over-playing, of getting something all at one time, and they haven't a chance—when I say "they", I mean the public—the music buying and music loving public who haven't a chance to digest a song of to-day. In other words, I think they just listen to songs to-day, they don't sing them.

Q. The public doesn't buy the sheet music and play it in the home?

A. That is right.

Q. They simply listen to them on the radio?

A. That is right.

Q. Would you say that the radio is a sort of furnace that burns up your music?

A. Definitely. We can't write them fast enough for radio.

Q. Is it necessary to-day to compose more music in order to fill the popular demand for new music?

A. Very definitely.

Q. I show you this list of compositions and ask you whether you recognize that? Is that a true and correct list [fol. 756] or a partial list of compositions that you composed?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(List received in evidence and marked Complainants' Exhibit 48 of this date.)

Mr. Frohlich: You may cross-examine.

Cross-examination.

By Mr. Bennett:

Q. Mr. Berlin, were you ever a member of the Board of Directors of ASCAP?

A. No, sir.

Q. At no time?

A. Only for one year, in 1914.

Q. I think you stated that prior to the organization of ASCAP you received no income from the public performance for profit of small rights.

A. That's right.

Q. Of your songs. Did you at any time prior to 1914 ever endeavor to obtain a fee from a cabaret, a motion picture theatre or other establishment for the privilege of performing the small rights on your songs?

[fol. 757] A. Did I personally? No, sir.

Q. Do you know anybody who did prior to 1914?

A. Well, I know a group of us got together around that time, through Victor Herbert, but I don't know of any individual; no, sir.

Q. That was in 1914, which gave rise to the organization of ASCAP, did it not?

A. That is right.

Q. Did you prior to the organization of Irving Berlin, Inc., in 1919, personally obtain the copyrights on your compositions, or did you sell those to the publisher? Did the publisher acquire those copyrights?

A. The publisher acquired them.

Q. And at the present time and since the organization of Irving Berlin, Inc., does Irving Berlin, Inc. acquire the copyrights?

A. That is right.

Mr. Bennett: Thank you, that is all.

Mr. Frohlich: Just one question.

Redirect examination.

By Mr. Frohlich:

Q. Do you know whether the users in New York City, I believe you were living in New York in 1914?

[fol. 758] A. Yes, sir.

Q. Do you know whether the users in New York City

commenced to pay to ASCAP in 1914, or at any time thereafter, any compensation for the public performance for profit of your musical compositions voluntarily?

A. I didn't hear that.

Q. Let me ask it again. Did the users voluntarily offer to pay ASCAP compensation for the public performance for profit of your musical composition or the musical compositions of any other members of ASCAP?

A. Did they pay any?

Q. Did they offer voluntarily to pay any in 1914, after the organization of ASCAP?

A. No, sir.

Q. Do you know from your own personal knowledge how ASCAP managed to compel the users to pay anything for these rights?

Mr. Boggs: I object to the question as it is not the best evidence.

Mr. Frohlich: You can tell us the story, if you know.

A. Well, I would be very vague on that story.

Q. Tell us generally just what you know.

A. Well, as I remember, we had to start many writers' [fol. 759] suits, and we worked like dogs to try to get them to pay something, until eventually, I think it was in 1921 first, so much so that we were terribly discouraged at one time.

Mr. Frohlich: That is all.

The Witness: May I volunteer one——

Q. Do you want to amplify that answer? All right; go ahead.

A. No.

Mr. Frohlich: That is all.

Mr. Bennett: That is all.

(Witness excused.)

HERMAN GREENBERG resumed the stand:

Direct examination (continued).

By Mr. Frohlich:

Mr. Frohlich: I offer in evidence pages 27, 30 and 31 of a document entitled "United States Department of Commerce, Daniel C. Roper, Secretary; Bureau of the Census,

William L. Austin, Director of the Census of American Business, 1933, a Civil Works Administration Project, Services, Amusements and Hotels, Volume 1, United States [fol. 760] Summary by Kinds of Business and by States", containing the Seal of the Department of Commerce of the United States of America, dated May, 1935.

It is stipulated that photostatic copies will be put in evidence. I assume that there will be no objection to the competency.

Mr. Boggs: I object only to it on the ground of irrelevancy and immateriality.

(Received in evidence and marked Complainants' Exhibit 49 of this date, 49-A, 49-B, 49-C.)

Mr. Frohlich: I offer in evidence Table 19, Table 27, Table 28, Table 30 and Table 39, contained in a document entitled "Federal Communications Commission, Accounting Department, Summary of Information Submitted to the Commission by Broadcast Networks in Response to Laws requesting financial data in connection with network operations, and summary of responses by broadcast stations to Commission Order No. 38, 1937, Summary of responses by broadcast stations, program service and personnel question-aire, week beginning March 6, 1938, submitted at a hearing on Rules and Regulations governing standard broadcast stations, docket 5072-A, June 6, 1930-38, numbered in the right-hand corner 27615, as one exhibit.

[fol. 761] Mr. Boggs: Same objection.

Mr. Frohlich: But no objection as to comp-tency?

Mr. Boggs: No objection as to competency.

(Received in evidence and marked Complainants' Exhibits 50-A to 50-E inclusive, of this date.)

By Mr. Frohlich:

Q. Mr. Greenberg, did you at my request prepare a compilation of the radio station rates in the State of Florida taken from the March 1929 and January 1930-1939 issues of the Radio Advertising Rates and Data?

A. I did.

Q. And is that a true and correct compilation table from that magazine?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: I object to it as immaterial and irrelevant, and the defendant reserves the right to put in other evidence corrective of that shown.

Mr. Frohlich: I will offer it subject to correction with any other data you may desire to put in.

No objection to competency?

Mr. Boggs: No.

(Received in evidence and marked Complainants' Exhibit [fol. 762] 51, of this date.)

Mr. Frohlich: I will offer in evidence page 59 of the document entitled "United States Department of Commerce, Daniel C. Roper, Secretary, Bureau of the Census, William L. Austin, Director of Census of Business, 1935, Radio Broadcasting, October, 1936," bearing the imprint of the seal of the Department of Commerce, United States of America.

Mr. Boggs: I make the same objection to this category of present exhibits and to all exhibits of this type.

Mr. Frohlich: But not as to incompetency?

Mr. Boggs: No.

Mr. Frohlich: May I at this time substitute a photostat for the original?

Mr. Boggs: That may be done with documentary exhibits.

(Received in evidence and marked Complainants' Exhibit 52, of this date.)

Mr. Frohlich: I will offer in evidence page 4, of a document entitled "United States Department of Commerce, Daniel C. Roper, Secretary, Bureau of the Census, William C. Austin, Director of Census of Business, 1935, places of amusement, April, 1937," bearing the imprint of the seal [fol. 763] of the Department of Commerce, United States of America.

Mr. Boggs: The same objection.

(Received in evidence and marked Complainants' Exhibit 53, of this date.)

Mr. Frohlich: I offer in evidence page 4, of the document entitled "United States Department of Commerce, Daniel C. Roper, Secretary; Bureau of the Census, William L. Austin, Director, Census of Business, 1935, Hotels, April,

1937", bearing the imprint of the seal of the Department of Commerce, United States of America.

Mr. Boggs: The same objection.

Mr. Frohlich: But not objected to on the ground of incompetency?

Mr. Boggs: Not objected to on the ground of incompetency.

(Received in evidence and marked Complainants' Exhibit 54, of this date.)

Q. Mr. Greenberg, did you make a compilation of the monthly chain income of the three chains, the National Broadcasting Company, the Columbia Broadcasting System and the Mutual Broadcasting System, from 1930 down to and including 1939, on a monthly basis?

[fol. 764] A. I did.

Q. And where did you obtain that information?

A. Oh, from various sources, broadcasting, a variety of publications.

Mr. Frohlich: I will offer it in evidence subject to correction.

Mr. Boggs: Same objection.

(Compilation received in evidence and marked Complainants' Exhibit 55 of this date.)

Q. Did you compile at my request, Mr. Greenberg, data giving the operating power of the radio stations in the State of Florida from the year 1929 down to and including the year 1939, from March 1929, January 1930-1939 issues of Radio Advertising Rates and Data?

A. Yes, sir.

Q. Is that a true and accurate compilation of the statistical information contained in those publications?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence subject to correction.

Mr. Boggs: Same objection.

(Compilation received in evidence and marked Complainants' Exhibit 56 of this date).

Q. Mr. Greenberg, I show you a photostat of two pages, [fol. 765] respectively pages 190 and 192 of the 1939 Year

Book number of "Broadcasting" and ask you whether you made the photostats from that magazine.

A. I had the photostats made.

Mr. Frohlich: I offer them in evidence subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 57 of this date.)

Mr. Frohlich: I offer in evidence photostats of pages 174 and 176 of the magazine entitled "Broadcasting," 1940 Year Book Number, subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 58 of this date.)

Mr. Frohlich: I offer in evidence photostats of pages 196, 198, 199, of the 1939 Year Book Number of the magazine entitled "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 59 of this date.)

Mr. Frohlich: I offer in evidence pages 186, 188, 189, of the 1940 Year Book Number of the magazine entitled [fol. 766] "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 60 of this date.)

Mr. Frohlich: I offer in evidence photostatic copies of pages 198, 199 of the 1940 Year Book Number of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Plaintiffs' Exhibit 61 of this date.)

Mr. Frohlich: I offer in evidence page 100 of the 1939 Year Book Number of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 62 of this date.)

Mr. Frohlich: I offer in evidence pages 110 and 112 of the 1940 Year Book Number of "Broadcasting," subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 63 of this date.)

Mr. Frohlich: I offer in evidence page 74 of the 1940 Year [fol. 767] Book Number of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 64 of this date.)

Mr. Frohlich: I offer in evidence page 76 of the 1939 Year Book Number of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 65 of this date.)

Mr. Frohlich: I offer in evidence page 78—I withdraw that—an unnumbered page, with the penciled notation, page 308, of "Broadcasting" Year Book of 1940, subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 66 of this date.)

Mr. Frohlich: I offer in evidence page 78 of the 1939 Year Book of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 67 of this date.)

[fol. 768] Mr. Frohlich: I offer in evidence pages 179 and 191 of the 1940 Year Book of "Broadcasting", as one exhibit, A and B, subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibits Nos. 68-A and 68-B of this date.)

Mr. Frohlich: I offer in evidence page 70 of the 1940 Year Book of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainant's Exhibit 69 of this date.)

Mr. Frohlich: I offer in evidence an advertisement contained in the magazine "Broadcasting", issue of October 15, 1937, subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 70 of this date.)

Mr. Frohlich: I offer in evidence page 197 and page 195 of the 1939 Year Book of "Broadcasting", as one exhibit, A and B, subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibits 71A and 71B of this date.)

[fol. 769] Mr. Frohlich: I offer in evidence page 216 and an unnumbered page of the 1939 Year Book of "Broadcasting", as one exhibit, A and B, subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibits 72A and 72B of this date.)

Mr. Frohlich: I offer in evidence page 79 of the 1939 Year Book of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibit 73 of this date.)

Mr. Frohlich: I offer in evidence pages 304, 305, 306, of the 1940 Year Book of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibits 74A, 74B and 74C of this date.)

Mr. Frohlich: I offer in evidence one unnumbered page and page 185 of the 1940 Year Book of "Broadcasting", subject to correction.

Mr. Boggs: Same objection.

(Received in evidence and marked Complainants' Exhibits 75A *nad* 75B of this date.)

[fol. 770] By Mr. Frohlich:

Q. Mr. Greenberg, have you at my request made a compilation of the gross license fees collected in the United States by the American Society of Composers, Authors and Publishers in the years 1935, 1936, 1937, 1938 and 1939?

A. I did.

Q. And did you also in that compilation compile the figures of radio study of the American Society of Composers, Authors and Publishers for the same years?

A. Yes, sir.

Q. And did you add those totals up?

A. Yes, sir.

Q. And were those taken from the books of the Society?

A. Yes, sir.

Q. Are they true and accurate?

A. Definitely.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 76 of this date.)

Q. Did you from your books, Mr. Greenberg, make a compilation of the amounts which were received by the [fol. 771] American Society of Composers, Authors and Publishers from the foreign societies for the years 1936, 1937, 1938 and 1939; also the sums which were paid by the American Society to such foreign societies?

A. I did.

Q. Does this document I hand you represent such compilation?

A. It does.

Q. Is it true, accurate and correct?

A. Yes, sir; according to our records.

Q. And were these payments actually received and actually made?

A. Yes, sir.

Q. Pursuant to the contracts in evidence?

A. Yes, sir.

Mr. Frohlich: I offer it in evidence.

Mr. Boggs: Let me ask a preliminary question on this, please.

Mr. Frohlich: Yes,

By Mr. Boggs:

Q. Mr. Greenberg, this document offered in evidence as Plaintiffs' Exhibit 77, this is based entirely on actual receipts and actual payments, not merely earned payments or earned receipts?

[fol. 772] A. No, sir; actual payments received and paid out.

Mr. Boggs: No objection.

(Compilation received in evidence and marked Complainants' Exhibit 77 of this date.)

By Mr. Frohlich:

Q. Now, Mr. Greenberg, did you at my request make a compilation of the moneys that were paid by the American Society of Composers, Authors and Publishers to the plaintiffs in this action, to wit, Gene Buck, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Olie Speaks, William J. Hill, the Estate of Ethelbert Nevin, the Estate of Victor Herbert, the Estate of John Philip Sousa, from the years 1932 to 1939, inclusive?

A. Yes, sir; I did make such a compilation.

Q. And was that compilation made from account books and records of the American Society of Composers, Authors and Publishers?

A. It was.

Q. Was it made under your supervision?

A. Yes, sir.

Q. And is it an accurate and true statement made from such figures?

A. That is correct.

Mr. Frohlich: I offer it in evidence.

[fol. 773] Mr. Boggs: I object to it on the ground it is immaterial and irrelevant, no objection to incompetency.

(Received in evidence and marked Complainants' Exhibit 78, of this date.)

Q. And so as to keep the record straight, in this compilation you speak of the Estate of Ethelbert Nevin. What relative is that?

A. Ann Paula Nevin.

Q. Of the plaintiff in this suit?

A. Ann Paula Nevin is the widow.
Q. Of Ethelbert Nevin?
A. Yes.
Q. And you state here the Estate of Victor Herbert. What relative is that?
A. Daughter.
Q. That is Ella Herbert Bartlett, his daughter?
A. Yes.
Q. Jane Sousa, a plaintiff, is the widow of John Philip Sousa?
A. A widow of John Philip Sousa, yes.
Q. And do these individuals now, Ella Herbert Bartlett, Jane Sousa, Anna Paula Nevin, receive the moneys represented in this compilation since the death of their respective predecessors in interest?
[fol. 774] A. That is correct.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Bennett:

Q. Mr. Greenberg, one of the exhibits, I believe it was Plaintiffs' Exhibit 16, was a list of stations to which the broadcast stations of the United States ASCAP has granted free licenses, and I believe your testimony was that they were non-commercial stations, that they were not commercial stations; is that correct?
A. Yes, sir; that is my recollection, if that is the correct exhibit.
Q. Now, has ASCAP ever issued a free license to any broadcast station which operates commercially for profit?
A. Not to my knowledge.
Q. I believe you stated that in connection with Plaintiffs' Exhibits 17-A to 17-P inclusive, which was a list of broadcast stations licensed in Florida, contracts between ASCAP and broadcasting stations in Florida, that the licensed station WTAL was not now in force.
A. That is correct.
Q. Would you say that had been cancelled?
A. Yes, sir.
[fol. 775] Q. For what purpose was that cancelled?
A. It is my recollection that it was cancelled due to failure of the licensee to comply with the terms of the agreement.

Q. In what respect?

A. Making payments, reports.

Q. You mean they were behind in payments, or had not made payments?

A. Had not made certain payments that were past due or became past due.

Q. Do you know, as a matter of fact, that radio station WTAL, owned by the Florida Capital Broadcast Company and Gilbert Freeman, its president, are under an injunction by the Court restraining them from making payment to ASCAP until such time as the present litigation is concluded and an adjudication has been had as to the constitutionality of the statute?

Mr. Frohlich: I object on the ground it is incompetent, irrelevant and immaterial. The witness has no knowledge of any litigation down in Florida between these broadcasting stations and themselves and their own officers and stockholders, and on the further ground that any litigation in Florida affecting any broadcasting station down there is [fol. 776] not binding on the American Society of Composers, Authors and Publishers, as they have not been made a party by effective service, and it is not binding on the American Society of Composers, Authors and Publishers.

Mr. Boggs: Answer the question.

A. I don't have any personal recollection of that litigation made reference to in the question, but the fact of the matter is that the payments were not made by the licensee under the contract and, after several requests, the contract was terminated in accordance with the terms of the license.

Q. Do you recall receiving a communication from the station, calling attention to the injunction, stating that to make the payments would place them in contempt of Court?

Mr. Finkelstein: We object to it on the ground that it would be hearsay, and not binding on the plaintiffs.

A. I don't have any definite recollection about receiving such communication. There is a possibility that there has been, but notwithstanding those communications, if they were received, our legal advice was to proceed as provided for by the agreement which we have.

Q. Do you recall receiving a visit from Mr. Gilbert Freeman some time during the latter part of the Summer of 1939?

[fol. 777] Mr. Finkelstein: I object to it on the ground that any visit that Mr. Freeman might have made would be incompetent, irrelevant and immaterial and not binding on the plaintiff, and the question is "Do you recall him having made a visit?"

A. I don't recall any visit Mr. Freeman made to me during the year 1939. I have a recollection of a visit from a representative of this station, I think it was Freeman, a number of years ago, at the time that the station commenced operation, regarding negotiating for a license.

Q. Do you recall seeing in any other publication that an injunction had been issued against Station WTAL, prohibiting payments to ASCAP during the pendency of the present litigation?

Mr. Finkelstein: I object to that on the ground that any such publication would be hearsay, not the best evidence, not binding on the plaintiffs.

Mr. Bennett: I call attention to the fact that defendant's counsel did not object on the same ground to a whole raft of exhibits just put into the record.

(Pending question read.)

A. I don't have any recollection of seeing any particular articles or reference to an injunction. I have a faint recollection of some litigation which that station had, some legal [fol. 778] litigation; the contents of it I do not have any recollection of.

Q. Mr. Greenberg, has ASCAP at any time made a compilation of musical compositions broadcast over NBC network, Columbia network, and certain other stations?

A. Yes, we have made some compilations of compositions broadcast over the networks mentioned, on the basis of information furnished us by the networks.

Q. Did you make a compilation entitled "ASCAP Program Listings for 1935", which was printed some time about 1936, the first part of 1936?

A. I think there was such a compilation made.

Q. Will you produce a copy of that compilation for the year 1935.

A. The networks broadcast—is that what the question is?

Q. The publication known as "ASCAP Program Listings for the year 1935."

Mr. Frohlich: If it is available I do not see any objection to producing it. The witness offers to produce the document. If we have it you can have it.

Q. Has ASCAP made any subsequent compilations similar to that of 1935?

A. It is my recollection there is, not in the same way or [fol. 779] to the same extent.

Q. Will you produce copies of such additional compilations?

A. I will be glad to, if they are available.

Mr. Frohlich: They will be marked Complainants' Exhibits 79 A, B and C.

Q. Did ASCAP publish a compilation entitled "Composers, Authors and Publishers throughout the World," dated January 1, 1936?

A. We did publish that, but whether there are extra copies around I am not ready to say. I will try and find a copy for this purpose.

Mr. Frohlich: And it will be put in evidence as Plaintiffs' Exhibit 80, to be produced at the trial.

Q. Has ASCAP compiled any supplemental list to the compilation of January 1, 1936?

A. My recollection is that there was a supplemental list —and there again I do not think there are any available ones. I will try and find one.

Q. Will you produce a copy at the trial?

Mr. Frohlich: If it is available, we will produce it at the trial and it will be marked Plaintiffs' Exhibit 81.

Q. I believe you stated that you were the assistant gen- [fol. 780] eral manager of ASCAP?

A. That is correct.

Q. What are your duties as assistant general manager?

A. Assistant to the general manager, particularly in the management and supervision of the operation of the Society from its business extent and supervising the other branches of its operations.

Q. Does ASCAP have various field offices scattered throughout the United States?

A. Yes, sir.

Q. Are you in charge of the operation of those field offices?

A. To a great extent.

Q. You have regular contact with the people who are on the ground handling those particular offices?

A. Yes, sir.

Q. Receive correspondence from time to time?

A. Yes, sir.

Q. Do you have a field office in Salt Lake City, Utah?

A. We have a field office in Salt Lake City.

Q. Who is in charge of that office?

A. It was in charge of Mr. Hugo Anderson.

Q. Do you have a field office in Milwaukee, Wisconsin?

[fol. 781] A. Yes, sir; we have an office there.

Q. Who is in charge of that office?

A. Robert Hess.

Q. Do you have an office in Indianapolis, Indiana?

A. Yes, sir.

Q. And who is in charge of that office?

A. Mr. Paul Summers.

Q. Have you an office in Minneapolis, Minnesota?

A. Yes, sir.

Q. Who is in charge of that?

A. Wayne Ewing.

Q. Do you know the agent well?

A. I know him. "Well" is a relative term.

Q. You are well acquainted with him?

A. I know him since his association, which is a period of about five to six years or thereabouts.

Q. Do you receive reports and letters from him in the usual course of business?

A. Yes, sir.

Q. Does ASCAP maintain a card index of any kind, or an index of the copyrighted musical compositions owned by its respective members?

A. I don't know if we have such an index of copyrighted [fol. 782] musical compositions of its members. We are attempting to compile information as to copyrighted musical compositions.

Q. How many individual items have you compiled in that index, approximately?

A. I don't understand the question; "individual compositions"?

Q. Individual copyrights.

A. I would not be able to approximate that, because we have included all the information we could get our hands on, and it would run into a number of thousands.

Q. Have you compiled the list of publishers, music publishers, in the United States?

A. We have a list; I don't know how complete it might be; but we have some information as to the music publishers of the United States.

Q. Have you made available to certain users of music a card index of publishers, music publishers, in the United States, and also an index of musical compositions?

A. We made available to licensees all the information we have relative to such information.

Q. Has that been compiled in any form for distribution to licensees?

A. We have compiled information with regard to musical [fol. 783] compositions for service to broadcasting licensees.

Q. What form is that?

A. In a card index form.

Q. Is it compiled in the form of a sticker to be placed on the card?

A. A sticker that can be placed on the usual 2 by 4 card or 2½ by 4, for the purpose of convenient filing.

Q. Can you tell me how many publishers are listed on the card index?

A. No, I couldn't answer that offhand, as to the number of publishers that are included in compositions furnished in that index, furnished to the broadcasting licensees I would not know that offhand. Of course, it includes not only publisher members of ASCAP, but all other publishers and copyright compositions of which we have been able to furnish information to broadcast licensees.

Q. Will you produce a complete list of the stickers or cards, or either one, of the publishers which you have included in that index and which you have made available to licensees?

A. Only the list of publishers? I see no objection to furnishing such a list.

Mr. Finkelstein: Do you want a list of the 84,000 compositions that accompany that list?

[fol. 784] Mr. Bennett: No, only the publishers.

Mr. Frohlich: We will produce that at the time of the trial.

Q. In the operation of ASCAP and in field offices, has ASCAP endeavored to force the acquisition of licenses through prohibiting remote control by radio broadcasting stations?

Mr. Finkelstein: Presently I object to the question be cause I do not understand it.

Mr. Bennett: Let me restate it.

Q. Does ASCAP endeavor to prevent a licensee, a broadcast licensee, from broadcasting a musical program by remote control from outside the station when that outside place is not licensed by ASCAP?

Mr. Frohlich: I object to that on the ground that the contract in evidence speaks for itself.

Mr. Boggs: He is asking about the practice now.

Mr. Finkelstein: Do you contend that a broadcaster has the right to rebroadcast an unlicensed program?

Mr. Bennett: I am not contending anything.

Mr. Finkelstein: I am trying to find the materiality of the question.

Q. I have asked you whether the licensed broadcast sta- [fol. 785] tion was prohibited by ASCAP from picking up by remote control and broadcasting a musical program from outside its own studio when the place where the pickup was not licensed by ASCAP.

Mr. Frohlich: I object to that on the ground that the contracts in evidence speak for themselves.

Mr. Finkelstein: On the further ground, as a matter of law, there is no obligation to authorize any licensee to broadcast an unlawful performance.

Mr. Frohlich: On the further ground that the contracts in evidence clearly show that the broadcasters are limited to certain restrictions and limitations in their practice and cannot go beyond that, and it is not for this witness to give his opinion on those practices.

Now you may answer that.

Q. I want you to state what you actually do, not what is in the contract.

A. Now, to my knowledge, I don't know of a single instance where we have prohibited a broadcaster from pick-

ing up a remote control broadcast. I know I have never taken such a stand with a licensee, a broadcast licensee.

Q. Do you know whether it is a policy of ASCAP to prohibit such broadcasts?

[fol. 786] Mr. Frohlich: I object to that question on the ground that it is speculative and hypothetical and assumes a state of facts not in the testimony, and on the further ground that the policy of ASCAP is entirely immaterial, in view of the fact that the contracts between ASCAP and its licensees are now in evidence, and any policy of ASCAP is best evidence by those contracts.

A. Well, now, as I stated before, if ASCAP had a definite policy I would follow it. I, personally, have never to my recollection at this time restricted a broadcasting station from picking up a remote control broadcast; I have always tried to license the remote control independent of any influence upon the station.

Q. And you stated that you are in charge of field offices?

A. Yes.

Q. And have the local agents in charge of those particular field offices on the ground come under you?

A. They come under my supervision.

Q. They are subject to your orders?

A. They are.

Q. You stated you knew Hugo B. Anderson?

A. Yes, sir.

[fol. 787] Q. And that you received reports and letters signed by Anderson. I ask you whether the signature at the bottom of that letter is the signature of Mr. Anderson.

A. I think it is his signature; as a matter of fact, I would say it is his signature.

Mr. Bennett: I offer it in evidence, and subject to a photostatic copy being made of it.

Mr. Frohlich: I object on the ground that it is incompetent, immaterial and irrelevant and not within the issues in this case. I have no objection to a photostat of the document in place of the original.

(Letter received in evidence and marked Defendants' Exhibit C.)

Q. I ask you whether this signature at the bottom of this letter is that of Robert A. Hess.

A. Yes, I guess it is his signature; it looks a little abbreviated.

Mr. Bennett: I offer it in evidence.

Mr. Frohlich: Objection is taken to this document on the same grounds as heretofore stated. No objection to a photostat being furnished in place of the original.

(Letter received in evidence and marked Defendants' Exhibit D.)

[fol. 788] Q. Is that signature that of Mr. Paul Summers?

A. Yes.

Mr. Bennett: I offer it in evidence.

Mr. Frohlich: I make the same objection as stated above. No objection to a photostat being furnished in place of the original.

(Received in evidence and marked Defendants' Exhibit E of this date.)

Q. Is that the signature of Mr. Ewing?

A. I think it is.

Mr. Bennett: I offer it in evidence.

Mr. Frohlich: Same objection as above. No objection to a photostat being furnished in place of the original.

(Received in evidence and marked Defendants' Exhibit F of this date.)

Q. Mr. Greenberg, I believe you testified that you have been employed by ASCAP for the past 20 years?

A. About 20 years, I should say.

Q. In the course of that employment you acquired a great deal of experience, have you not?

A. I hope.

Q. As to the copyrights coming within the ASCAP repertoire?

[fol. 789] A. I have some information with reference to that subject.

Q. How many copyrights would you say come within the repertoire of ASCAP?

A. Well, now, you are going to start having me think a little bit. My last recollection, when a compilation was made by the Copyright Office, there were recorded with all arrangements approximately 700,000 copyrighted songs, effective the date of this Act of 1909. I would say it does

not go in excess of 200,000 to 250,000, if it went that high.

Q. Have you ever claimed that ASCAP controls millions of copyrights?

Mr. Frohlich: I object to that on the ground that it is speculative and hypothetical, and incompetent, irrelevant and immaterial, and what he claims would not affect ASCAP or any rights of ASCAP.

A. No, I don't think I have ever made such claim, unless it was one of these exaggerated sort of conversations, which would not mean anything.

Q. You would not tell a licensee that you controlled millions of copyrights?

A. No, I don't see how we can precisely say millions of copyrights.

[fol. 790] Q. Would you claim that you controlled millions when you were endeavoring to license a licensee?

A. No, I don't think it would be necessary to make any such claim ordinarily.

Q. I ask you if that is your signature at the bottom of that letter.

A. Yes, that is my signature.

Mr. Bennett: I offer it in evidence. I offer a photostatic copy.

Mr. Frohlich: I object to that on the ground that it is incompetent, immaterial and irrelevant and not within the issues here.

There is no objection to furnishing a photostat in place of the original.

(Received in evidence and marked Defendants' Exhibit G of this date.)

By Mr. Boggs:

Q. Mr. Greenberg, I have just one question to ask you, with regard to those various compilations that have been put in evidence in connection with your testimony, which you say were made up from the books and records of ASCAP. Will you please state for the record whether you have taken the precaution to have those lists carefully checked as to accuracy.

[fol. 791] A. Yes.

Redirect examination.

By Mr. Frohlich:

Q. Mr. Greenberg, with reference to this letter, Defendant's Exhibit G, dated June 6, 1933, addressed to John G. Carey, Editor, Central Broadcast Company, Davenport, Iowa, will you tell us whether you had available at the time you wrote this letter any information which enabled you to make the statement that "the numbers run into millions and new ones are constantly being added"?

A. Well, at that time I was under the impression that there were within the repertory of the Society the quantity of copyrights as indicated by the letter, due to the large membership of the affiliated societies, but subsequent to this date, after making an inspection and investigation of the facts, my conclusion and opinion were different than in that letter.

Q. Did you mean in that statement that you made in that letter that the numbers owned by members of ASCAP together with the numbers owned by foreign societies ran into the millions?

Mr. Boggs: I object to the question on the ground that [fol. 792] the answer is being put into the witness's mouth by counsel.

Mr. Frohlich: I don't think so.

A. As to the quantity of music copyrights within the repertoire as indicated in that letter, that was based not only upon copyrights of members of the American Society, but also of all members in the foreign societies, with which societies the American Society was affiliated, and there being 45,000 members within the membership of the foreign societies, I came to the conclusion, without any investigation, that the copyrights ran into the millions.

Q. Were you on June 6, 1933, assistant general manager of the Society?

A. No, sir.

Q. What was your position?

A. I was assistant.

Q. Assistant to whom?

A. To the general manager.

Q. Assistant to the general manager?

A. Yes, sir.

Q. And at that time was the American Society affiliated with the various foreign societies whose contracts we have put in evidence?

A. There were many societies with whom the American Society was affiliated.

[fol. 793] Q. At that time approximately how many members were there in the foreign societies?

A. Approximately 35,000 to 40,000, as I recall.

Q. Now, did you have in mind the copyrights owned by the members of the foreign societies when you said the numbers ran into millions?

A. Yes.

Mr. Boggs: Same objection as before.

Recross-examination.

By Mr. Bennett:

Q. Do you now claim, Mr. Greenberg, that ASCAP has no right to license the foreign copyrights?

A. No, sir; I make no such claim. I make no such statement.

By Mr. Boggs:

Q. I understood you to say, Mr. Greenberg, in explaining your letter of January 6, 1933,—June 6th, rather,—Defendants' Exhibit G, that you had had reason since writing that letter to change the conclusion that you expressed in that letter?

A. That is right.

Q. And from that I infer that you have since changed your mind as to the right of the Society to license the for-

[fol. 794] eign copyrights?

A. No, that is a wrong conclusion of interpretation of my answer. From the large membership of the foreign societies, without making any investigation, I came to the natural conclusion that the copyrights of such a large membership would run into such a large number; subsequent to the writing of that letter a thorough investigation was made as to the copyrights in the Copyright Office under the present Act, and also what the maximum foreign copyrights were, and the conclusion was materially different from anything in that communication in evidence. But the Society, under its assignments with the foreign societies, controls

the performing rights of the works of the members of the foreign societies in the United States, and the foreign societies control the performing rights of the members of the American Society in their respective countries.

Q. Mr. Greenberg, did you ever correct the impression conveyed in that letter that there were millions of copyrights?

A. Well, no, I can't recall that I wrote a follow-up letter correcting that; but I think the general tone of the Society's attitude relative to its control of performing rights of copyrights and the nature of its members, as well as the work [fol. 795] of members of foreign societies with whom we are affiliated has clarified what the Society license makes available to such licensees.

Q. But you don't know whether you wrote to the addressee of that letter, changing that impression?

A. No, I don't think I have, if my recollection serves me correctly.

Q. Will you please have a search made in your files, and if you find any further communication to the address of that letter pertaining to the matter about which I now inquire, produce it for the trial of this case.

A. I will check it.

It was Stipulated that a copy of the Standard Uniform form of contract between composers and the Songwriters Protective Association would be produced upon the trial, to be marked Defendants' Exhibit B.

[fol. 796] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

GENE BUCK, as President of the American Society of Composers, Authors, and Publishers, et al., Complainants,

vs.

GEORGE COUPER GIBBS, et al., Defendants

Statement of Evidence

Be It Remembered, that commencing on the 15th day of April, 1940, at 9:30 o'clock A. M., in the United States Court Room, Post Office Building, Gainesville, Florida, the above entitled cause was tried before a three Judge United

States Court composed of the Honorable Joseph C. Hutchinson, Judge of the Circuit Court of Appeals, Fifth Circuit, the Honorable William J. Barker, Judge of the District Court for the Southern District of Florida, and the Honorable A. V. Long, Judge of the District Court for the Northern District of Florida; that on the trial of said cause, the complainants and defendants, to maintain the issues joined on their respective parts, introduced and offered before the said Court the following oral and documentary evidence and interposed the objections and took the exceptions herewith noted:

[fol. 797] APPEARANCES:

Manley P. Caldwell, Esquire, Herman Finkelstein, Esquire, Louis D. Frohlich, Esquire, Frank J. Wideman, Esquire, counsel for Complainants, and Thomas J. Ellis, Esquire, Lucien H. Boggs, Esquire, Andrew W. Bennett, Esquire, counsel for Defendants.

COLLOQUY

The Clerk: Gentlemen, this is the case of Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers; Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor——

Judge Hutchinson: You do not have to read it all.

The Clerk: Against George Couper Gibbs, Individually and as Attorney General of the State of Florida, Et Al.

Mr. Frohlich: The complainants are ready, your Honors.

Mr. Ellis: The defendants are ready, your Honors, except as to the depositions. An offer was made by the plaintiff to supply any documents in their possession, without service or formal notice, and a request was subsequently made to furnish said documents, only some of which were furnished. The principal, missing documents have not been supplied which are contracts between the plaintiffs and the National Broadcasting Corporation and the Columbia Broadcasting Corporation. The defendants consider [fol. 798] these documents will have some bearing upon the issues, and we wish to renew the demand for them at this time, and to inform the Court that the demand has been made; a formal offer is of record.

Mr. Frohlich: We have produced each document, your Honors, called for with the exception of two contracts that

we did not have available at the moment. As a matter of fact, they are available to the State. These contracts are contracts made with the National Broadcasting Corporation and the——

Judge Hutchinson: If you say they can have them, what is the point in making the demand?

Mr. Ellis: We don't have them, your Honor.

Mr. Frohlich: I haven't them here yet, but they will be here by air mail.

Mr. Ellis: There is one other matter with regard to the introduction of depositions taken in what is called the Nebraska Suit that either side may wish to introduce—subject to objections as to competency and materiality.

Mr. Frohlich: That's agreed.

Judge Hutchinson: Counsel for plaintiff will state the case and make it as intelligible to us as are our limitations.

Mr. Wideman: May it please the Court, I think a brief review of the history of the trial proceedings and the things that have occurred since the l. t hearing before this Court in Jacksonville will be helpful.

The original bill of complaint in this case was filed in [fol. 799] February of 1938, to restrain the operation of a Florida Statute that was passed in June, 1937, which placed certain restrictions on the sale of copyrighted music in Florida. About two months later this Court granted a restraining order against the operations of that Statute. The defendants appealed from that order to the United States Supreme Court on the ground of the failure of this Court to dismiss the bill of complaint, and on the ground that the jurisdiction of the Court had not been shown.

The Supreme Court affirmed the order of this Court in granting the temporary injunction, and thereafter, and shortly thereafter, the Legislature of the State of Florida passed another law; that was in June, 1939. The Complainants filed a Further Supplemental Bill of Complaint to restrain the operation of this new law, and this Court granted a second temporary injunction bringing the new law within the scope of the first temporary injunction that was granted.

That second injunction granted at the hearing in Jacksonville of October 19, 1939; the defendants have filed answer to the bill of complaint, a considerable amount of testimony has now been taken, and the case is here, before this Court, for trial and on final hearing.

Now, at the last hearing in this case, the hearing of October, 1939, the Court directed that the parties proceed to take the greater part of their testimony by depositions. The complainants have complied with those instructions of the [fol. 800] Court. We have taken and filed some five hundred pages of testimony, and we have introduced nearly one hundred exhibits.

For the information of the Court, we might call attention more specifically to the testimony that has been taken since that hearing in Jacksonville by deposition, but it is lengthy and I will make no attempt even to give a brief resume of the substance of the testimony, but merely to indicate to the Court the names of the witnesses, and to——

Judge Hutchinson: Don't you think it would be a better idea first to state what the issues are that we are to try? Just what your bill complains of? Not the legal grounds but the grounds of fact upon which you rely since the depositions. Give us a sort of a pre-trial statement of the issues in controversy—not those not in controversy; if you do this we would be in a better position to follow the evidence. I am, in fact, kind of hazy on the issues. It is not clear in my mind. Just give me the issues.

Mr. Wideman: The original law passed by the Legislature in 1937, if the Court will recall, made it unlawful for any substantial number of composers, authors, and publishers to combine for the purpose of selling copyrighted music. All contracts then existing between any such combination and the users in plays, theaters, hotels, broadcasting companies, dance halls, and what not were made invalid and void, and under certain sections of the Statute a composer, author, or owner of the copyright was compelled to place on the sheet of music the price for the use of that [fol. 801] piece of sheet music for all purposes.

Judge Hutchinson: That particular piece as opposed to the general license?

Mr. Wideman: That's right, your Honor. That is to say, as opposed, as the Court says, to the blanket license issued by the society for the use of compositions of all of the members of the society. This law endeavored to compel each composer of copyrighted music, and there are thousands of such composers in the country and more than one thousand members of this society—to compel them to place on that sheet of music the price for which that sheet, the price for

which that sheet of music should be for all purposes. The Court, of course, recalls that under the copyright law he has a sort of a separate right—the exclusive right to the public performance of that in addition to the right of the sheet music and for its recording on phonograph records.

The 1937 law provided also that no suit might be brought within the State of Florida by the Society except through compliance with the law. This law also had very severe penalties; a person who violated the law was subject to a fine of not less than fifty dollars and not more than five thousand dollars, and he was also subject to imprisonment, a minimum term of one year and a maximum term of ten years. That, very briefly, were the provisions of the '37 law.

Now, as I understand it, the operation of that law enjoined—was enjoined, and this Court was affirmed by the [fol. 802] Supreme Court, and the mandate from the Supreme Court came down in April, 1939, and in less than two months' time the Legislature of the State of Florida had passed another law which we feel is merely supplementary to the first law, and which we think was more stringent than the first law. We endeavored to demonstrate at the prior hearings that the new law did not repeal the old law, but was merely supplementary to it. In addition to the provisions of the '37 law, this new law provided for a complicated system of registration with the Comptroller of the State of Florida, requiring each composer to file with the Comptroller's office the name of every composition that he seeks to sell in Florida, the owner of the copyright, the name of the person who is the owner of the public performing rights for profit, and a number of other things were required to be filed, as well as the payment of so much filing fee.

Mind you, that law provided that two or more persons should be regarded as an unlawful organization, whereas, the first law was a little bit more liberal in saying any substantial number of composers, authors, and publishers. The new law also provided that if two or more persons combine to market their product in Florida and one license was sold by them then they were required to—already having been required to file this list and the price opposite each composition to be paid, all users in Florida would have to try to go in and buy on a per piece or per use basis, namely: so much for each composition for each use.

Now, we contend pretty much on the same ground as our [fol. 803] original bill of complaint. It deprives us of our property without due process of law, it invalidates our contracts, and renders it impossible for us to market our product in the State of Florida.

Judge Hutchinson: That is legal theory. There are certain facts—issues which you think require proof. Now, what are those issues of fact which you think give you these rights? There is something, you think, you have got to prove. What are those facts? What are those facts that we are going to try right now?

Mr. Wideman: I think, your Honor, that could just be stated by a short statement of what our twelve witnesses have testified to. Each of these witnesses has been a member of the American Society of Composers, Authors and Publishers for many years, and is familiar with its operations, and has a contract with the Society which he insists on retaining and which he expects to renew.

The witnesses testified that prior to the formation of ASCAP it was an unknown thing for anyone to receive any compensation for the public performance for profit rights in copyrighted music. For the first seven years of ASCAP, while it was engaged in the struggle for recognition of the rights of composers and publishers, no compensation was received. Commencing in 1921 they began receiving quarterly distributions from ASCAP which have continued and increased until in recent years the witnesses or their companies have received sums ranging from nine thousand dol- [fol. 804] lars to one hundred thousand dollars through ASCAP. As Walter Fischer said, the receipts from public performance for profit rights through ASCAP are "the life blood of the music industry".

These twelve witnesses, whose testimony I am giving a brief resume of now, are twelve of the most prominent and outstanding composers of popular music in the country, and, I think, for that matter, in the world; Irving Caesar, Deems Taylor, a composer of music of a more serious nature, Harry and Will von Tilzer, Walter S. Fischer, publisher, George W. Meyer, and Irving Berlin. They emphasized that prior to 1923 the royalties received from the sale of sheet music and mechanical reproductions were substantial. It was not unusual for a song to sell over a million copies and to be popular for a long time, and the record sales were proportionate, but commencing in 1923 the situation changed

drastically. Where millions of copies were sold previously only thousands of copies are sold now, and while a song was good for a year or fifteen months, it lasts only a few weeks now. This change has been due to radio for two principal reasons. In the first place, the public is not interested in playing sheet music when it can hear the songs easily by merely turning on the radio. Secondly, the incessant use of songs over the radio quickly wears out their popularity.

The Society was organized, as the Court will recall, in 1914. It had a struggle for the first few years of its existence, and it was not until several years after it was or- [fol. 805] ganized that it finally succeeded in compelling compensation for the public performance for profit of copyrighted music.

Each of the witnesses testified that he could not operate independently in fixing prices for public performance for profit, nor in detecting or enforcing infringements. As Mr. Caesar said, the composer would have to become a "one man Gallup survey", or as Fred Ahlert said, even if the composer could operate independently, he would not have any time left to think about writing songs.

That, of course, is the purpose of the Florida laws—to compel them to operate independently; each would have to investigate the various factors affecting the proposed use of music—such as the nature of the place, its size, financial ability, and so forth. Then, it would be necessary to employ investigators to detect infringements, and attorneys for advice on various rights and infringement suits. They agreed that the expense of operating separately would be prohibitive, and they could not afford such expense, and that the loss of ASCAP's services would be disastrous. As George Meyer said, "Without ASCAP, I would be driving a cab or something if I wasn't too old for that."

Just merely a statement of the situation in Florida makes the difficulty obvious. There are over three hundred places of amusement in the State of Florida that use copyrighted music, and who depend very largely for their existence on copyrighted music. If one man writing one song in the City [fol. 806] of New York should endeavor to get fair compensation for public performance, it would be necessary for him to contact all of these three hundred places of amusement and entertainment. The size of the establishment would have to be considered, the size of the audience he

would play to, and a great many other things. The difficulty of such negotiations are apparent, and are developed in this testimony. That is why, your Honor, these people never got payment for their property before the organization of ASCAP in 1914—the utter impossibility of negotiating individually or singly.

They also testified that it would be impossible, as a practical matter, to comply with the registration provisions of the 1939 law. In the first place, the compiling and furnishing of the required data would be a prohibitively expensive burden. As Mr. Meyer said, "It would take me the rest of my life to furnish the information". Mr. Fischer said, "God knows how it could be done in our case". And further, they could not make the required affidavit as to ownership of the performing rights because they are assigned to ASCAP and even without such assignment neither the composer nor the publisher owns the entire rights on any song.

Reference was made to the provisions of Sections 2A and B of the 1937 law requiring the affixing of prices for public performance for profit rights to sheet music and records. They explained the situation regarding these—that neither publisher nor the composer has any control over the manu-
[fol. 807] facturers of records once a number is permitted to be broadcast, and any manufacturer may record the number and sell the records by paying two cents per record royalty. They could not be required to put the public performance for profit price on the record nor charge for it, nor account for the proceeds. Similarly, the jobbers and distributors of sheet music likewise could not be controlled. It would be impossible to determine in advance the public performance for profit value of the various numbers.

The various composers and publishers have valuable copyright renewal rights which the Statutes impair. At the end of twenty-eight years from the original copyright the owner or his heirs, if he is dead, is revested with the copyright ownership regardless of assignment. The Florida Laws affect the operation of this provision of the Federal Copyright Law—among others. The witnesses valued this renewal right as high as one hundred and fifty thousand dollars.

Another important right the Statutes infringe, the witnesses testified, is the right of restricting the performance of songs. Mind you, in this new law is the requirement that the person making the affidavit under this new law must make the statement that he has the sole right to public per-

formance for profit of the piece of music concerning which the affidavit is made. It is impossible for these composers or publishers to truthfully make such an affidavit, or to guarantee the continuing of the piece of music for the reason that the music is subject to being restricted, and [fol. 808] the reason for the restriction is to keep it from being played to death in a few weeks. That is just one of the many issues. Irving Berlin stated that this right was among the most valuable rights he has, and Deems Taylor testified that restriction is even more important in the case of serious music than popular music.

The witnesses agreed that the present system of blanket licenses is desirable. Mr. Ahlert said, "It is the ideal status." The per piece system seemed to them to be impracticable. A point developed by Irving Berlin was that if a specific charge were made for his music, proportionate with the royalties for movie and stage rights received, it would cost the users far more than they are now paying, through ASCAP, for the public performance for profit or "small" rights to his music.

In other words, Irving Berlin retains for himself the right to sell his music for movie and stage purposes, and if he received proportionate compensation acting as an individual with respect to his public performance for profit rights, the price it would cost—it would cost the users many, many times what they pay through ASCAP, because his music is simply worth that much and will demand that much money. The result is the users pay less under this plan of procedure and plan of marketing copyrighted music than they would otherwise.

The method of distribution among ASCAP members was also described. First, expenses of about 17½% are deducted, and the balance is allocated 50% to composer-members and the same to publisher-members. Each allocation [fol. 809] is then divided among its group according to classifications based upon length of service, artistic merit, popularity and so forth.

A witness of another category was Herman Greenberg. He has been associated with ASCAP for twenty years and is now Assistant General Manager; his testimony went entirely to the set up of the Society. He further described the practice in prosecuting infringements of ASCAP music. This consists of sending out three notices, copies of which were put in evidence, followed by an investigation, then suit

and settlement of the suit upon granting of a license. He put in evidence a list of the number of licenses in the United States since 1922. He also stated the amount of revenue derived by ASCAP from Florida for the years 1935 to 1939, respectively, and also the expenses in Florida with the net amount computed.

Now, that would give the Court some idea of the issues concerning which testimony has been introduced, and which we purport to establish in support of the bill of complaint. If the Court asks me my view of the case we are to try, it reduces itself to the simplest terms. I should say it is the fight and the purpose of the broadcasters and other various users of music to compel the composers—the owners of property to market that property on their own terms and to sell it on a plan that suits them, which plan would mean either a ridiculously inadequate compensation for that property, or result in the impossibility to collect anything for that property. In other words, the fight is to compel a per piece or per use system of sale.

[fol. 810] Judge Hutchinson: You are on one side and the broadcasters are on the other. They are claiming some rights compelling you to act. I think you will win the battle—but your statement of the issues? The State will reply it is motivated by a—sincerely trying to protect the poor people of the State of Florida. Now, it doesn't make any difference what group they are trying to protect, somebody has had the power to get the Legislature to pass this law. Of course, it would have been in fine shape if you told the Legislature what you are telling us. The Legislature has said this must be done, and no matter how much I might sympathize with ASCAP, we would have to have pointed out to us some difficulty—some impediment to the power of the Legislature. I would be rather surprised if they could combat any of those things you have been telling me. I assume they could do a lot better with ASCAP than they could without it. But it doesn't strike me that that's the real issue.

Mr. Wideman: It is unconstitutional.

Judge Hutchinson: That's a good word, but why? There is something I haven't got yet. Why would it be unconstitutional for a state to say, "I don't want the composers to combine; I don't want the manufacturers to combine"? Are you relying on the commerce laws or something like that? Would this thing be unconstitutional because it in-

terferes with commerce? Does the Constitution of the United States or Florida help you out? Just where?

Mr. Wideman: For one thing, your Honor, it impairs [fol. 811] obligations under contracts entered into—knocks them out——

Judge Hutchinson: You think it violates the clause against impairing of contracts?

Mr. Wideman: Yes, sir, your Honor.

Judge Hutchinson: What other?

Mr. Wideman: It deprives us of our rights under the Copyright Laws.

Judge Hutchinson: You think it interferes with the Federal Statute?

Mr. Wideman: Yes, your Honor, the said laws interferes with the operation of the Federal Copyright Laws.

Judge Hutchinson: And those rights, you say, extend not only to the right to withhold the sale or use, but the right to determine how that sale and use shall be effected?

Mr. Wideman: Of course, your Honor, otherwise the property would be valueless.

Judge Hutchinson: You are putting yourself on the ground that the Federal Copyright Laws have been violated. What other laws have been violated?

Mr. Wideman: I think, your Honor, I can give you just that information by reading one paragraph in the bill of complaint.

Judge Hutchinson: That's fine.

Mr. Wideman: (reading) "This further supplemental bill of complaint is brought among other things, to enjoin the enforcement of the New Law; to repress and prevent [fol. 812] the deprivation under color of the said New Law of certain rights, privileges and immunities secured to complainants by the Constitution and laws of the United States and the Constitution of the State of Florida, that is, the right to have and enjoy exclusive rights under certain copyrights granted and owned by the respective complainants, other than the Society, as well as the exclusive right to publicly perform for profit such copyrighted compositions which has been vested in the complainant Society for a limited period as hereinafter set forth, which rights have been respectively granted to the complainants pursuant to Article 1, Section 8 of the Constitution of the United States and the Copyright Act of 1909 as amended (35 Stat. L. 1075-1078, U. S. Code, Title 17); to repress

and prevent the deprivation of such rights without due process of law and without the equal protection of the laws; and to repress and prevent——

Judge Hutchinson: Where do you say due process of law comes in here?

Mr. Wideman: Music. Not all of the people who own copyrights have music; there are copyrights on books.

Judge Hutchinson: You think the Statutes can't make a classification of music as against books?

Mr. Wideman: That is my point, your Honor. Yes, sir.

Judge Hutchinson: All right.

Mr. Wideman: (continuing) "* * * and to repress and prevent the impairment of obligations of contracts heretofore made by the——.

[fol. 813] Judge Hutchinson: The impairment of the obligations of contracts necessarily does not arise in a constitutional sense where the act is within the police power of the State.

Mr. Wideman: I think that is true. We propose to demonstrate, before the case is over, that this is not a proper exercise of the police power of the State of Florida. (continuing) "* * * and to repress and prevent the impairment of obligations of contracts heretofore made by the respective complainants and others similarly situated; to repress and prevent the operation and enforcement of said New Law; to repress and prevent a compulsory and irrevocable grant of special privileges to the users of complainants' copyrighted musical compositions in the State of Florida in violation and disregard of complainants' rights; to repress and prevent the taking of complainants' property without just compensation and for a private purpose; to repress and prevent the enforcement of said New Law as a special law granting to corporations, associations and individuals a special privilege and retroactive in its operations; and this further supplemental bill, among other things, involves the question as to whether or not each of the complainants may combine with one or more persons as defined in the Statute as a partnership, society, association or corporation (whether a resident or non-resident of the State of Florida), for the purpose of licensing the public performance for profit of their copyrighted musical compositions without the State of Florida; whether or not complainants in combination with one or more other per-

[fol. 814] sons, have the right to issue by themselves or

through any agent, attorney or representative, the right to users in Florida to publicly perform for profit musical compositions copyrighted and owned by complainants on any basis other than prescribed in said New Law; whether or not complainants acting in combination or collectively have the right to issue to citizens of Florida licenses for the public performance for profit of their copyrighted musical compositions copyrighted and owned by complainants by means of blanket licenses and fixed fees for the public performance for profit of complainants' copyrighted musical compositions to users within the State of Florida without giving such user an option to pay royalties either on a per piece or program basis; whether the State of Florida has the right to require and compel complainants to file within the State of Florida a list of musical compositions written, composed, copyrighted or owned by the complainants; whether or not the State of Florida may deprive complainants of rights secured under the Copyright Laws of the United States to restrict certain uses of their copyrighted works where they have given a license for a limited use thereof; whether the State of Florida has the right to require or compel complainants to fix a price for their copyrighted musical compositions for the performing rights of each separate performance for profit of each composition belonging to the complainants and to compel complainants to make classifications determined by use and function or either of the users of such compositions with separate price for each classification; whether the [fol. 815] State of Florida may fix the terms upon which complainants may license the performance for profit of their respective compositions to users within said State; whether the State of Florida has the right to subject complainants and others similarly situated to the jurisdiction of the Courts of Florida and to require them to designate the Secretary of State as a person upon whom process may be served as their agent in the event that complainants or any of them shall attempt to license the public performance for profit of their respective copyrighted musical compositions or dramatico-musical compositions or to collect any compensation on account of any such sale, license or other disposition in the State of Florida; whether the State of Florida may prevent plaintiffs from engaging an attorney, agent, collector or representative in said State by enacting that any such attorney, agent, collector or repre-

sentative shall be subject to the penal provisions of said State Statute; whether the State of Florida has the right to impose a three per cent tax upon moneys collected by complainants for licenses to publicly perform for profit the copyrighted musical compositions and dramatico-musical compositions within the State of Florida; and whether said tax is discriminatory; whether said State Statute is sufficiently definite to apprise complainants of the acts for which they may be subjected to the penal provisions of said State Statute, including fine and imprisonment; and whether or not defendants in threatening to enforce the provisions of said New Law against complainants are not depriving [fol. 816] complainants of their property and their right to liberty without due process of law; and whether they are not denying the complainants the equal protection of the laws; and whether the State of Florida may impose conditions upon the enjoyment of copyright in the United States by the 44,000 members of foreign societies who have authorized the Society to grant licenses in the United States in their behalf, which conditions are not embraced in but are in conflict with existing treaties, Presidential proclamations and the Copyright Act of the United States."

Judge Hutchinson: Is all that in one paragraph?

Mr. Wideman: Your Honor, that is not all of that paragraph. However, on that point——

Judge Hutchinson: It looks like there can't be any facts in dispute. The State can't interfere with copyrights—with the rights of persons holding copyrights within in the limits that the Courts have worked out on that.

Mr. Wideman: Isn't it a question of whether or not it should be shown in the testimony that the operation of these laws will deprive the plaintiffs of their rights under the Constitution of the United States?

Judge Hutchinson: There isn't any doubt but that it will deprive plaintiffs of some rights. The State has police power which it may exercise without interference of either Federal or State Constitutions up to a point, and the question is where the law—it seems to me, there can't be very much fact in controversy, not from the standpoint of your [fol. 817] statement. I think it will be well to hear from the State—to hear what the issues of fact are. I am inclined to think that what the Legislature is doing is going to be a serious drawback; that isn't the solution of the question.

Mr. Wideman: The question is whether or not it deprives

us of our property under the Constitution. We don't say we can't collect the full amount of money we could collect. We say our fundamental rights under the Constitution of the United States are——

Judge Hutchinson: You say you have the right under the Constitution to proceed with your business substantially as you are doing. If you can maintain this Act will fall, but the solution that we must come to, as I see it, so far, isn't bound so much in the resolution of controverted facts, but in the resolution of controverted terms as to the limits within which the Legislature can work. The State may claim you can go on as before but I doubt that.

Mr. Wideman: They are going to claim we can, but we think we have demonstrated we cannot.

Judge Hutchinson: Well, let's hear from the State.

Mr. Wideman: I think I see your Honor's point. We must in the presentation of this case deal with police power, and before sitting down——

Judge Hutchinson: Of course, we will hear arguments on the case, but I would like for you to use as much of this time in expressly coming to a pre-trial set up on the facts. [fol. 818] Where do we differ on the facts? Is there a real conflict, and, then when we find where we are on the facts we have only a small conflict to resolve. That's why I would like to know now, why I would like to hear what the State has to say. Of course, we expect to be presented with written briefs.

Mr. Wideman: We have taken testimony pursuant to those ends, your Honor. Before sitting down, may I mention the brief your Honor spoke of a moment ago. The brief will be filed, but I would call your Honor's attention to the fact that there is already on file a brief in connection with the original bill of complaint that pretty well covers all of the issues, and there is something on that point of police power in that brief. However, we will supplement that brief with a further brief.

Judge Hutchinson: If you think the matter has been thoroughly briefed, all right. I haven't had access to this brief.

Mr. Wideman: We will be glad to file another brief. May I also call attention to the fact that since the last hearing in this case in October in Jacksonville there have been handed down in other states by two and three judge Federal

Courts, decisions and decrees enjoining the operation of State Statutes that are substantially the same in form, content, and substance as the Florida Statutes.

Judge Hutchinson: On final hearing?

Mr. Wideman: Yes, sir. I have here a copy of the findings of fact and copies of the decrees in both of those cases. [fol. 819] In the Tennessee case the opinion was not written, but in the other a very thorough opinion was written by the Court—in the Nebraska case.

Judge Hutchinson: Who wrote that opinion?

Mr. Wideman: Judge A. K. Gardner. It is a well considered discussion of the issues involved in *this* proceedings.

Judge Hutchinson: Did they decide the question on the Federal Constitution or the State?

Mr. Wideman: The Federal Constitution. The decree was entered on January 25, 1940, and the decree in the Tennessee case was rendered in Nashville, Tennessee, on February 19, 1940.

Judge Hutchinson: I suppose an appeal has been applied for?

Mr. Wideman: No, sir.

Judge Hutchinson: The time is out?

Mr. Wideman: They filed a motion for a new trial in Nebraska and the motion for a new trial was denied, so that the ninety days has not probably expired.

Judge Hutchinson: All right. Now, we will hear from the State.

Mr. Ellis: I am sure the Court recognizes the State, through the Attorney General, has no interest whatever in any private controversy that may be involved in this litigation. The State and the Attorney General are charged with the administration of the 1939 Act; the '37 Act has not been superseded. We are considerably interested, however, in sustaining the acts and policies of the Acts which we re- [fol. 820] gard as strictly in accordance with the laws of the State and the Nation against unlawful combinations in trade.

It seems, from Mr. Wideman's statement, we are in conflict as to the issues, and I really don't exactly agree as to what the issues of law are. In order to present our position we must disagree in regard to the contents of the Statutes. We must——

Judge Hutchinson: Give it to us without reading it. Where is the real pinch in this case?

Mr. Ellis: The position of the State is that there are only two or three essential features in these two Acts. The first appears in Section 1 of the 1937 Act, and simply makes it unlawful for composers, authors, and publishers to combine to fix prices for the use of their original compositions.

Another object of the Statute is provided by the 1939 Act which says there shall be no combination of two or more persons to issue a blanket license for musical compositions. That is a license for a public performance of these compositions at a certain price unless there be an established per composition price, and shall be offered also at the option of the user. In other words, the acts do not prohibit the issuance of blanket licenses, they merely provide that there should be a blanket license and a per piece price established, and that should be filed by the owner of the composition with the Comptroller of the State of Florida, with the statement as to who owns the copyright, his residence, and [fol. 821] certain formal details of that kind.

Judge Hutchinson: You mean it does not prohibit the association of these persons, the organization of ASCAP to also file this schedule of ownership and price?

Mr. Ellis: Yes, sir.

Judge Hutchinson: As I remember the argument in Jacksonville, the trouble there was they said they couldn't arrange individual licenses, not only because of the cost, but because there are a great many people in this organization; they just couldn't put a price on those things. Now, from your standpoint that is immaterial?

Mr. Ellis: Yes, sir.

Judge Hutchinson: All right, go ahead.

Mr. Ellis: And, second, that is not true. There is nothing in the Act which prevents an organization like ASCAP from functioning in a non-monopolistic manner—the using of musical compositions in a competitive manner.

Judge Hutchinson: The Act doesn't prohibit them from granting licenses?

Mr. Ellis: No, sir, but it does prohibit them from combining together, both the composers and publishers, and the issuing of licenses for which they collect compensation derived from programs on which their compositions are not even used.

In other words, that arises out of this situation. ASCAP,

it will be shown in evidence, levies or collects a fee—a license fee, on which some broadcasting station, movie house, [fol. 822] night club, hotel pays based upon a percentage of the entire gross income of that place, and where there may be many a night when nothing control-ed by ASCAP is used. That income may come even from the sale of fruit, or a tap dance, or an amateur entertainer—on something which has no connection with ASCAP, something which ASCAP and its members have no copyright interest.

Judge Hutchinson: Does the Act prohibit these people from licensing?

Mr. Ellis: It provides a schedule or a classification be established for different kinds of uses, or the volume of use according to trade conditions. It permits that so long as they are filed, and it may be changed on seven days' notice.

It forbids the exaction of compensation for the use of a copyrighted musical composition based upon the proceeds or revenue from a program in which that copyrighted composition is not used.

Judge Hutchinson: The Act doesn't merely provide for the filing of this schedule and the prices and individual use —the license, unless it took into account where none of those compositions were used.

Mr. Ellis: That is an important feature, and we can show your Honor decisions by the Supreme Court——

Judge Hutchison: That tells people how to fix prices for the articles they are selling?

Mr. Ellis: Your Honor, the holder of a copyright, like the holder of a patent, can charge anything he wants to [fol. 823] for the use of that patented article, or for the use of that copyrighted composition, but the Supreme Court has held several times that he cannot charge for the use of that article—he cannot make a charge based upon the revenue from something else in connection with that article which is not copyrighted and in which he has no copyright interest. That came up in a gasolene case some time ago.

Judge Hutchinson: They have here a copyrighted article which is subject to the regulations as to the manner in which the persons owning the copyright can charge? Is that it?

Mr. Ellis: Yes, sir. Basically our position is simply this. The effect of the Copyright Laws, the effect of the provi-

sions of the Federal Constitution that only Congress can give, as Mr. Justice Roberts said recently, "The right of the property is an intangible species of property which the common law gave as tangible property." It gives that man an exclusive right to control that intangible species of property, but we contend that, nevertheless, he is subject to other laws of the commonwealth in regard to police power.

Judge Hutchinson: It is the combination you are relying upon? You are the head of a combination and it is in restraint of trade?

Mr. Ellis: We construe these acts—there is not a thing in there that imperils in any substantial degree the exclusive right of the individual copyright owner, which is the only right he has under the Federal laws.

[fol. 824] Judge Hutchinson: Well, they don't make them outside of the State. There is no question at all of Interstate Commerce.

Mr. Ellis: No, sir; it regards the exaction of these prices in Florida—they don't have to come in here. They can come in individually and in a group so long as they don't combine together to fix prices.

Judge Hutchinson: They come into Florida and make this violation in the State—there is no question about being subject to Florida Laws; this would be a combination in violation of State Laws.

Mr. Ellis: We will submit all of this to the evidence, and also to the bill. Their bill establishes, without any evidence, such a combination. Their bill shows an association of some ten thousand members and a self-perpetuating board of directors with power to deal with the copyright protection of their members, and with the arbitrary power to determine how much their members should get.

Judge Hutchinson: Do you mean if it weren't for the fact of a copyright, there would be no question at all of a combination?

Mr. Ellis: Yes, sir. The bill shows that they are barred by their own conduct.

Judge Hutchinson: What are the facts that you will have to have two or three days to try?

Mr. Ellis: I don't think, your Honor, that there are any dispute of facts; we would be willing to stipulate. We have [fol. 825] some evidence these gentlemen have prepared to

show instances of discrimination, and it shows the number of copyrights controlled by ASCAP, and to show the extent of their activities; all of that appears in the bill.

Judge Hutchinson: These people do better by virtue of the organization?

Mr. Ellis: Certainly.

Judge Hutchinson: They go further and say they really cannot do business under your system, but if they can't that is just their hard luck?

Mr. Ellis: Yes, your Honor, just like the Standard Oil Company.

Judge Hutchinson: Do you go further and say they have this idea that police power takes their copyright protection away from them—you can do all you want by yourself and fix any price by yourself, but you can't combine with other persons who have similar copyrights and make a big trust or combination out of it? They say what they are doing is not a combination—that they are doing the only thing that can be done. That they can't use their copyrights unless they work it like this. I suppose your proof would be on the grounds that it is being done in different states and it could be done?

Mr. Ellis: We have evidence to show, that can be introduced in thirty minutes or less—to show that it is very simple and inexpensive; there might be an issue of fact there.

Judge Hutchinson: Let's get back to the facts. What [fol. 826] evidence do you propose to offer in rebuttal? You spoke of a stipulation. How far will you go on that?

Mr. Ellis: We will stipulate to any fact which is clear.

Judge Hutchinson: How far?

Mr. Ellis: I have examined the details Mr. Wideman referred to. As I understand his statement—the first part was devoted to the earnings of the members of the Society. I don't think we can go so far as to say they have no revenue.

Judge Hutchinson: I am not sure in view of all this that I really understand what the issues are. It is our business to do it, and as they have stated it, it doesn't look like any issues of fact.

Mr. Wideman: Mr. Frohlich will examine our witnesses, which, I think, we can finish with today.

Judge Hutchinson: Have you undertaken to see if you can stipulate on anything?

Mr. Wideman: I see no possibility of stipulating as to the facts. Compliance with this law would run us out of business, confiscate our property.

Mr. Ellis: I don't know what they want to stipulate to.

Judge Hutchinson: I am trying to clarify it in my mind so that my mind can start to working—what I have got to decide. I can see lots of law contested here; that is as big as a house, but what are the facts in this case?

Mr. Wideman: We intend to show, your Honor, as a [fol. 827] matter of practical operation it is a physical economic and financial impossibility to comply with the law, because, thereby, we are deprived of our property.

Judge Hutchinson: Is that the line of your testimony?

Mr. Wideman: Partly so, your Honor. But while we are on the subject as to what the issues are, there is one thing that I do not think I have mentioned yet and that is our right not only to sell our property, but also our right to withhold our property from sale. Under this law the right of public performance for profit is confiscated—it will be taken by the people of the State of Florida unless this law—

Judge Hutchinson: That's a law question. What is the fact question here? The law says you must do it, and there is no dispute over the fact that you don't want to do it. The only question of fact there could be in it, that it is just an impractical thing, and you have already produced this through your depositions; it is an impractical thing and you could not really run your copyright under those terms. It would be largely opinion testimony.

Mr. Frohlich: No, your Honor; I want to prove the history of the Society, and the fact that it was met and opposed by a large, organized group of users for twenty-six years—it was met at every turn. I want to show that negotiations were had with these users, and that these users agreed to every fee. I want to show that we never arbitrarily fixed a fee on anybody. There has been a concerted attempt for a great many years, commencing in the halls of Congress, [fol. 828] to emasculate the law so that it would give no relief to these people. That attempt was not successful. There has been——

Judge Hutchinson: Does anybody deny all of that now? Does anybody deny that all of that has been going on?

Mr. Frohlich: Mr. Mills has been in this dispute, your Honor, for twenty years. I want to prove, furthermore, that when the attempt failed to amend the Copyright Law

these groups of users led by the broadcasters commenced in 1937 to initiate legislation in the states and they were successful in five of the states. I want to show that this represents the deliberate efforts on the part of a gigantic industry to crush the song writers.

Judge Hutchinson: We can't do anything about that. We can't inquire into the motives of the Legislature. We can't consider the motive which induced the passage of this law.

Mr. Frohlich: Here is what I have in mind. There is an issue here of public policy and public interest and police power, because if this Act does take away rights granted by the Copyright Laws, has the State under its police power the right to do this? Then, your Honor is to determine is there an evil in the State of Florida——

Judge Hutchinson: If we can say there is evidence—there are conditions which the Legislature could legitimately have considered, it doesn't make any difference whether somebody went down there and bought them out lock, stock and barrel; we couldn't do anything about it.

[fol. 829] Mr. Frohlich: But then, your Honor, would have to determine as a question of law.

Judge Hutchinson: I have no objection to hearing you for a while on that—those political activities; there is a lobby in every legislature, and if this was considered in every act, why, we would never do any business.

Mr. Frohlich: I want to give you a general picture.

Judge Hutchinson: Well, I know that somebody is after you, and I know it is somebody who expects to make money out of you. (laughter)

Mr. Frohlich: That's what I want to prove.

Judge Hutchinson: We understand what the issues, suppose you go ahead.

Mr. Boggs: Before commencing the testimony, your Honor, may I say that I am not so sure that the Court understands fully the difference between the 1937 Statute and the 1939 Statute. The '37 Statute prohibits any price fixing combination. The——

Judge Hutchinson: Is it necessary for us to pass upon the '37 Law?

Mr. Boggs: No, I am not suggesting that. The Court has already decided against the 1937 Act, but I do say that the '37 Act is still in existence and this is a supplement to it. The monopoly provisions of the 1937 Act are still in

effect, but Sections 2A and 2B and 6 of the 1937 Act are out. Those are the sections on which, by the way, a great deal of evidence was taken in New York. That's why I am call-
[fol. 830] ing your Honor's attention to it. There are sections which require the impressing of a price on a piece of music. We have conceded freely that those sections were barred by leaving them out. If your Honor will bear that in mind—if the plaintiffs want to offer further testimony on the supposed deleterious effects of Sections 2A, 2B, and 6, you will, no doubt, find it unnecessary because we have already consented to being enjoined on those sections.

Judge Hutchinson: What issues of fact do you think testimony should be taken on?

Mr. Boggs: Issues of facts as to monopoly. There is enough in the pleadings in this case to show that they are a price fixing combination in restraint of trade, and we shall have some testimony to offer to show how large and substantial a hold they have upon the industry.

If I had composed one piece of music and if Mr. Ellis had composed one piece of music, and if we put our heads together and made a price fixing combination, the Court wouldn't think that that was a very important combination, but we will show that that is an important and powerful combination; we will show that compliance with the 1939 Statute is very easily done by anyone willing to do so. So far as the monopoly issue is concerned, they have never agreed that they were a monopoly.

Judge Hutchinson: As concerns the broadcasting of copyrighted music?

Mr. Boggs: They have never indicated that, but we shall [fol. 831] have some evidence on that score.

The only other thing I want to call your Honor's attention to now is in reference to the decrees of the Tennessee and Nebraska Cases. A copy of the Tennessee decree shows on its face that it was entered by consent of the Attorney General of Tennessee, so I don't think that is any precedent for anything. I will welcome your examination of the Nebraska decree. Mr. Wideman thinks it is a good opinion for him, but I am sure it is a good opinion for us. The State of Nebraska did have the power to regulate; ASCAP was a price fixing combination, but the Nebraska Act did not hold because of sections similar to our Sections 2A and 2B of the 1937 Act.

Mr. Wideman: Your Honor, we can't blame counsel for wanting to get rid of Sections 2A and 2B, but it has not been demonstrated that that has been repealed. We submit it has not been repealed; it doesn't say Sections 2A and 2B are not kept in effect. It is not limiting what we say to those Statutes. If it is the law in Florida, we are entitled for it to stay in order to show to what lengths the State of Florida would go in trying to enact legislation against complainants.

There was a second repealing law, if the Court will recall, that failed to pass.

Judge Hutchinson: All right, now suppose you go ahead with your testimony.

[fol. 832] Thereupon, to maintain the issues on their behalf, the Complainants produced as a witness one Edwin Claude Mills, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name?
A. Edwin Claude Mills.
Q. Where do you reside?
A. In New York City.
Q. How many years have you resided in New York?
A. Twenty-two years.
Q. Prior to your coming to New York had you been engaged in any business connection with the theatrical or entertainment professions?
A. Yes, sir, since 1911; I have been in the theatrical business, the movie business, vaudeville theatres, and various other amusement enterprises.
Q. Did you have any connection with the motion picture theatre business at any time?
A. Yes, from 1913 until 1918.
Q. What types of theatres?
A. What types? Motion pictures, vaudeville, legitimate —dramatic; all sorts.
Q. And in what parts of the United States?

A. In the southwest generally; Texas, Oklahoma, Arkansas, Kansas and Missouri.

[fol. 833] Q. When you came to New York did you have any experience with the theatrical industry?

A. Yes, when I came to New York I became secretary of the Vaudeville Managers' Protective Association.

Q. How long did you serve in that capacity?

A. Until some time in 1919.

Q. Is that vaudeville industry still flourishing?

A. No.

Q. Did the time come when you severed your connection with the industry?

A. Yes, sir.

Q. Then, what did you do?

A. I became Chairman of the Board of the American Society of Composers, Authors and Publishers.

Q. In what year was that?

A. 1919.

Q. What did you do after that?

A. Well, I continued in that office until 1929.

Q. And what was your occupation after 1929?

A. Well, during the time I was the Chairman of the Board of the American Society of Composers, Authors and Publishers. In 1929 I left and became President of the Radio Music Company.

Q. Then, did you give up your occupation with that company?

A. Yes, I left there in March, 1932, and became associated with ASCAP.

[fol. 834] Q. In your business experience and connection with ASCAP did you have occasion to personally conduct negotiations with the motion picture theatres with reference to license fees?

A. Repeatedly.

Q. At the time that you first joined up with ASCAP were motion picture theatres in the United States using music to any great extent?

A. All of them.

Q. It was not on the screen in the theatres——

A. (interrupting) No, sir, it was performed by pianists, organists—it was living music played by live musicians.

Q. And the time did come when you participated in the negotiations for license fees?

A. Yes, sir.

Q. Can you tell us the approximate time when you first entered upon these negotiations?

A. I would say early in 1920.

Q. With whom did you negotiate?

A. With the Motion Picture Exhibitors League, with the Motion Picture Theatre Owners of America, and with various other state associations.

Q. Was that Motion Picture Exhibitors League a national organization?

A. Yes, sir.

Q. Its members were the individuals who owned and operated motion pictures throughout the United States?

[fol. 835] A. Yes, sir.

Q. In these negotiations with these organizations did you particularly come in contact with any individuals——

A. (interrupting). Yes, sir, with Sidney Cohen, who is now dead; he was president of the organization at that time. Also with Walter Vincent their Executive——

Q. (interrupting) Did you on behalf of ASCAP finally consummate an agreement or a basis of operation on a fee—a license fee basis?

A. Yes, sir.

Q. Can you tell us generally what were the terms of these agreements?

A. Well, there have been so many, but I will state to the best of my recollection. I think the first agreement we succeeded in negotiating was one under which a motion picture theatre in a smaller community would pay a license fee at the rate of two and a half cents per seat per annum. That is to say, a theatre with a thousand seats would pay twenty-five dollars a year for a per annum license to use that music, if an- when it wanted the music of ASCAP. The theatre in the larger city—the larger theatre was to pay five cents per seat per annum, and a theatre in the metropolis, the large house, was to pay ten cents per seat per annum for the same sort of blanket license.

Q. Were those negotiations and terms you just described approved by the Board of Directors of the Society?

A. Yes, sir.

[fol. 836] Q. Did the American Society license these theatres only on the basis you have just described?

A. Well, it is not so simple. No. There has always been some exhibitors that felt that their organization had nego-

tiated at a rate that was too high, and they repudiated, as individuals, these rates and sought to make individual deals; it was many years after that and we haven't been successful in licensing all of the theatres. There are some twenty thousand theatres located in every city and village throughout the United States, and they can't all be reached by our staff effectively, that is to say, each and every one of them.

Q. The contracts that are made on behalf of ASCAP, are they made within groups of motion picture owners?

A. The contracts are never made with the groups that represent these users. We made contracts with the individual user of music based usually on the trade association negotiations which have been conducted in his behalf, and upon the association's recommendation that these terms should be acceptable.

Q. What is the present basis of the licensing fee between the members of the Society and the theatres?

A. The minimum rate is now five cents per seat per annum, and the maximum rate is twenty cents per seat per annum; that would be the case in a theatre like Music Hall in New York City which is a house that seats six thousand people. Fees relate generally to the policy of the house, its size, its capacity, the number of shows it does per week, and its profit opportunities. The rate is very much lower [fol. 837] for a little theatre over on Third Avenue than it is for a big theatre which makes a much greater use of our music.

Q. After 1921 or 1922, did the radio industry come into the field?

A. Well, radio, as entertainment, began to develope in 1919, with the boys in the hay lofts and the barns who built receiving sets out of Ten Cents Store stuff, and from this a few broadcasting stations began to develope very rapidly up to 1922 when there were thousands of sets out and receiving sets had been vastly improved with the coming of loud speakers.

Q. Did the American Society license any operators of radio broadcasting stations from time to time from 1919 to 1922 or '23?

A. As radio grew in popularity, we began to be concerned at the commercial turn it was taking, and by the fact that music constituted almost the entire content of the programs, and it became obvious to us that radio was a strictly

commercial operation, and its use of music made what we thought was the condition established by the lowering of public performances for the purpose of profit. That hadn't been the case in the early days when there hadn't been enough, in our opinion. In the early days there had not been any profit motive, apparently, but with the development of radio, those that controlled the radio patents realized that if they were going to profit under those patents, they would have to improve radio sets, produce them in large quantities, and find a market for them, and there [fol. 838] wasn't going to be a market for radio receiving sets unless there was entertainment broadcasts of sufficient quality to create a demand for these sets. If people invested their money in receiving sets obviously broadcasting systems had to maintain those sets. It became a proposition of broadcasting existing in the entertainment sense, to the end that more people would buy the sets in order to get the entertainment; all of this was before there was any advertising by radio.

Q. Did you make any attempt on behalf of ASCAP to collect any fees from the radio industry prior to 1922?

A. No.

Q. Did you issue any special licenses to any broadcasters?

A. Yes.

Q. How many?

A. Twenty-five or thirty around and over the country.

Q. Were these upon a basis of no payments?

A. Yes, entirely free of charge. Special licenses were issued to operators who weren't certain about the law and who had been advised by their various counsels there might be a liability. We participated in the development of radio.

Q. What were your first contacts with the industry as a group?

A. My recollection is that in the fall of 1922, we discussed this matter. We discussed this matter at a meeting of the Board of Directors of the Society. Radio had grown to such proportions we thought it was time to do something about it—to find out whether there was a public performance for——

[fol. 839] Judge Hutchinson. We have no objection to all of this, but can't he bring it down to the present?

Witness: I will answer more briefly, your Honor.

Judge Hutchinson: I understand that you have lived all through this, and that you want to tell it all.

Witness: (continuing) In the fall of 1922, we summoned into conference the representatives of the various broadcasters and broadcasting interests in the United States, and the United States Government, Department of Commerce, to discuss some of the questions involved—whether radio was in the category of places that used music for public performance for profit, and whether broadcasters should take licenses from ASCAP if they wanted our music.

A. As a result of those discussions were licenses negotiated between ASCAP and the radio broadcasters?

A. No——

Q. (interrupting) When were the first licenses issued, if you know?

A. (continuing)—they took the position in those conferences that broadcasting was not a public performance for profit, and they refused to take licenses. A suit was brought against Station WOR, a few months after that, in New Jersey alleging infringement by broadcasters. Is that brief enough?

Q. I want you to tell the Court——

A. (interrupting) That suit was tried and a decision rendered that was favorable to the copyright owners. There- [fol. 840] after, the defendants declined to appeal, and said that was as far as they wanted to go, and Station WOR took a license from ASCAP. The next step was the General Electric Company——

Judge Hutchinson: That doesn't make any difference. So you had a lot of suits.

Witness: Yes, sir. After a number of these suits broadcasters generally all over the country took licenses.

Q. For how long a period were your license contracts with these broadcasters?

A. Usually one year.

Q. Did the time come when you extended that period?

A. Yes, sir.

Q. When?

A. In 1932.

Q. Was that the result of general negotiations?

A. Yes, indeed; long continued negotiations.

Q. And for how long a period did that license extend?

A. For three years.

Q. Upon the expiration of the three years, were further negotiations had?

A. Yes, sir.

Q. With the same purpose?

A. Yes, sir. We extended the then existing licenses under the same terms for an additional three years.

Q. Three years?

[fol. 841] A. No, five years.

Q. For five years?

A. Yes, five years; that would bring it up to 1940.

Q. Does the present license agreement with the broadcasters expire in 1940?

A. Yes, sir.

Q. How many broadcasting stations are there in the country?

A. In round figures seven hundred.

Q. How many of them belong to the National Association of Broadcasters?

A. I can't say; they either own, control, or have management contracts for the operation of about eighteen stations.

Q. Are you speaking of the National Association of Broadcasters?

A. No, the National Broadcasting System.

Q. How many broadcasters are members of the National Association of Broadcasters?

A. Oh, I misunderstood your question. I don't know. It is reported about three hundred and seventy.

Q. Did the Federal Trade Commission get in touch with ASCAP?

A. Yes, sir.

Q. They wanted to know something about that situation?

A. Not about——

Judge Hutchinson: If that comes under some law.

Mr. Frohlich: It does not, your Honor.

Q. Was there an investigation made by the Federal Trade Association?

[fol. 842] A. Yes, upon complaint of the Motion Pictures Exhibitors League.

Q. What year was that?

A. 1920.

Q. As a result of that investigation did Mr. Sidney Cohen,

President of the Motion Picture Theatre Owners of America, receive a communication from the Federal Trade Commission?

A. Yes, sir.

Q. Have you seen it?

A. We received a copy of it from the Federal Trade Commission.

Q. I will show you this copy in this here (indicating book), dated January 2, 1930. (handing book to witness). Is that the copy you saw?

A. Yes, sir.

Mr. Frohlich: I would like to offer that in evidence as part of the hearings before Congress. May I read it, your Honor?

Judge Hutchinson: There is no use to encumber the record. Let the reporter copy it in the record. (Thereupon, the said letter was copied into the record and made a part hereof as follows:)

"January 2, 1923.

"Mr. Sidney S. Cohen, President Motion-Picture Theatre Owners of America, New York City.

"Dear Mr. Cohen:

"Your letter on the 14th instant addressed to the secretary of the commission, making application on behalf of [fol. 843] the Motion-Picture Theatre Owners of America against the American Society of Composers, Authors, and Publishers on account of alleged violation of the law against unfair methods of competition by the imposition of a tax or royalty on motion-picture theatres for the right to play the copyrighted music of its members, has been considered.

"We have carefully considered the facts, as stated by you, and examined the decision of the courts applicable thereto, with the result that it has been concluded that the case is not one calling for the exercise of the commission's corrective powers. The chief reason for this conclusion may be stated as the fact that the making of a claim for royalties, apparently in good faith, cannot be said to constitute "an unfair method of competition in commerce"; it cannot be said to be unfair in the sense in which the word is used in the commission's organic act, but is merely an assertion of a supposed legal right which is fully determined

by the Courts; and it is not a "method of compe-tion", because the parties in controversy are not in any way competing with each other.

"It is regretted that we are unable to aid you in this instance.

[fol. 844] "Very Truly yours, Federal Trade Commission, Millard F. Hudson, Chief Examiner".

(Whereupon, a recess was taken until 2 o'clock P. M., on the same day.)

(After recess—2 o'clock P. M.)

Judge Hutchinson: Proceed.

Mr. Frohlich: Before proceeding with Mr. Mills, your Honor, I have the copy of Judge Gardner's Decision.

Judge Hutchinson: All right.

(Thereupon, the witness, Edwin Claude Mills, took the stand, and Mr. Frohlich resumed the direct examination of said witness.)

Direct examination (continued)

By Mr. Frohlich:

Q. Mr. Mills, in all of these negotiations that extended from 1922 to 1935 with the broadcasters, were you met on each occasion by the National Association of Broadcasters?

A. By a negotiating committee representing that organization.

Q. Did that committee also employ counsel from time to time?

A. Yes, sir.

Q. You sat in a conference with committee and counsel on these occasions?

A. Repeatedly.

[fol. 845] Q. Now, with reference to the hotels, do you know how you negotiated your license fees with the hotels?

A. Yes, with a committee representing the American Hotel Association.

Q. When did those negotiations commence for the first time?

A. I would say in 1920.

Q. Have you, on behalf of the Society, from time to time,

over the years, had other negotiations with the American Hotel Men's Association?

A. Yes, almost every year.

Q. Something was said this morning, Mr. Mills, about ASCAP obtaining a percentage of the business done by these various users, will you state whether or not ASCAP collects, exacts, or obtains a percentage on any of the business done by the hotels in this country?

A. No, sir.

Q. Does any restaurant?

A. No, sir.

Q. Cabaret?

A. No, sir, no other class of establishment other than broadcasters.

Q. In other words, the percentage system is exclusively confined to the broadcasting industry?

A. Yes, sir.

Q. What is the percentage which is today paid by the broadcasting systems?

[fol. 846] A. 5% after certain deductions; it is not 5% on the gross income.

Q. After the deductions, is there an additional charge made in addition to this percentage?

A. There is a fixed sustaining fee—a fixed sustaining fee for commercials as differentiated from non-sponsored programs.

Q. Have you a famil-arity with the radio broadcasting industry?

A. Yes, sir.

Q. Do you know how it operates?

A. In a general way.

Q. Can you tell us whether the broadcasters in addition to paying the Society 5% pay any other charges for time on the air?

A. To ASCAP?

Q. No, to anybody?

A. They pay plant charges, talent, salaries; they pay all charges normally incident to the——

Q. (interrupting) Do they pay an agency?

A. Yes.

Q. What does that amount to?

A. 15%; sometimes it is as high as 30%.

Q. Is that paid by each and every broadcaster that advertises?

A. Yes, sir.

Q. In other words, they pay three times as much to the agency as they do to the Society?

A. Yes, sir, and sometimes more.

Q. Do you know how many broadcasting stations there [fol. 847] are in the State of Florida? Approximately?

A. I don't; twenty or twenty-two, something like that.

Q. Are these stations now licensed by the American Society?

A. I think so.

Q. And have they been licensed for years?

A. I think so.

Q. Commencing with the year 1924, hasn't there been, to your knowledge, bills introduced in Congress, from time to time, which effect and have effected the Copyright Act of 1909?

A. A great many of them. Yes, sir.

Mr. Ellis: I don't want to object to this, may it please the Court. I am trying to be lenient, but I can't see what that has to do with this case—we are getting into an elaborate political discussion.

Judge Hutchinson: Counsel regards that general fact—that bills have been introduced, as important. Of course, somebody might differ with him. Just get that general fact in. I would rather let it go in.

Mr. Frohlich: I was just going to make an inquiry on a few of these bills that have been introduced, because, I think, it will be helpful to this Court. I know that the Court is going to consider the question of the evil and police power.

Judge Hutchinson: Well, we are not really going to be concerned with how many bills have been introduced.

Mr. Frohlich: Your Honor, the claim has been made [fol. 848] that the justification for the Statutes are that they are in the public interest of the citizens of the State of Florida, and I propose to show that they are in the private interest of a small group of users in the State of Florida.

Judge Hutchinson: I don't think that is admissible in an inquiry of this kind.

Mr. Ellis: I object to the evidence upon counsel's statement as to what the purpose of it is.

Judge Hutchinson: Its purpose unseats it as evidence. We have got many truck laws in Texas which have the idea that it was good for the people, but everybody knew that it was the railroads that got the laws passed. It was within the power of the State of Texas to choose between those two carriers.

Mr. Frohlich: Here is a case where the radio industry has appealed to Congress to change the law, and Congress would have the right to modify and change the Copyright Law, but it hasn't done it.

Judge Hutchinson: That certainly doesn't effect the State. It seems to me, this testimony is primarily for the purpose of showing that this bill hasn't the support of the police power because it is not in the public interest, but in the interest of a particular group. I will sustain the objection. I thought you were going to show it for the purpose of the color you were trying to give the [fol. 849] case.

Mr. Frohlich: In order to protect my record, may I make a formal offer of proof—of the documents setting forth the various bills, and as, your Honor, has ruled, may I have an exception.

Judge Hutchinson: Yes, of course.

Mr. Frohlich: Mark this for identification.

Judge Hutchinson: Subject to the objection, and if we find it material later on, we can use it.

(Complainants' Exhibit No. 1 for Identification.)

Q. Now, Mr. Mills, in these negotiations you had with the broadcasters, from time to time, was there anything said by the gentlemen representing the broadcasters about the blanket license under which you were licensing these stations?

A. Yes, it was repeatedly referred to in various different formulae for licensing the users of copyrighted music—many were suggested.

Q. To help the Court, explain what you mean by a blanket license?

A. A blanket license which grants to the licensee the right to use at will any and all selections—copyrighted musical selections of ASCAP, any and all of them.

Q. Does it make the reservoir of the compositions owned by the Society available to these users?

A. Yes, as to non-dramatic public performance.

Q. That is known as the "small" rights as distinguished [fol. 850] from the stage rights?

A. Yes, as distinguished from the dramatic composition.

Q. Did the broadcasters ever tell you that they wanted some other system of licensing?

A. Yes, sir.

Q. What did they tell you and when?

A. Well, from time to time, I can't identify the particular times without consulting the records, they have suggested all sorts of licenses. The negotiating committees have suggested that they would like to have what they call—well, they have generally discussed three kinds of formulae, none of which I understand. The per use system of licensing, a per piece system of licensing, a per program system of licensing—a measuring system of licensing.

Q. Did you ever ask them to explain to you in detail what any of those four systems were?

A. Yes, sir.

Q. Were you ever able to obtain that information from them?

A. I asked them to cooperate and to submit the sort of a formula they would like to have—in precise and exact detail, so that we might study it and see if, in our opinion, it was practicable. I have asked for that repeatedly from every negotiating committee and from the executives of the National Association of Broadcasters, and from their counsel, orally and in writing, and to date they have never submitted the detail of the plan which would have included these four different descriptions.

[fol. 851] Q. Now, these broadcasting stations throughout the country run for how many hours a day?

A. A full time station is on sixteen or more hours per day.

Q. How many programs would you say a full time station plays in a day?

A. It is difficult to compute an average of programs. A station that concentrated on fifteen minute programs would have approximately four times as many programs in a day as a station that concentrated on one hour programs.

Q. Do these broadcasters make use of music to a great extent on these programs?

A. Yes, sir.

Q. Can you state from your experience what the percentage is? Approximately?

A. Well, there is some disagreement about that. I would say not less than 60% and not more than 80% of the content of the programs.

Q. How many musical compositions a day would they play?

A. An average station not less than two hundred and fifty, and some of them five or six hundred different titles.

Q. Some of them play as many as five and six hundred?

A. Yes, sir.

Q. And two hundred and fifty——

A. (interrupting) Two hundred and fifty would be a minimum for a full time station.

Q. Under the blanket license system of the Society, are [fol. 852] these stations able to play any composition in the repertoire of the Society without making any inquiry?

A. Yes, except as to composer restricted songs.

Q. Tell us about that?

A. The individual owner of the copyright notifies the Society, under his agreement with the Society, of his desire to restrict the number of performances of that particular number. His reason for doing that is based upon the desire of the composer that the composition be not broadcast to its destruction—be not repititiously broadcast during the peak hours of radio popularity. Second, if the composition is a number in a current motion picture or stage production, he restricts it because if it is widely broadcast interest in that particular show will have depreciated; people will have heard the music and to that effect their desire to buy tickets will be diminished. For these two reasons and also if there is some dispute about the ownership of the copyright, as is commonly the case—not commonly, but frequently the case, the one who owns the copyright may restrict it because of these infringement suits.

Q. Are there frequently infringement suits brought by third parties against the members of the Society?

A. I wouldn't say frequently——

Q. (interrupting) Who defends those suits?

A. The American Society of Composers, Authors and

Publishers under our license agreement with the broadcaster. Under our license agreement we agree to serve [fol. 853] him harmless against any damage suits.

Q. Is that the practice of the Society with respect to all users throughout the country?

A. Yes, sir, we have defended many such suits.

Q. Approximately how many users would you say the Society has?

A. How many? Twenty-four or twenty-five thousand licensees.

Q. To your knowledge, has any licensee of the Society in the past twenty-six years ever paid one dollar in the way of damage by the way of infringement claims?

A. Not if the composition was represented as being a part of ASCAP's repertoire.

Q. You say there are about two hundred and fifty musical compositions played per day on a full time station?

A. That is a minimum.

Q. If the broadcaster didn't have the service of ASCAP, what would he have to do to clear his copyrights in order to avoid infringement suits?

A. He would have to ascertain first what composition he wanted to play, then, he would have to ascertain the copyright ownership of the composition, and then he would have to contact the owner and secure his license.

Q. Would that have to be done a reasonable time in advance of the program?

A. It depends—the answer is, yes.

Q. Are there often disputes as to the ownership of copyrights——

A. (interrupting) Very frequently.

[fol. 854] Q. (continuing) —belonging to the members of the Society?

A. Yes, sir.

Q. The Society also has contracts with various foreign societies, hasn't it?

A. Some twenty-one of them.

Q. Are these similar in function to the American Society?

A. Organized for exactly the same purpose.

Q. What is the oldest Society?

A. The French Society.

Q. When was that founded?

A. Ninety years ago.

Q. Is there a society like this in England?
A. Yes, sir.
Q. Italy?
A. Yes, sir.
Q. Germany?
A. Yes, sir.
Q. Austria?
A. Yes, sir, in all civilized countries, and some not so civilized.
Q. And this Society has contractual relations with all of these societies?
A. We represent each of them.
Q. In addition to the works of the members of the Society, does the Society furnish to its users the right to publicly perform for profit the works of the forty-four [fol. 855] thousand members of the *of the* European Societies?
A. Fifty-six thousand. Yes, sir.
Q. Does the American Society remit these license fees to the European Societies?
A. Yes, sir.
Q. Does the European Societies remit to the American Society?
A. Yes, sir.
Q. Are these monies all put into a common pot?
A. Foreign royalties are distributed to our members in exact proportion.
Q. How are the revenues of the American Society divided among the members of the Society?
A. From the entire revenue after the cost of operation is deducted.
Q. What is that operating cost?
A. Between seventeen and twenty percent.
Q. Then, what happens?
A. The amount left, after the deduction of operating costs, is distributed among the members every three months.
Q. And on what basis is that made?
A. It is divided into two equal funds, one of those is placed at the disposal of the publishers' classification committee, and the other is placed at the disposal of the writers' classification committee. The members of these committees are selected by the members of the Society, and each of these groups classifies its own members upon the basis of profits and the popularity of their respective works,

[fol. 856] the number of performances of which we have records and so forth and so forth, so that their respective participation in dividend and royalty distribution is fixed by the Classification Committees.

Q. Does the Society maintain a reserve fund?

A. Yes, sir.

Q. Is it very large?

A. That, of course, is a matter of opinion.

Q. How much is that now?

A. I don't know.

Q. Does the Society maintain a relief fund?

A. Yes, sir.

Q. What is that money used for?

A. For the relief and aid of members in distress, and even non-members in distress—composers and authors. It is not for the relief of publishers.

Q. How far in advance are radio programs made up, if you know?

A. Well, any length of time in advance. I mean by that a station might be planning a program for Christmas right now, but that is an exception. Generally, seventy-two hours in advance.

Q. And are there frequently last minute substitutions?

A. Yes, very frequently.

Q. Due to the illness of the artists?

A. There are any number of causes.

Q. If the radio had to contact individual copyright owners, could they operate their business today upon its present basis?

[fol. 857] A. As an opinion, no.

Q. Is there a definiteness and certainly as to the ownership of the public performance for profit rights in copyrighted musical compositions as between the writers and publishers themselves?

A. There is a joint ownership. The publisher does not own the composition exclusively as to the performing rights in it, and if the writer of the composition is a member of ASCAP and vice versa.

Q. That joint ownership, of course——

A. (Interrupting) Cannot be exercised by one without the permission of the other.

Q. Since the rights and the writer and publisher belong to——

Mr. Ellis: We object to this line of questioning, your Honors. The witness is being made to answer purely legal questions here. The contracts will speak for themselves.

Judge Hutchinson: I suppose we will let this go in, with the idea that counsel will soon finish up; it doesn't seem very material. The virtues of the Society doesn't seem to me to have any bearing on this case.

Judge Long: What is your view point?

Mr. Frohlich: Thank you, your Honor. Our view point is to show that the operation of this Society is of benefit to the users of music in the State of Florida, as well as to the citizens of the State of Florida. There has never been any [fol. 858] harm or injury done to anybody by it in the State of Florida.

Judge Hutchinson: That's what I mean by its virtues; that would be for the Legislature to say.

Mr. Frohlich: There is always, involved in my head, the evil and police power—it would make legal a Statute which infringes upon copyrights.

Judge Hutchinson: I am not sure I see it. Objection overruled.

Q. Now, these broadcasting stations are divided into groups of some kind, are they, Mr. Mills?

A. Yes, sir.

Q. Well, now, is there such a thing as general broadcasting stations or a system?

A. Yes.

Q. How many of those are there?

A. Fourteen or sixteen of them.

Q. Now, what are the general networks?

A. May I correct myself? I used the name general synonymously with the word network. The chief networks are those operated by the Columbia Broadcasting System, the National Broadcasting Corporation, and the Mutual Broadcasting Company.

Q. What are the affiliated stations?

A. Stations affilated with a network which regularly takes the network's programs.

Q. Just how do these networks operate throughout the country?

[fol. 859] A. The program originates in a key station to which the other stations throughout the country are connected by telephone, and they simultaneously broadcast the same program.

Q. A program that originates in one station?

A. Yes.

Q. And this program is simultaneously broadcast throughout the country?

A. Yes, sir.

Q. Are there any broadcasters in the State of Florida who are members of and affiliated with the National Broadcasting Corporation and Columbia Broadcasting System?

A. Yes, sir.

Q. Do you know, off hand, the names of any of these stations?

A. At the moment, I can't name any.

Judge Hutchinson: We take that for granted. Nobody disputes that.

Mr. Frohlich: I think it is in the——

Witness: Station WYAX in Jacksonville, Florida, is affiliated with one of the networks.

Judge Hutchinson: There is no use going into that.

Q. Mr. Mills, when the composition of a member of the Society is broadcast on one of those affiliated networks to which a radio broadcaster of the State of Florida is hooked up, does that program come into the State of Florida although it originates in another state?

A. Yes, it is broadcast in the State of Florida simul- [fol. 860] taneously with the station that originates the program.

Q. Have you in the past few years heard any of the compositions of the members of the Society performed on network programs?

A. Yes, sir.

Q. On programs hooked up with Florida broadcasters?

A. Yes, sir.

Q. To your knowledge, has music of the members of the Society been broadcast in that manner into the State of Florida?

A. Yes, sir.

Q. Do the members of the Society from time to time, publisher-members, sell their musical composition in sheet music form in the State of Florida?

A. Yes, sir.

Q. Have you been frequently in the State of Florida?

A. Yes, sir.

Q. Have you seen on sale or purchased any composition of the members of the Society in that State?

A. No, sir.

Q. Have you seen them on sale anywheres?

A. Not to my recollection.

Judge Hutchinson: I suppose the State will admit that some of them are published here.

Mr. Frohlich: There is no sales dispute about that.

Judge Hutchinson: I don't think counsel is disputing anything that you are putting on.

Q. Now, Mr. Mills, your attention is directed to the [fol. 861] Statute of the State of Florida, Chapter 19653 of the Laws of 1939, sub-division 2, which provides: (reading) "It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

"(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto."

There is also provided in Section B, Mr. Mills, that an affidavit should be filed with such lists, and which must be submitted to the Comptroller of the State of Florida. Now, Mr. Mills, have you had any experience in drawing up lists of musical compositions in this country?

[fol. 862] A. Yes, sir, a great amount of it.

Q. When did you for the first time have something to do with the drawing up of such lists?

A. In November, 1927.

Q. Have you compiled lists of musical works, copyrighted musical works, that are on record in Washington?

A. Yes, sir.

Q. Have you compiled an extensive list of such works?

A. Yes, sir.

Q. About how many in number?

A. I have an index of one million two hundred and seventy thousand compositions, and have prepared for circulation, oh, some one hundred thousand copyrighted compositions.

Q. Have you available that index of one hundred thousand compositions?

A. Yes, sir.

Q. Have you offered to furnish that index to any of the broadcasting — in the country?

A. Yes, I have offered it to all of the broadcasting stations in the United States entirely free of charge.

Q. How many broadcasters have accepted that offer?

A. Less than two hundred.

Q. This list of one hundred thousand compositions, what do they represent?

A. Those are the compositions most used. They include every composition used by the broadcasting stations over a [fol. 863] period of three years.

Q. How many musical compositions are copyrighted by the copyright office each year?

A. Twenty-five thousand.

Q. How many of that twenty-five thousand are owned by the members of ASCAP?

A. On the average of between two thousand five hundred and three thousand.

Judge Hutchinson: What portion of this million two hundred thousand are owned by the members of the association?

Witness: It would be impossible to answer. The figure is a million two hundred and seventy thousand, and it is not truly indicative of the number of compositions that there are, because there is a tremendous amount of duplications in that index.

Judge Hutchinson: Of the one hundred thousand, what proportion of those will be works that belong to the members of the association?

Witness: My guess would be about forty percent of them. Now, of course, many of them are in the public domain. I must state that to fully inform you. These are composi-

tions upon which the copyrights have expired. This list is a list of all compositions performed by all major stations over a period of three years, during which they furnished complete programs.

[fol. 864] Judge Hutchinson: Forty percent of which your member own? Now, what proportion of those are still under copyright?

Witness: I couldn't answer you accurately on that. However, I could and would make the computations.

Judge Hutchinson: You figure forty percent. Is that just an estimate?

Witness: Yes, sir.

Judge Hutchinson: Did you do the same kind of estimating on the other?

Witness: You are asking me of that forty percent, what proportion is controlled by the members of the Society?

Judge Hutchinson: I thought you said twenty percent of the whole one hundred thousand.

Witness: Of the copyrights, yes, sir.

Judge Hutchinson: You can't give an estimate of how many of that one hundred thousand are copyright?

Witness: I prefer not to, because it would be too inaccurate.

Q. Mr. Mills, did you read the two Statutes in question in this case?

A. Yes, sir.

Q. Are you fairly familiar with the terms of the Statutes?

A. Yes, sir, I think so.

Q. Could the Society, as a Society or organization or com-

[fol. 865] bination, operate and do business within the State of Florida with respect to collecting revenue from the performing rights for profit of the compositions of its members under these two Statutes?

Mr. Ellis: Objected to, first, on the ground that it is immaterial, and, second, it is purely an opinion.

Judge Hutchinson: Of course, I think, the question of whether or not they could operate under it would be a question of law for the Court to decide.

Mr. Frohlich: The question is, your Honor, could it get any revenue by operating under it. Could they get a dollar of revenue. Could any group of composers do it. My contention is that under these two Statutes no two composers or more, no combination of any kind, can operate at all in

this State and receive a dollar of revenue. However, I will withdraw the question.

Q. You, of course, are familiar with the music publishing business, aren't you?

A. Yes, sir.

Q. And you have been in it yourself?

A. Yes, sir.

Q. And you have had a very accurate and comprehensive knowledge of the business for years, haven't you?

A. Yes, sir.

Q. Now, prior to 1923 how many copies, as a rule, would a hit song sell?

[fol. 866] A. A hit would sell a million or a million and a half copies.

Q. And it would remain popular for how long a time?

A. Oh, a year and a half to three years.

Q. Can you name some of the well known songs that sold as many as a million or more copies?

A. Songs like "Romona," "Wait Until The Sun Shines, Nellie," "My Old New Hampshire Home," "Let Me Call You Sweetheart," I could go on indefinitely, your Honors.

Q. To your knowledge, how long is a hit song popular today?

A. Barely ninety days.

Q. If it is a very good song, how long does it sell?

A. A big sale would be one hundred and fifty thousand copies.

Q. Prior to 1923, did publishers and writers derive a substantial revenue from the exploitation of these compositions on records, rolls, and discs?

A. Yes, sir.

Q. Has there been any change in that compensation since that time?

A. It has diminished up to ninety-four percent.

Q. From your knowledge of this business, what is this diminution in the revenues derived from sheet music sales due to?

A. It is due mainly to the tremendous popularity of radio entertainment.

Q. The public doesn't purchase sheet music today?

A. No, sir, it doesn't need it.

Q. In other words, is there a great deal more music required today?

[fol. 867] A. Vastly more because of the quick demise of a composition, shorter life.

Q. Did you compile a list sometime ago of the music publishers in the United States?

A. Yes, sir.

Q. About how long ago was that done?

A. Oh, about the middle of 1937, I would say.

Q. (handing paper to witness) I show you this list and ask you whether that is the list you compiled?

A. I recognize it.

Q. You compiled this list?

A. Yes, sir.

Q. How many publishers are there in this list, approximately?

A. My recollection is about twelve hundred.

Q. Does that list of twelve hundred publishers include publishers who are members of ASCAP?

A. It includes all publishers who registered themselves as such with the Copyright office in Washington, D. C.

Q. Does it include the publisher members of ASCAP?

A. Yes, sir, all of them.

Q. And how many ASCAP publishers are listed in it?

A. I believe presently about one hundred and fifteen.

Mr. Frohlich: I would like to offer this in evidence.

Mr. Ellis: No objection if the list shows that many.

Judge Hutchinson: We are going to take that as correct [fol. 868] unless there is a showing to the contrary. (Thereupon, without objection, the said list was admitted in evidence and marked Complainant's Exhibit No. 1.)

Q. How many publishers did you say are included in this list?

A. I said approximately twelve hundred.

Judge Hutchinson: Let the record show that there are as many publishers registered in the Copyright office as that list numbers up to.

Witness: In round figures twelve hundred.

Q. Mr. Mills, with the diminution of revenue from the sale of sheet music what other source of revenue is open to the owners of copyright rights and composers?

A. Well, so far as ASCAP is concerned only the public performance rights.

Q. And if the authors, composers, and publishers should be deprived of their right to obtain revenue from public performance for profit, would they have any substantial revenue from the exploitation of their musical compositions in the State of Florida?

A. They would first—the answer is no.

Mr. Ellis: I feel compelled to ask the Court to strike that answer, your Honor. I don't think this witness can predict with any degree of certainty it would happen.

Judge Hutchinson: We are presumed to consider only that which is relevant. I don't see much reason, in a case [fol. 869] like this, to have objections. The prevalence of a thing doesn't make it relevant or convincing.

Mr. Ellis: It is the time element, your Honor.

Judge Hutchinson: I am hoping he is cantering to a close. We will let it go in subject to the objection.

Q. Directing your attention, Mr. Mills, to Section 4A of the 1939 Florida Act which provides: (reading)

"It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition."

Do you understand what I have read, Mr. Mills?

A. Generally, yes, sir.

Q. Is it possible, as a practical matter, to establish a price for each separate performance for each separate composition when there is a blanket license?

[fol. 870] A. The two things are inconsistent. The answer is no.

Q. Can you fix a price in advance or file a schedule in advance with reference to the performing rights of a musical composition?

A. The performance of a particular composition?

Q. Yes?

A. One performance at a price to be fixed in advance?

Q. Yes?

A. No, sir. You have to consider the nature of its use, and a multitude of details.

Q. Well, what factors would you have to take into consideration?

A. The establishment of a price—of fifty, sixty, seventy prices on a single composition; there would be varying prices for varying uses.

Q. Would you have one price?

A. No, sir. There would be one price for use on a sustaining program, another price on a sustaining program as distinguished by day time and night time broadcasts, another price on a sponsored program, another price for a motion picture of a certain size, and still another, and another, and another, and a multitude of prices. Again as regards radio prices as to the power of the station, the radio population within the area of the station, whether or not the station had undivided time, dance halls, night clubs, restaurants, circuses, carnivals and all of endless establishments which use music.

Q. And would the price have to vary from time to time?

A. The price would be determined in such case by each individual copyright owner. I don't know.

[fol. 871] Q. How would each individual copyright owner go about establishing the price?

A. I don't know.

Judge Long: He just stated he couldn't fix it.

Witness: One copyright owner would take a certain set of circumstances into consideration and want a certain price, and another the same; they wouldn't all want the same price.

Judge Long: The answer is you couldn't fix a price?

Witness: Not practically, sir. Theoretically, yes, but not as a practical matter.

Mr. Frohlich: That is all you may cross-examine.

Cross-examination.

By Mr. Ellis:

Q. Mr. Mills, what is your position with ASCAP?

A. I am the Chairman of the Administrative Committee.

Q. Is that in substance an executive committee of the Society?

A. It is a committee, under the articles of the association, empowered to advise with and consult with the Board of Directors, and to generally advise the Society as the term implies.

Q. Is it the chief managing committee?

A. No, sir.

Q. What is the Managing Committee?

A. The management of the business affairs—the general management of the Society is in the hands of an individual [fol. 872] elected by the Board of Directors, and the present General Manager of the Society is Mr. John G. Paine. I was, previously, for some twenty years the General Manager.

Q. Will you state briefly the composition of the Board of Directors of the Society?

A. The board consists of twelve composer-writer members, and twelve publishers, publisher-members, who are divided into groups of four. Four being in the popular field—four being writers in the popular field, four writers in the standard field, and four writers in the production field. Each of those four are divided into groups of two—two authors or writers and two composers of music in those respective fields. Now——

Q. (interrupting) That board, as I understand it, controls the basic policies of the Society?

A. Wait, I haven't finished yet. Those twelve writers are on the board, and there are twelve publisher-members who are similarly divided according to the music they publish into popular, standard, and production music.

Q. Does that board control the basic policies——

A. (interrupting) Under the articles of the association the board has entire jurisdiction of the administration of the affairs of the Society.

Q. How are vacancies in that board filled?

A. In elections—by elections by the Board of Directors.

Q. That is the agency basis—it fixes the terms of the li-

censes with the users of the compositions held by the mem-
[fol. 873] bers of the Society?

A. No, that is the agency to which the management must go for the approval of any licensing arrangement or formula that has been negotiated with the groups representing the users.

Q. It is correct to say as between the holders of the copyrights who are members of ASCAP and the users of copyrighted musical compositions—the prices and terms at which they are used are fixed by that board?

A. No.

Q. It is not?

A. No. The prices and terms upon which they are used are fixed as the result of negotiations with committees authorized to act as between the management of the Society and the Committees, then, the management of the Society goes to the Board of Directors for approval of the formula and rate which has been set up.

Q. The board is the agency as between the copyright members and the users, or associations of users, with whom negotiations are conducted—they approve the prices for the copyright members of the Society?

A. After those prices have been negotiated with the Committees representing the users.

Q. Of the twenty thousand theatres in the United States how many are licensed by ASCAP?

A. I think about fifteen or sixteen thousand of them.

[fol. 874] Q. Of the seven hundred broadcasting stations how many are licensed by ASCAP?

A. All except those in the states of Montana, Washington, and Idaho.

Q. Does not the Society maintain records showing the names of the musical compositions to which copyrights are held by its members?

A. Well, the Society subscribes to the catalogue of copyrights issued by the Registry of Copyrights, and in that catalogue is included the titles and complete listing of every composition in the United States, both foreign and domestic. Anyone can get that catalogue.

Q. Does that catalogue show which are the members of ASCAP?

A. The checking of the catalogue issued by the Registry lists all of the ASCAP—the answer is yes.

Q. Does not the Society maintain a list of the compositions controlled by the Society?

A. To the best of their ability, yes, sir.

Q. And they also maintain a list of the owners of those compositions?

A. Yes, sir. Of course, there are some twenty thousand copyrights that expire each year and which are not subject to renewal.

Judge Hutchinson: That is the difficulty inherent in copyrights, but you keep as good a list as you can?

Witness: Yes, sir, but I wouldn't say our list is complete or entirely accurate.

Judge Hutchinson: It is as complete as most anybody [fol. 875] can make it?

Witness: We think it is the most complete of anybody.

Q. Of the one hundred thousand you referred to as copyrighted and of which ASCAP controls forty percent, you were unable to say how many of that one hundred thousand are in the public domain to which copyrights had expired?

A. Yes, sir.

Q. Do you know how many of those have not been published?

A. Oh, I think, they have practically all been published. I am quite sure of that.

Q. Do you know how many of them are what are called useable or occasionally valuable compositions?

A. They are all used; they are listings from broadcaster's programs.

Q. Is the sixty percent of the one hundred thousand which is not controlled by ASCAP used as much or as actively as the forty percent which is controlled by ASCAP?

A. Generally, I would think not.

Q. But you are not prepared to say to what extent there is a difference?

A. I am not going to say that our catalogue is a poor catalogue. I am always trying to sell it. I am going to say it is a good one.

Q. I was simply unable to understand your explaination of why the Society or why the copyright holder could not [fol. 876] fix the price in advance for the use of the compositions. Is it correct that there are no prices now for the per piece use of musical compositions controlled by the Society?

A. Not so far as ASCAP is concerned.
Q. There are no per piece prices fixed in advance?
A. That's right.
Q. But there are prices fixed in advance for what you call blanket license use?
A. Well, the rate which is applied for blanket license—which is to apply, is not fixed in advance; it is fixed as of a certain date by a committee of broadcasters. For example, broadcasters are negotiating with us about rates and different formulas for the use of ASCAP's repertoire, and——

Judge Hutchinson: You must answer briefly. Read that question to him. (question read by reporter)
Witness: No. The answer is no.

Q. ASCAP does have licenses with broadcasting stations and theatres for the use of musical compositions controlled by ASCAP at certain stipulated rates, do they not?
A. Yes, sir.

Judge Hutchinson: He has explained all of this.
Mr. Ellis: I understand, your Honor, that they fix a rate for blanket license contracts which run over a period of four or five years' time.
Judge Hutchinson: He explained that this morning.
Mr. Ellis: I withdraw the question.
[fol. 877] Judge Hutchinson: Do you know whether these other publishers and producers, who are not members of ASCAP, do fix in advance for use per piece prices for their compositions?
Witness: No, sir.
Judge Hutchinson: You don't know or they do not?
Witness: They do not.
Judge Hutchinson: Do they fix a blanket license rate like you do?
Witness: Yes, sir.
Judge Hutchinson: Everybody follows the same system as ASCAP?
Witness: Yes, sir.
Judge Hutchinson: And the only difference between you and them is that you belong to the association and they don't? Is that about the only difference?
Witness: Yes, sir.
Judge Hutchinson: Is the association a closed association, or can anybody join it?

Witness: Any qualified composer, publisher, or auth
can join it.

Judge Hutchinson: The reason you haven't got ma
more publisher and author members is not because th
have been excluded, but because they haven't applied f
membership?

Witness: Yes, sir. They have established their ov
[fol. 878] organizations of this kind, and proposes to iss
those licenses upon a blanket basis.

Q. You do have some requirements as to the number
compositions?

A. Eligibility for membership of a composer depen
upon his having written and regularly published at lea
five of his compositions. Eligibility for a publisher d
pends upon his having established a catalogue of mus
generally used in the type of establishments licensed
the Society.

Q. Isn't it a fact that the composer members compo
the bulk of the desirable music published in this country

A. That's a matter of opin-on. I am always trying
sell our catalogue. Yes; I will say yes.

Mr. Ellis: Read him the question. (question read b
reporter)

Witness: I was trying to say that I think the ASCA
catalogue embraces most of the best music.

Q. Isn't it a fact that the music publisher members
ASCAP do most of the commercially profitable music pul
lishing business in this country?

A. I think that is so.

Q. And all of the well known, active, and well paid com
posers are members of ASCAP?

A. Many well known composers are not members
ASCAP.

Q. But the great majority are members?

A. Yes, the majority.

Q. And the same is true of the authors?

[fol. 879] A. Yes, sir.

Q. Have the rates of the Society been reduced generall
in the last ten or fifteen years?

A. No, sir.

Q. They have gone up pretty steadily?

A. Yes, sir.

Judge Hutchinson: The Court will take a ten minute recess.

(After recess)

Mr. Ellis: With the permission of the Court, Mr. Bennett would like to ask the witness a few questions.

Judge Hutchinson: All right, but it is not a good idea. I do not like to complicate the record.

By Mr. Bennett:

Q. Mr. Mills, I would like to clear up a little bit of the explaination you made about composers and authors, members, and membership requirements of the Society. You stated, I believe, that under the articles of the association that they should have not less than five numbers regularly published, is that correct?

A. Yes, sir.

Q. Explain what you mean by regularly published?

A. By someone other than themselves.

Q. Does that mean that they might be published by a non-member publisher of ASCAP?

A. Yes, sir.

[fol. 880] Q. Has that always been the rule?

A. Always.

Q. Who was Mr. Rosenthal?

A. There are lots of Mr. Rosenthals.

Q. Was there a Mr. Rosenthal connected with ASCAP?

A. No. Did you say is there?

Q. No, was there?

A. Yes, sir.

Q. A Mr. J. C. Rosenthal?

A. Right.

Q. What was his position with ASCAP?

A. General Manager.

Q. Did you know Mr. Rosenthal?

A. Very well.

Q. Did you ever see a memo signed by Mr. Rosenthal at any time?

A. Did I ever see a memo signed by him?

Q. Yes.

A. I know his signature if that's what you mean.

Q. Are you familar with his signature?

A. Yes.

Q. I hand you a letter under letter head of ASCAP, a
ask you whether that is Mr. Rosenthal's signature? (han
ing letter to witness)

A. Yes, that is his signature; a rubber stamp of h
signature.

Q. Did that originate in the office of ASCAP?

A. So far as I know.

Mr. Bennett: I offer it in evidence and ask permissi
[fol. 881] to substitute a photostatic copy.

Judge Hutchinson: What is the materiality of the lette

Mr. Frohlich: The letter was written in 1929, your Hono

Judge Hutchinson: I don't suppose it makes any diffe
ence as to what were the rules of the Society.

Mr. Bennett: It demonstrates one of the unseen metho
by which the power of the Society is concentrated by i
publisher members.

Judge Hutchinson: Is that a part of the case of the Stat

Mr. Bennett: It demonstrates the evil which the Legi
lature had in mind when it enacted the Statute.

Judge Hutchinson: You think you were wrong in sayin
that the virtues of the organization were immaterial?

Mr. Bennett: I meant to say that the evil of the organ
zation we are attempting to correct was something to tak
into consideration.

Judge Hutchinson: The question of the evil of not allow
ing the people to buy music at a fair price, but not wh
controlled it. I am thinking of evil from the standpoint o
use, and you are thinking of it from the standpoint o
the publishers.

Judge Long: The purpose of that, it seems, is to impeac
[fol. 882] this man's testimony.

Judge Hutchinson: The testimony was is that the presen
situation. He didn't say it had never been.

Mr. Bennett: I think, your Honor, he did state it ha
always been.

Judge Hutchinson: I think we should rule on whether i
is material or immaterial. Whether that rule which yo
say they had is material in the case. I didn't suppose i
was.

Mr. Bennett: It goes directly towards restraint in trad

Mr. Ellis: If the Court rules there is not any need to pu
in this letter—most of the testimony by this witness is o

no use. The only purpose of this is to show that it contradicts the testimony——

Judge Long: If that is the case it is purely a question of impeachment of this witness, and if this testimony is offered on behalf of the defense it ought to go in when the defense offers its witnesses.

Mr. Frohlich: My objection is that Mr. Bennett asked the witness whether or not he recognized his signature and he stated that this was a memo from Rosenthal to Mills, but it is a letter written by Mr. Rosenthal to a man named Donald P. Fina on February 20, 1929. I don't see where that impeaches this witness.

[fol. 883] Mr. Ellis: I would like to have it marked for identification.

Judge Hutchinson: All right.

Mr. Ellis: May I have a photostatic copy marked.

Judge Hutchinson: Yes.

(Defendant's Exhibit No. A1 for Identification)

Q. Mr. Mills, I hand you another letter and ask you whose signature is at the bottom of that letter (handing letter to witness)?

A. That's my signature.

Q. That letter was written and signed by you?

A. Yes, on February 26, 1929.

Q. Will you state what that letter says?

A. It is addressed to Mr. Donald Pascal Fina and it reads (reading), "This acknowledges receipt of your application for membership.

"On its face however, your record does not show that you are as yet eligible for membership.

"Our regulations require that an applicant for writer membership——

This is addressed to the same person as the other letter.

(continuing) "On its face however, your record does not show that you are as yet eligible for membership.

"Our regulations require that an applicant for writer membership must have written and had published by publisher members of this Society at least five numbers. At present your status does not meet this requirement.

[fol. 884] "We shall be glad to have you keep us informed of the progress which you made and just as soon as you

Q. Mr. Mills, on your direct examination you testified that you had a meeting in 1922 with the various representatives of the broadcasting industry?

A. Right.

Q. At that meeting, was that meeting taken down by a stenographer and recorded?

A. It was reported, yes, sir.

Q. Did you at that meeting make the statement to those broadcasters present that ASCAP then—that ASCAP's then membership controlled ninety percent of the copyrighted popular music of the United States?

A. I probably made a statement to that effect. Just as the broadcasters say they broadcast to fifty million people, I say ninety percent or whatever I think.

Q. Do you control ninety percent?

A. I don't know how much we control; it is a matter of public record. I haven't examined it.

Q. Have statements to that effect been made by you or other representatives of ASCAP to Congressional Committees in Congress?

A. To the effect that we control ninety percent?

Q. Yes, ninety percent of the popular music?

[fol. 888] A. I don't think in that exact language. We have always professed to control a large portion, and to be able to furnish a repertoire sufficient for anyone's needs.

Q. Did you testify in Nebraska last September that you had made that statement—that the membership of ASCAP had increased each year since then by the addition of new publisher members, composers and authors, and foreign socities, and that the ratio remains proportionately the same?

A. I don't remember, but I would testify to that now, or then, because it is a fact.

Mr. Bennett: That's all.

Redirect examination.

By Mr. Frohlich:

Q. Mr. Mills, what is the fact with respect to eligibilty for membership in ASCAP of a writer or composer?

A. The rules are as stated, that anyone who is——

Judge Long: He has already testified to that.

Judge Hutchinson: I think he has a right to explain that letter. Will you tell us why in 1929, you wrote that letter which you read into evidence?

Witness: I didn't get a chance to see the dictation marks on that letter, and I wondered if it was written—I noticed it was the same applicant. I don't know whether I dictated the letter; I sign a great pile of letters.

Q. Was there any discussion between you and the members of the administrative committee of ASCAP with refer-
[fol. 889] ence to eligibility on or about the year 1929?

A. Not that I recall.

Q. Can you name some writers today who are members of ASCAP whose works are published by non-ASCAP publishers?

A. Well, I can't name them from my recollection, Mr. Frohlich.

Q. As a matter of fact, don't publisher members of ASCAP publish works of composers who are not members of ASCAP?

A. Yes, sir.

Q. Has that been true through the years?

A. Yes, sir.

Q. Does the Society deal in any sheet music?

A. No.

Q. Records, rolls, or discs?

A. No, it deals solely and exclusively with the non-dramatic public performance rights of all of its members and nothing else.

Q. Do the users of music in dance halls keep logs of the compositions they use each night?

A. No.

Q. Do the hotels and restaurants keep logs?

A. No, sir.

Q. Do radio broadcasters?

A. In some cases.

Q. If a radio broadcaster were compelled to pay for the use of public performance on compositions on programs
[fol. 890] emanating from its station it would be required to keep logs of its programs, wouldn't it?

A. There would be no other way in which it could be done.

Q. Would the keeping of such records entail expense?

A. Tremendous expense.

Judge Hutchinson: That is not in rebuttal; it is a continuation of the direct and the asking of the obvious.

Mr. Frohlich: That is all.

(Witness excused.)

Thereupon, to further maintain the issues on their own b
half, the Complainants produced as a witness one Jon
Gregg Paine who, being first duly sworn, testified as follow

Direct examination.

By Mr. Frohlich:

Q. What is your full name?
A. John Gregg Paine.
Q. Where do you reside, Mr. Paine?
A. Wilton, Connecticut.
Q. How long have you been a resident of that State?
A. Seven years.
Q. Are you at present connected with ASCAP?
A. I am its General Manager.
Q. And how long have you been such?
A. Since May, 1937.

[fol. 891] Q. Prior to assuming your duties as Gener
Manager of the Society what occupation did you follow?

A. I was in the legal—immediately prior to that I wa
Chairman of the Board of the Music Publishers Protectiv
Association. Prior to that I was in the legal department o
Warner Brothers Pictures, and prior to that I was with th
Victor Talking Machine Company.

Q. How long were you with the Victor Talking Machin
Company?

A. From 1914 to 1927.

Q. What were your duties in that company?

A. I had charge of copyrights—the clearance of music
compositions for the purpose of manufacturing records.

Q. Did you in the course of your occupation familiariz
yourself with the music publishing business?

A. Oh, yes, I had to.

Q. Did you come in contact with any publishers an
writers?

A. Yes, all over the world.

Q. Did you become familiar with the customs and usage
of that business?

A. Yes, sir.

Q. And do you know how publishers and writers operate

A. Yes.

Q. Let me show you this list of compositions of Gen
Buck, one of the plaintiffs in this case, and ask you if tha

was prepared under your supervision? (Handing paper to witness.)

A. Yes, it was.

[fol. 892] Mr. Frohlich: I would like to offer that in evidence.

Mr. Ellis: No objection.

Mr. Frohlich: I had intended bringing Mr. Buck down here but he is ill.

(Thereupon, without objection, the said "List of Compositions By Gene Buck, was admitted in evidence, and marked Complainants' Exhibit No. 2.)

Q. Now, you say your function was to assist in the clearing of titles of copyrighted compositions, will you explain in detail what is necessary to clear those titles?

A. For the technical reproduction of a copyrighted musical composition, unless there is a license granted, there is an infringement of the copyrights, and we had to obtain a license to manufacture these things, and we had to do it before we employed our artists, so that I had to make a study of the copyright status of the work we desired to reproduce, search the records—search the public records. If it was an American copyright, I would search the copyright records in this country, and if it was a foreign copyright, I had to ascertain from the records of those countries who owned the copyright, and to ascertain who owned the mechanical reproduction rights of that composition, because the copyrights may not always be owned by the same persons. Obtaining that I had to contact the man—the corporation that owned the mechanical reproduction right and get permission from him to record if and whenever I entered into a [fol. 893] written licensing agreement with him.

Q. Did you frequently encounter difficulty in clearing different copyright titles?

A. Yes, sir.

Q. Did you find that many rights under copyrighted musical compositions had been carved out and given to various people?

A. Yes, you always had to ascertain in who was the owner of the particular right you wanted.

Q. Was there sometimes a dispute between two or more claimants?

A. Yes, sir, frequently.

Q. In such cases were you able to clear a title?

A. No, we probably wouldn't record.

Q. Now, the Victor Talking Machine Company is the largest company of its kind in this country, isn't it?

A. It was in those days and still is, I think.

Q. Did you familiarize yourself with the titles of compositions that are in the public domain in the United States?

A. Not with all of them. I had a catalogue which I had built up over the years of over nine hundred thousand numbers, and I had the physical music of one hundred thousand.

Q. And this nine hundred thousand were in the public domain and no one had any rights in them?

A. Yes, in the United States.

Q. Now, this Victor Talking Machine Company, does it have some connection with the National Broadcasting Company?

A. It is now owned by the Radio Corporation of America [fol. 894] which owns NBC.

Q. Did the Victor Talking Machine Company make available to the National Broadcasting Corporation this catalogue of over nine hundred thousand numbers?

A. If they still have it. It was 1927 when I left. They could have very readily.

Q. Hasn't there been a change in the dancing habits of the country in the past few years?

A. Yes, they change constantly. Today, at the present time, there is a vogue for rhumbas and congas—dances which have developed in Cuba and Trinidad.

Q. Has this change in the dance habits of the country effected the composition of music?

A. Yes, of popular music. It always does and always has. When the tango came in there was a great influx of dancing compositions of that kind, and when it was Black Bottom and the Charleston and the Funny Hug, then, the composers were writing in that idiom.

Q. Hasn't there been a tendency on the part of the music world to take old numbers and adopt them to modern dancing?

A. Yes, sir, a great quantity. For instance, a little lyric like "A Tisket A Tasket".

Q. That was in the public domain for a number of years, wasn't it?

A. Yes, in the original form.

[fol. 895] But a new arrangement has been made?

A. It is copyrighted by an ASCAP publisher. Yes.

Q. That arrangement could have been made by anybody, couldn't it?

A. Yes, sir.

Q. And the broadcasters can make the same arrangements as others do?

A. Yes, sir.

Q. It simply involves a matter of research and expense?

A. Yes, and possessing a knowledge of public taste.

Q. Would you say there is enough in the public domain today to furnish sufficient dancing entertainment for the public if someone were willing to make the arrangements?

A. For rhumbas you can go to Cuba and bring them back by the boat load; tangos from Argentina, and congas from Trinidad.

Q. That is true of tango music?

A. Yes, the Maxixie or anything. Polkas are popular now since the introduction of "The Beer Barrel Polka"—people like that kind of music some time.

Q. What is the American Record Company catalogue?

A. The American Record Company today is a consolidation of a number of older companies like Columbia and Brunswick, and I understand they all consolidated and combined and formed the American Record Company, and which, I think, was purchased by the Columbia Broadcasting System.

Q. Is that an extensive catalogue?

[fol. 896] A. Yes, very.

Q. Are the music compositions in that catalogue works that are in the public domain?

A. Some of them.

Q. What is the Langloy and Wentworth Catalogue?

A. Langloy & Wentworth is a company organized for the purpose of supplying radio broadcasting stations with recordings of works in the public domain—what they call a tax free catalogue.

Q. Is it very extensive?

A. I am really not familiar with it at the present time. It is quite an extensive catalogue and has been in operation for eight or ten years.

Q. What is the Schubert Publishing Company?

A. Schubert or Schuberth Company.

Q. Schubert?

A. The Schubert Company owns a great many of the

operas; it is a member of ASCAP. The Schuberth Company is rather a substantial publishing company not a member of the Society.

Q. It controls the German music?

A. Yes, not a lot of American copyrights.

Q. What is the Universal Edition?

A. It is a European publishing company having extensive houses in both Berlin and Vienna. It is now represented in the United States by Associated Music Publishers.

Q. Is this Universal Edition and Associated Music Publishers connected at all with the ASCAP?

[fol. 897] A. It is a competitor.

Q. Have these two companies an extensive catalogue?

A. Yes, and the Universal Edition is a very large catalogue.

Q. How about G. Ricordi of Milan?

A. That is reputed to be the largest publishing house in the world. It controls the operas and all of the copyrights for all the great Italian music; such composers as Verdi, Puccini, Boito and Mascagni.

Q. Are any of the compositions owned by G. Ricordi of Milan controlled by ASCAP?

A. No.

Q. Now, as a matter of fact, isn't the greatest music in the world free?

A. Well, as a salesman I hate to admit that, but from the standpoint of artistic music—great music, the great music of the world is in the public domain; those men whom I have just named and Beethoven, Brahms, Mendelssohn, Bach.

Q. Who is Pasderich?

A. Who?

Q. Did you ever hear of the Pasderich Catalogue?

A. No. Oh, you mean Pacdirek.

Q. Yes. Isn't that published in thirty-two volumes?

A. Yes, sir.

Q. What does it represent?

A. It is a catalogue which has endeavored to present all of the music that has been published by anybody anywhere [fol. 898] in the world at any time, and, of course, the bulk of that, I would say ninety-five percent of that, of necessity is public domain music.

Q. Is this public domain music which appears in these

various catalogues I have mentioned available to users in the United States in its original form?

A. Yes.

Q. Have you frequently visited the Library of Congress?

A. Yes, sir.

Q. And the Smithsonian Institute?

A. Yes.

Q. Do these two libraries contain the original manuscripts or printed records?

A. The Library of Congress has an enormous collection of works; it runs into the hundreds of thousands—some of them original, but they have the published copies of works at the New York Public Library, the Boston Public Library, the Philadelphia Public Library, and the Flagler Library in Philadelphia has a quite a substantial library of music.

Q. Have you heard of the Hoffmeister Catalogue?

A. Yes, sir.

Q. Isn't that larger than the Pacdirek Catalogue?

A. It is more authoratative; we use it in preference to that.

Q. If I were to use a work of Mozarts, which is in the public domain, would it be possible for me, Mr. Paine, to find that work in either of the libraries you have mentioned, or any of them?

[fol. 899] A. The great bulk of Mozart's works, in one form or another, are available in the Library of Congress, the New York Public Library, and if you——

Q. (interrupting) Would you say that the works of these composers, which are in the public domain are available to anyone who wants to play them?

A. Yes, sir.

Q. They are available, of course, in their original form?

A. They are available in all kinds of arrangements. If it is European the instrumentation is different, and you have to arrange and adopt it for American consumption—for American orchestral set ups.

Q. If when a broadcaster wants a particular song of Mozarts——

A. (interrupting) You can get it.

Q. (continuing) —you can get it in this country in one of those four or five libraries you mentioned and in these different catalogues?

A. Yes, everything they have written is there.

Q. If I were a broadcaster and had to have a special

arrangement or orchestration of Mozarts, could I get such an arrangement from that original?

A. Yes, sir.

Q. As a matter of fact, isn't that what a great many publishers do today?

A. Yes, for instance, we took Debussy's "Reverie" and [fol. 900] made a very attractive arrangement out of it. It is called, "My Reverie". As "My Reverie" it was very popular, but as Debussy's "Reverie" it had very little public interest.

Q. In other words, a great deal of value is added to one of the old works as new orchestrations are made?

A. Yes, a lot of public interest.

Q. As a matter of fact, don't a great many of the popular songs of today base their melodies on the music of the old masters?

A. Quite a lot.

Q. Isn't it merely a matter of making arrangements and publicizing these arrangements of old tunes?

A. Well, not one hundred percent. Included in the membership of the Society are a very great many great creators.

Q. But at the same time, a great deal of the popular music of the day is based upon old public domain numbers?

A. Yes, sir. For instance, "Three Blind Mice", "A Tisket A Tasket", "The Mulberry Bush", to take some of the nursery rhymes, and the song "My Reverie" which I have just mentioned is another type, and I could go on and name hundreds of them.

Q. Do you know whether the National Broadcasting Company has a library of its own?

A. Yes.

Q. How extensive is that?

A. I haven't seen it, but I understand it is very extensive.

Q. Does that contain public domain music?

A. Yes, sir.

[fol. 901] Q. Has the Columbia Broadcasting System such a library?

A. Yes, sir.

Q. And is it very extensive?

A. Yes, sir.

Q. Does it contain a great deal of public domain music?

A. Yes. Surely.

Q. What was the Radio Foundation?

A. That was something before my time, but I understand it was organized by—created by the National Association of Broadcasters to build up a library of music which would be available to broadcasting stations in competition with the offerings of ASCAP.

Q. Don't the broadcasters in the country make license agreements for public performance for profit for compositions other than those owned by ASCAP?

A. Yes, sir.

Q. Can you name some of the organizations with whom they deal?

A. The Society of European Stage Authors and Composers known as SESAC, and I understand that they enter into independent contracts with composers and creators of works that haven't been published or copyrighted. Then, they have the big transcription societies—firms like Davis & Schwegler.

Q. Do these people have many thousands of compositions?

A. I don't know how many, but I understand Davis & Schwegler has thousands.

Q. And are those catalogues made available to the broadcasters?

[fol. 902] A. Yes, surely, but by contract—you pay for them.

Q. What is Broadcast Music, Inc.?

A. A private corporation owned by a lot of broadcasters or broadcasting stations who have subscribed stock. Its purpose is to build up and lay a foundation for a library of music which will be available to radio stations throughout the country in competition to the offerings of ASCAP.

Q. Was that organization organized within the past year or two?

A. Yes, within the last eight or nine months.

Q. I show you this photostatic copy of a proposed contract between a broadcaster and Broadcast Music, Inc., and ask you whether you saw the original of that (handing paper to witness)?

A. Yes, I did. I saw the original.

Q. Is this a true copy?

A. It is a photostatic copy.

Mr. Frohlich: I would like to offer that in evidence.

Judge Hutchinson: What is the purpose of that?

Mr. Frohlich: They have talked about blanket licenses, and the Statute purportedly tried to do away with blanket licenses, and here is Broadcast Music Inc., organized by the broadcasters themselves, and they are going to license individual broadcasters to use its music and do the same thing. The only visible—the only sensible way in which these broadcasters can operate is under a blanket license, [fol. 903] and their own organization recognizes it. It seems so inconsistent with this Statute.

Judge Hutchinson: The broadcasters didn't prepare—didn't pass the Statutes, and I don't see any reason for it going in for the purposes of your case.

Mr. Frohlich: May I be permitted to read the first paragraph, your Honor.

Judge Hutchinson: Can't you state it?

Mr. Frohlich: It is not long, your Honor.

Judge Hutchinson: All right.

Mr. Frohlich: Thank you, your Honor. (reading)

"1. Music hereby grants to Broadcaster a non-exclusive license to perform by radio broadcasting over Station —— —— all musical works the copyrights or rights to grant broadcasting performing licenses of which Music may, during the term hereof, own. Music agrees to deliver to Broadcaster from time to time during the term hereof lists of musical works covered by this license. The rights granted hereby shall include the right to broadcast dramatic performances of such musical works as Music at any time shall have given notice to Broadcaster that it owns the dramatic performing rights thereof."

Mr. Ellis: We object on the ground that — immaterial and irrelevant, and has——

Judge Hutchinson: Let the record show you offered that kind of a contract subject to their objection, and admit it [fol. 904] subject to the objection.

(Thereupon, subject to the foregoing objection, the said contract was admitted in evidence, and marked Complainants' Exhibit No. 3.)

Q. Is Mabel Daniels a member of the American Society?

A. Yes. She is a very distinguished composer.

Q. Do you know who has published her compositions?

A. Arthur P. Schmit of Boston.

Q. And is he a member of the Society?
A. No, he is not.
Q. How long has she been a member of the Society?
A. Quite a number of years; long before me.
Q. Is Mrs. Edward MacDowell a member of the Society?
A. Yes, sir, she is.
Q. She is the widow of the distinguished composer of the same name?
A. Yes, sir.
Q. Now, do the publishers print up several copies of the compositions when they publish them?
A. I don't know exactly what you mean by that.
Q. Do they print up great quantities of the songs when they publish them?
A. As a rule, five thousand copies.
Q. Then, how do they sell them?
A. Well, a number of them are sent out free to performers.
[fol. 905] Q. What are those called?
A. Professional copies. The balance are placed on sale through jobbers and dealers.
Q. They are sent to jobbers and dealers in various parts of the country?
A. Yes. The whole merchandizing method is a complicated business. The popular jobbers merchandize by quantity sales; they will sell to anybody who will buy a quantity, say, two hundred copies at a time, and at a discount. Usually the only person capable of buying those are jobbers and they, in turn, sell to retailers.
Q. Would the retailers in the State of Florida have to go to the jobbers?
A. Yes.
Q. Is that customarily done?
A. Yes.
Q. Is this sheet music ever sold by the publisher to the jobber?
A. Yes.
Q. Is it sold on consignment or outright?
A. Outright.
Q. And has the publisher any further control over that particular sheet of music?
A. No.

Judge Hutchinson: I might suffer this, but counsel is evidently reading from some record. Why should we take

the time to find out something that is already in the record? [fol. 906] Why can't we put into this record such of that record as is material?

Mr. Frohlich: I was only going to ask a few more questions and then rest, your Honor.

Judge Hutchinson: All right, if there is only a little more.

Q. From your knowledge of the music business, could the individual writer, composer, or publisher license the performing rights of his works in the State of Florida under these two Statutes?

A. No, I don't think so.

Q. Is the combination between him and the other members of his craft necessary in order to allow him to market his compositions in this State?

A. They must have a cooperative similar to the Society for the merchandizing of his property.

Q. Under this Statute, Mr. Paine, could the publisher distribute professional copies of his works to stimulate the interest of the people of the State of Florida?

A. No.

Q. Could the publisher under these Statutes furnish professional copies to orchestras and other performers in the State of Florida?

A. No.

Q. And would the failure to do that effect the business [fol. 907] of the publisher?

A. Materially.

Q. Is it necessary for publishers to furnish these professional copies?

A. Yes, sir.

Q. Have they been furnished for many years?

A. Yes; it has been the custom. I would say yes.

Q. Now, take the average piano edition of the copyrighted edition, what does that usually sell for?

A. The retail price is twenty-five or thirty-five cents.

Q. If the publisher were to put on that composition, under the provisions of these Statutes, the price for each and every use of that composition would he be able to sell that composition in the State of Florida for twenty-five or thirty-five cents?

A. If he had to put the price on it for each and every use, the printing cost would be so high it couldn't be done.

Q. How many pages are there to the usual composition?

A. About four.

Q. If the publisher were compelled to have on it the complete list of the schedules of all of the uses and prices how many pages would he have to print?

A. It would take about four pages of printing to put on the price list for every conceivable kind of use.

Q. And would that effect the price of the articles?

A. It cost twenty-one dollars a thousand under the union [fol. 908] scale of labor—rates, and counting the increase in the cost of mailing, the cost would be very, very large.

Q. Does the Society audit the books of the broadcasters from time to time?

A. Yes, sir.

Q. Does the Society from time to time find deficiencies in the reports of the broadcasters?

A. Yes, sir.

Q. Have they been substantial amounts?

A. Yes, a deficiency in the first audit of over seven hundred thousand dollars was found, and in the second audit a deficiency of five hundred and thirty-five thousand dollars.

Q. And have there been deficiencies in the State of Florida?

A. Yes, sir.

Mr. Frohlich: Your witness.

Cross-examination.

By Mr. Ellis:

Q. Mr. Paine, it is a fact that there are many thousands of musical compositions which are copyrighted, but which do not sell because they don't strike the public fancy, or for some other reason are not in public demand?

A. Yes, sir.

Q. Therefore, they are only occasionally profitable?

A. Right.

Q. The percentage of the total number that are profitable is comparatively small?

[fol. 909] A. By that, I suppose, you mean those that catch the public fancy?

Q. Yes.

A. Yes, if a publisher strikes it once in thirty times he is fortunate.

Q. Isn't it a fact that ASCAP controls the greater share of the licensing and public performance rights of the music that is occasionally profitable in this country?

A. I would say yes, but I think you would have to always say yes with an explanation.

Q. Do you have an explaination?

A. Yes, I think we are good merchandizers and good showmen. I think we understand a lot about public taste and interests, and if other catalogues used the same skill in the selection of their material, the same skill in the exploitation of their material, then, they would gain popularity similar to that of ASCAP, as it is purely a matter of merchandizing.

Q. You don't mean to slight the efficiency and the mode or organization of your Society, do you?

A. There is nothing unique in the mode of organization of our Society. It is duplicated all over the world.

Q. But the personnel is not?

A. Well, that is very flattering.

Q. Isn't it a fact, that on account of the personnel and the nature of the copyright properties that the Society controls that enables it, along with its merchandizing methods, to get a great deal more revenue than the rest [fol. 910] of them?

A. I think that is undoubtedly so.

Mr. Ellis: No more questions.

Mr. Frohlich: That is all, Mr. Paine.

(Witness excused.)

Mr. Frohlich: This morning, the Court will recall, we stipulated that the depositions could go in along with some of the Nebraska testimony. I don't want to burden this Court with the reading of the depositions, and I thought instead of reading them I would make the formal offer to put them in evidence, and if there are objections your Honor could pass upon them.

Judge Hutchinson: All right.

Mr. Ellis: I would like to suggest that we simply inform the reporter as to what part of the records should go into the record. So far as the record is concerned counsel will get together that portion of the depositions to be copied in the record.

Judge Hutchinson: All right.

Mr. Frohlich: Plaintiff rests.

Thereupon, to maintain the issues on their behalf, the defendants produced as a witness one WILLIAM BURTON RICHARDSON who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ellis:

[fol. 911] Q. State your name and residence, please.

A. William Burton Richardson, and my residence is 216 Quackenbas NW, Washington, D. C.

Q. What is your profession, Mr. Richardson?

A. I am an attorney-at-law and accountant.

Q. State briefly your technical education, please.

A. In 1929, I graduated from Yale University with an A. B. Degree; in June, 1933, I graduated from LaSalle Law School, Washington, D. C., with the degree of LL.B. and in 1938, I graduated from Benjamin Franklin School of Accountancy with a degree of B.C.S.

Q. You are now practicing law and accountancy in the City of Washington, D. C.?

A. Yes, sir.

Q. What was your occupation before entering the practice of law?

A. Assistant Technical Adviser to the United States Social Security Board.

Q. You are famil-ar with the manner of keeping records in the United States Copyright Office?

A. Yes, sir.

Q. Have you prepared an exhibit entitled, "Compilation Made From ASCAP's Sticker Card List Of American Publishers And Records Of United States Copyright Office Showing Numbers of Musical Compositions Copyrighted July 1, 1909 to November 27, 1939 by Publishers Listed in ASCAP Stickers Who Are Not Members Of (1) ASCAP, [fol. 912] (2) SESAC, Or (3) American Music Publishers"?

A. That is correct.

Q. It should be Associated Music Publishers instead of American Music Publishers?

A. That is correct.

Q. You personally prepared that list from the sticker card list of ASCAP's sticker card list of American Pub-

lishers and the records of the United States Copyright Office?

A. Yes, sir.

Q. Describe briefly the mode of compilation of that exhibit (handing exhibit to witness)?

A. I received a group of cards from Mr. Bennett which was the ASCAP sticker card list containing some twenty-five hundred, I think, twenty-seven hundred cards. These cards had a yellow sticker placed upon them three by five in size. In making this compilation, which I have before me, it was necessary for me to withdraw the members of ASCAP, the members of SESAC, and the members of AMP—SESAC being, of course, the Society of European Stage Authors and Composers, and AMP is the Associated Music Publishers of America. Then, with these cards I went to the Copyright Office and searched the files for all the copyrights which the remaining cards contain in here which are non-members of these associations. I went through three files which are broken down, first, from July 1, 1909, to June 30, 1927, the second file is from July 1, 1927, to November 6th——

[fol. 913] Q. (interrupting) Just a moment. This exhibit in brief shows the numbers of musical copyrights owned by persons who are not members of one of those three Societies?

A. That is correct.

Q. And you tabulated the results on an adding machine?

A. Yes, sir.

Q. And you did the work personally?

A. Yes, sir.

Mr. Frohlich: We object to that on the ground that it is incompetent, immaterial, and irrelevant. In the first place, it is not according to the witness' own testimony—his statement of what is on record in the Copyright Office. He says, if I understand him, that he took ASCAP publishers and SESAC publishers, and publishers which appeared on the list of twelve hundred—which I offered in evidence and he compiled a list and which your Honor rejected——

Judge Hutchinson: Do you want to reduce him to numbers?

Mr. Frohlich: It doesn't represent what is on record in the Copyright Office. These are ASCAP's and the copyrights of everybody else.

Q. Are the records in the Copyright Office indexed?
A. They are.
Q. Now, did you make up this exhibit from the names of the copyright holders shown by those indices?
[fol. 914] A. Yes, sir.

Judge Hutchinson: It is complete so far as it goes. Objection overruled.

(Thereupon, the said Compilation was admitted in evidence and marked Defendants' Exhibit No. A-1.)

Mr. Ellis: Now, with the Court's permission and counsel's cooperation, I would like to get up a stipulation to give the results in the record.
Judge Hutchinson: This is an examination of publishers?
Mr. Frohlich: Yes, your Honor, publishers.
Mr. Ellis: The purpose is to show the comparative control by non-members.

Q. Will you explain to the Court what the classifications E, E-1, and E-2 are at the head of the columns from that exhibit?
A. It is the practice of the Copyright Office to make three divisions of the musical copyrights presented to them to be copyrighted. In other words, there is an E classification, and an E-1 and E-2 classification. E stands for the published compositions reproduced for sale or distribution to the public and placed on sale, sold or publicly distributed. E-1 stands for published musical copyright arrangements on old copyrighted material, and E-2 stands for unpublished copyrighted manuscripts.
Q. Will you read the totals, commencing over again?
[fol. 915] A. The period from July 1, 1909, to June 30, 1927, for the Classification E, that E is the published classification, 17, 271. Now, for the same period, Classification E-1, which are the arrangements of copyrighted works, 8,957. And for the Classification E-2, which are the unpublished manuscripts, 1,825. For the next period of years, from July 1, 1927, to November 6, 1937, the E Classification, which is the published copyrighted music, 7,033 copyrights. For the E-1 Classification 2,256 and for the E-2 Classification, which are the unpublished, 4,286. For the third and last period of years which is from November 7, 1937, to November 27, 1939, the E Classification, the published ones, 623, the E-1 Classification, 418, and the E-2 Classification,

470. The total copyrights for this entire period from July 1, 1909, to November 27, 1939, for these cards is 43,139.

Judge Hutchinson: That includes all publishers—ASCAP and everybody else?

Witness: The non-members.

Judge Hutchinson: I thought he said publishers excluding these different organizations.

Mr. Ellis: He commenced with a set of cards bearing the names of the music publishers in this country, and took out the names of these three societies and ran through the Copyright Office indices of the remainder non-members.

Judge Hutchinson: I see.

[fol. 916] Q. Mr. Richardson, have you prepared another exhibit entitled, "Illustrative List Of Musical Compositions And Data Relative Thereto (Excepting Prices) Such As Might Be Filed By A Music Publisher With The Comptroller Of Florida For Compliance With Sections 2(a) And 4(b) Of The "New Law," Chapter 19,653, Acts Of 1939, Prepared From Records Of United States Copyright Office"?

A. I have.

Q. Did you prepare this exhibit of a proposed filing with the Comptroller of Florida from the records of the Copyright Office so far as might be necessary for a publisher to consult those records?

A. I did.

Q. What was the approximate date of preparation?

A. I worked on March 18, 1940, and April 1st, April 3rd, April 4th, and April 5th, I think.

Q. Did you keep a record of the time required?

A. I did.

Q. And how long did it take you to compile this proposed or sample illustrative list?

A. Nineteen and a half hours; about two and a half days working time.

Mr. Frohlich: We object to this as an exhibit. It is incompetent, irrelevant, and immaterial. It is an attempt, on the part of the defendants, to set up what they believe to be a compliance with the Statute.

[fol. 917] Judge Hutchinson: What is that?

Q. Mr. Richardson, did you select a particular, actual, operating publisher as an illustration or example with reference to which you prepared this list?

A. I did.
Q. What was that publisher?
A. Broadway Music Corporation.
Q. And is that an operating music publishing house?
A. It is.

Judge Hutchinson: Is that a member of the association?
Witness: It is. That is my understanding.

Q. How many compositions are included on this list?
A. 938.

Judge Hutchinson: Does it include every composition it held?
Witness: So far as I was able to ascertain.
Judge Hutchinson: That purports to be an examination made from the Copyright Office? It includes—that is a complete list?
Witness: With the exception of any assignments.
Mr. Frohlich: The Broadway Music Corporation might have many copyrights prior to 1909; it lasts twenty-eight years and may be renewed for twenty-eight years. You can't go to the Copyright Office and——
Judge Hutchinson: He doesn't have to put out a list of compositions that nobody is going to use.
[fol. 918] Mr. Frohlich: That is something nobody can tell.
Judge Hutchinson: Objection overruled.

(Thereupon, the said Illustrative List was admitted in evidence, and marked Defendants' Exhibit No. A-2.)

Q. Now, Mr. Richardson, did you prepare another exhibit entitled, "Tabulation Showing Number Of Musical Compositions Copyrighted in 1922 by Publisher Members of ASCAP in 1922"?
A. I did.
Q. Did you personally prepare that?
A. Yes, sir.
Q. What sources did you use?
A. It was necessary for me to consult Blue Book of ASCAP showing the members of ASCAP as of January 1, 1936. On the front page, or the very first two or three pages in this——
Q. (Interrupting) Just a moment. That is supposed to show the members of ASCAP down to 1936?

A. Correct.

Q. There is a supplement to that book which brings it down to date?

A. Yes, the supplement we used was the photostatic copies submitted in the Nebraska Case.

Q. A supplement to the Blue Book?

A. Yes, sir.

Q. Did you run the records of the Copyright Office to see [fol. 919] how many copyrights were taken out by the present members of ASCAP as shown by those books in the year 1922?

A. No, it wasn't necessary.

Q. Did you consult some official catalogue?

A. I did.

Q. In what way?

A. The United States Copyright Office, each year, puts out an index of all musical copyrights issued for that year. To my understanding, they each month—they put out a volume, approximately each month listing by title——

Q. (Interrupting) That is an official publication put out by the Copyright Office, being a catalogue of the copyrights?

A. Right.

Q. And that is what you consulted?

A. Yes, sir.

Q. Is this (indicating) the exhibit and the results?

A. Yes, it is.

Q. And you personally prepared it in that manner?

A. Yes, I did.

Mr. Ellis: I offer this as our Exhibit No. A-3.

Mr. Frohlich: Objected to on the ground that it is incompetent, immaterial, and irrelevant.

Judge Hutchinson: What is the purpose of this?

Mr. Ellis: To show how many copyrights are controlled by ASCAP.

[fol. 920] Judge Hutchinson: Does that list show the copyrights by other people, too?

Mr. Ellis: Not this list.

Mr. Frohlich: That is my objection, your Honor. If he will come in with all of the copyrights for 1922, I will have no objection. I object to it on that ground.

Judge Hutchinson: Objection overruled.

(Thereupon, the said Tabulation was admitted in evidence, and marked Defendants' Exhibit No. A-3.)

Q. Now, Mr. Richardson, did you prepare in similar fashion a tabulation entitled, "Tabulation Showing Number Of Musical Compositions Copyrighted in 1922 By Publisher Members Of Foreign Societies Having Affiliation Contracts With ASCAP"?

A. I did.

Q. Did you prepare this exhibit (indicating) substantially in the same manner as you did the exhibit about which you have last testified?

A. Yes, sir.

Q. And you personally prepared it?

A. Yes, sir.

Mr. Ellis: We offer this as our Exhibit No. A-4.

Mr. Frohlich: Same objection. Objected to on the ground that it is incompetent, immaterial, and irrelevant.

[fol. 921] Judge Hutchinson: Same ruling. Objection overruled.

(Thereupon, the said Tabulation was admitted in evidence, and marked Defendants' Exhibit No. A-4.)

Mr. Ellis: If your Honor please, that completes the direct examination of this witness—to simply identify those exhibits. I think it might be convenient to put in a certified copy of the Register of Copyrights which shows the number of copyrights registered of music copyrights by years from 1912 to 1939 made by the Register of Copyrights, and with your consent I would like to substitute that copy.

Judge Hutchinson: Very well.

(Thereupon, the said list of copyright registrations was admitted in evidence, and marked Defendants' Exhibit No. A-5.)

Judge Hutchinson: The Court will adjourn until 9:30 tomorrow morning.

(Whereupon, an adjournment was taken until 9:30 o'clock A. M., Tuesday, April 16, 1940.)

[fol. 922] (Whereupon, at 9:30 o'clock A. M., Tuesday, April 16, 1940, the Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done, and entered of record, to-wit:)

(Thereupon, the witness, William Burton Richardson, on the stand at the adjournment of Court, resumed the stand for further direct examination.

Direct examination (continued).

By Mr. Ellis:

Q. I hand you again Defendants' Exhibits Nos. A-3 and A-4, being tabulations showing the numbers of musical compositions copyrighted in 1922 by the publisher members of ASCAP and by the foreign affiliates of ASCAP (handing exhibits to witness). Were those prepared on mimeographed lists of the publishers? They appear to be.

A. Yes.

Q. Did you send copies of those same mimeographed lists containing the names of the publishers, but with the spaces for the numbers left blank to any other persons or agencies as a basis for preparing similar information for other years?

A. Yes, I did.

Q. What did you send them?

A. I sent them to Station WIOD in Miami and WFLA [fol. 923] in Tampa, WDAE in Tampa, WMBR in Jacksonville, and there is a station in Orlando, I forget the name of it—WDBO in Orlando.

Q. Those are all designations of radio broadcasting stations?

A. That's correct.

Q. Were those mimeographed lists which you so transmitted identified in any way?

A. Yes, they all have my initials on the copy.

Mr. Ellis: That's all.

Cross-examination.

By Mr. Frohlich:

Q. Who asked you to send those lists to those broadcasting stations?

A. Mr. Andrew W. Bennett.

Q. Did Mr. Bennett retain you to make up these lists?
A. He did.
Q. Can you tell us the first time when you were so retained?
A. I think a few days before November 27, 1939.
Q. Did he write you any letters of instructions?
A. No, most of them were verbal.
Q. Did he tell you who you represented?
A. No, not as far as I can recall.
Q. Did he pay you for it?
A. Well, I have got some of it.
Q. Who paid you?
A. Mr. Bennett.
[fol. 924] Q. Did anyone else pay you anything?
A. No, sir.
Q. Did you get any money from Broadcast Music Inc.?
A. No, sir.
Q. Did you ever hear of them?
A. Who was that again?
Q. Broadcast Music Inc.
A. Oh, no.
Q. You have never heard of them?
A. I have heard of them. Yes.
Q. Have you ever been employed by them?
A. Oh, no.
Q. Do you specialize in making up lists from the Copyright Office?
A. No, sir.
Q. This is the first time you have had that kind of work?
A. Yes, that's correct.
Q. Had you known Mr. Bennett before that retainer?
A. No, I hadn't.
Q. How did you get in touch with him or how did he get in touch with you?
A. Well, it was through a mutual friend. Mr. Howard Callahan.
Q. Is Mr. Callahan connected with any of the broadcasters?
A. Not so far as I know.
Q. Do you represent any broadcaster?
A. No, I don't.
Q. Did you ever?
[fol. 925] A. No. No.
Q. Who assisted you in these compilations?

A. I did the work myself. Of course, I had secretarial help in that respect, but I did all the actual compilations from the Copyright Office myself.

Q. Will you be good enough to look at Defendants' Exhibit No. A-2. Is that the one you have got there?

A. No.

Q. This one (handing exhibit to witness).

A. Yes.

Q. That's the illustrative list containing the information that runs up to price?

A. Yes.

Q. That's the list that should be filed by the Broadway Music Corporation?

A. That's correct.

Q. Will you be good enough to look at that list on Page 1?

A. (complying) All right.

Q. Now, you will find there a composition, "Am I To Blame". Do you see it?

A. Yes.

Q. E-2, that means unpublished, does it?

A. Yes.

Q. That was filed with the Register in 1922?

A. Yes, sir. Correct.

[fol. 926] Q. Now, will you be good enough to look at Page 4?

A. (complying) Yes.

Q. "Boo-hoo-hoo You Gonna Cry When I Am Gone," do you see it there?

A. You mean the top one here (indicating)?

Q. Yes, "Boo-hoo-hoo You Gonna Cry When I Am Gone"?

A. Yes, "Boo-hoo-hoo You Gonna Cry When I Am Gone".

Q. Now, that's a published composition?

A. Yes.

Q. It was published in 1922?

A. That's correct.

Q. It had been unpublished in 1921; there is a notation there, isn't there?

A. No, I haven't got that.

Q. Now, you see the notation of its being published in 1922 on Page 4?

A. Yes, sir.

Q. And on that same page you see "Bunch of Happiness"?

Judge Hutchinson: What is the purpose of this?

Mr. Frohlich: I am trying to save time. I want to go down to this exhibit on the compositions that were published or unpublished that were registered in 1922, and I want the witness to testify the number of those compositions from that exhibit.

Judge Hutchinson: Isn't the exhibit in?

Mr. Frohlich: Yes, your Honor, but it will show that this [fol. 927] exhibit made up to represent all of the compositions of the Broadway Music Corporation shows that in 1922 there were filed twenty-six unpublished songs, and thirteen published songs, and of the thirteen published songs nine of them had also been filed as unpublished so there are really only four songs. Now——

Judge Hutchinson: What is the point?

Mr. Frohlich: I am coming to that. There were thirty songs in that year. I have got a compilation up myself, and——

Judge Hutchinson: What is the point?

Mr. Frohlich: The point is that another exhibit came in——

Judge Hutchinson: This is an impeachment of his work? You are showing his work is unreliable?

Mr. Frohlich: Right.

Judge Hutchinson: I don't attach much importance to the exhibit otherwise anyway. Of course, it may be that his testimony is much more important than we see. The only thing I can see of importance to his testimony was to show it was not impossible to comply with the Acts in getting up these compositions and letting somebody know about it. You might say he doesn't prove that because he made some inaccuracy, but he said he only took nineteen hours—well, take twenty hours. You may have proved that it takes more [fol. 928] than nineteen hours to make an accurate calculation.

Mr. Frohlich: I was addressing myself to another element in the case. They have tried to show that we could comply with the Statute, but they have also put in evidence exhibits to show the great amount of copyrights that the members of the Society own as against other publishers, and——

Judge Hutchinson: That isn't important either, because you people admit that you do control a large amount. Your last man said he thought you controlled practically all of the worthwhile music, and they told people so. It doesn't make any difference whether it is sixty, ninety, or seventy-five percent. You are pretty good operators, aren't you?

Mr. Frohlich: I think we are.

Judge Hutchinson: So the question of the details isn't important. You could almost submit this case on the facts of the Nebraska Case, but go ahead with it. It isn't important that he should prove precisely that there were 7,841 compositions when there might be 7,839. It makes no difference. But if you can so break him down to show that it is impossible to do what you ought to do, it is all right. All right, suppose he did leave out two or three little songs, or fifteen songs. I don't care. I would be willing to take [fol. 929] that as proof that it was inaccurate, but it is not material whether it is inaccurate or not unless the inaccuracy goes to the point of utterly destroying the truth of that exhibit. I am pretty sure it could be done—we have the records and if we have the records we can get the people to search them down.

Mr. Frohlich: That, I think, I will develop on another witness. In order to save time, can I get concession from Mr. Ellis, that Defendants' Exhibit No. A-2 contains thirty-nine registrations of musical compositions of the Broadway Music Corporation registered in the year 1922 of which number twenty-six were unpublished songs and thirteen published songs nine were registrations that had been filed as unpublished, making a total of thirty actual new songs filed with the Register of Copyrights in 1922.

Mr. Ellis: I concede the totals on the second exhibit. I can explain that by one question to the witness. (to witness) Were renewals included on one of those exhibits there (indicating) and not on the other?

Witness: Yes.

Mr. Frohlich: Can I have the concession subject to checking up?

Judge Hutchinson: Instead of taking it out on the witness check them over yourselves.

Mr. Ellis: I will be glad to do that.

Q. May I have that, Mr. Richardson?

[fol. 930] A. Yes (handing exhibit to counsel).

Q. This document that was made up, Defendants' Exhibit A-2, who instructed you to make up the tabulations and columns of this document?

A. I was referred to a copy of the Florida State law in that respect.

Q. Who referred you to that law?

A. Mr. Bennett.

Q. Did he send you a copy of the law?

A. The copy that I used was part of a brief filed by Mr. Wideman.

Q. Was that the 1937 Statute or the 1939 Statute?

A. I don't know. I would have to see it, Mr. Frohlich.

Q. Suppose I refresh your recollection.

A. It was the one used there in the brief.

Q. I show you now the 1939 Statute, is that the Statute you used (handing paper to witness)?

A. As far as I can tell, I think it was that. Yes.

Q. Now, you are a lawyer and you read this carefully, didn't you?

A. Not carefully.

Q. You did not?

A. No.

Q. You made up the nine columns here didn't you?

A. Yes, sir.

[fol. 931] Q. And you got the information for the nine columns out of the Statute, didn't you?

A. That's correct.

Q. Did you get the information out of any particular section?

A. Yes, I did.

Q. Suppose you look at Section 4-A and tell us whether you got that information out of that Section?

A. No, I didn't.

Q. Well, what other Section did you get it from?

A. I got it from Section 2-A.

Q. 2-A?

A. Yes, that's correct.

Q. Well, now, will you be good enough to point out in Section 2-A where there is a schedule of prices for each performance for profit of each composition?

A. It is not in there; it is in another section pertaining to that column.

Q. You said you made this up from Section 2-A?

A. Not entirely.

Q. Well, what other section did you use?

A. We are coming to that. This is Section 4-A for the price; that last column.

Q. Was your exhibit intended to be illustrative of compliance with Section 2-A and Section 4-A?

A. That's correct.

Q. Both sections?

[fol. 932] A. Yes.

Q. In Section 4-A did you notice the explaination, "* * * at a price established for each separate performance of each such composition"?

A. Yes.

Q. And so when you sat down to make this compilation you intended to make something that would be a complete compliance by the Broadway Music Corporation with Sections 2-A and 4-A?

A. With the exception of the insertion of the price.

Q. With that exception?

A. Yes.

Q. You had the date of the copyrights?

A. Yes, sir.

Q. And the number of the copyright?

A. Yes, sir.

Q. And the name of the composer of the song?

A. Yes, sir.

Q. And the name of the author of the words?

A. Yes, sir.

Q. And the name of the publisher?

A. Yes, sir.

Q. Now, do you find anything on that record as to the owner—the present owner of the performing rights in the song?

A. No, sir.

Q. On your Exhibit A-2 under column eight, name of the present owner of the performing rights, you have BMC?

[fol. 933] A. Yes, sir.

Q. That stands for Broadway Music Corporation?

A. Yes, sir.

Q. You made the assumption that the owner of the copyright was the owner of the performing rights?

A. Yes, sir.

Q. Have you had experience as an attorney in copyright matters?

A. Oh, no.

Q. You never had any?
A. No.
Q. Do you know that the Copyright Law splits up various rights in a musical composition?
A. I have heard of that.
Q. Didn't you examine the Copyright Act before you made this compilation?
A. No, I did not.
Q. Have you ever examined the Copyright Act?
A. Yes.
Q. How long ago?
A. Well, in the course of this investigation; merely a cursory examination.
Q. You don't know that there are several exclusive rights given to the owners of the copyright?
A. No.
[fol. 934] Q. You didn't know that the performing rights is only one of the rights given?
A. I had no interest in that.
Q. You don't know there is such a thing as dramatic rights or stage rights in musical works?
A. Merely hearsay knowledge.
Q. Did you intend to include dramatic works as well as the musical composition in that compilation?
A. No.
Q. If Broadway Music Corporation owned a copyright in a dramatic musical work, which might have ten or fifteen musical compositions separately copyrighted, would this compilation show it?
A. I couldn't be sure about it. I will say this that the copyrights listed there are purely musical; the dramatic rights are listed under a different classification in the Copyright Office.
Q. Column nine says, schedule of prices for each performance for profit of each composition. I see you have one column for that, haven't you?
A. Yes.
Q. Do you know how many kinds of performances there might be in a musical composition?
A. I haven't any idea.
Q. Have you any idea of the extent of these performances?
A. No, I don't.

Q. Do you know that these performances may be had by various users? Hotels, restaurants, cabarets and so forth?

[fol. 935] A. I recognize that to be a fact.

Q. Don't you know that under the language of that Statute the copyright proprietor would have the right to fix the price of his performance with respect to each of these uses?

A. Yes.

Q. And you don't want us to believe that in that one column a man could set down in that small space all of the uses of this composition?

A. No. No, sir.

Q. If a man wanted to license the use of his performing rights for profit for a composition in the State of Florida under this Statute, wouldn't he be entitled to fix a price for its use in the theatres?

A. I think so.

Judge Hutchinson: That's a question of law. I have read the Statute and it does indicate that he can fix his prices for any use; there is no use asking him that. If you want to ask him something about how his lists conforms to that, you can. I think you are asking him to construe the Statute.

Mr. Frohlich: I think I will develop that with another witness.

Judge Hutchinson: Somebody has testified about four printed pages to print the prices.

Mr. Frohlich: That's right.

Q. You say you took nineteen and a half hours to [fol. 936] compile that list?

A. Yes, sir.

Q. How long did it take you to compile the other lists that are in evidence?

A. Which ones are you referring to?

Q. Well, A-4 (handing exhibit to witness)?

A. Lets see what that is. I think that was—oh, a week or ten days; something like that. You mean to the end of the notations?

Q. The entire list?

A. Oh, I would say two weeks or a little more than two weeks.

Q. When Mr. Bennett asked you to make up this compilation with respect to Broadway Music Corporation, did he specifically mention Broadway Music Corporation?
A. He did.
Q. Did he mention any other members of ASCAP?
A. No, he didn't.
Q. He said he just wanted a list of Broadway Music Corporation?
A. Yes, sir.
Q. You know that Broadway Music Corporation is one of the smallest companies, don't you?
A. No, I couldn't say whether it was small or big.
Q. You didn't know anything about Broadway Music Corporation?
A. No, I didn't.
Q. Did you make any other lists in compliance with the 1939 Statute in addition to those that are in evidence?
[fol. 937] A. No, I haven't.

Mr. Frohlich: That's all.

(Witness excused.)

Thereupon, to further maintain the issues on their behalf, the defendants produced as a witness one RUSSELL S. JONES who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ellis:

Q. State your name and place of residence?
A. Russell S. Jones, 311 NE 79th Street, Miami, Florida.
Q. What is your occupation, Mr. Jones?
A. I am employed by Radio Station WIOD as an announcer, utility man, and production man.
Q. Did you prepare some exhibits showing for some year the number of copyrighted musical compositions held by the Society—the members of the Society known as ASCAP?
A. Yes, I did for the year 1933.
Q. Did you prepare a similar exhibit showing such copyrights held by the Societies in foreign countries affiliated with ASCAP?
A. I did for the same year; 1933.

Q. How did you prepare those exhibits? From what sources? State very briefly?

A. From a catalogue—a make up catalogue from the United States Copyright Office.

[fol. 938] Q. That is an index of the copyrights and list of the copyright holders?

A. A catalogue prepared by the Copyright Office.

Q. These are the exhibits you prepared (indicating)?

A. They are; those are the exhibits.

Mr. Ellis: We offer these exhibits in evidence.

Mr. Frolich: Object to them on the ground that they are incompetent, irrelevant, and immaterial, and not within the issues in this case. They are supposed to represent extracts from official documents—the Copyright Office Bulletin with respect to musical compositions. I don't think it is necessary to encumber the record. The document is available and could have been produced here. I don't think it is within the issues, and has no bearing upon the points we are interested in in this case.

Judge Hutchinson: What is the purpose of it?

Mr. Ellis: To show the number of copyrights held by the members of ASCAP for the year 1933.

Judge Hutchinson: How is that material?

Mr. Ellis: It simply bears upon the extent of the control over the music business held by ASCAP. It is not of great weight, but it adds to the evidence.

Judge Hutchinson: On that point, it doesn't seem to me that there is any real conflict between you. Do you [fol. 939] contend that ASCAP owns or controls the greater portion of the business of the usable musical compositions?

Mr. Frohlich: I don't.

Judge Hutchinson: Your witness testified to that.

Mr. Frohlich: No, he didn't, your Honor; it was limited to a very fine catalogue of popular music.

Judge Hutchinson: What I am trying to get at is, why do we dispute over something that is not in dispute. You claim ASCAP really has control of very little music, do you? The music they have to do with is negligible?

Mr. Frohlich: I didn't say that, your Honor. ASCAP has an excellent repertoire of popular music.

Judge Hutchinson: It has a very complete and thorough repertoire of usable, popular music?

Mr. Frohlich: It has.

Judge Hutchinson: And outside of its repertoire there is very little music used and played which has popular use?

Mr. Frohlich: That, I will not admit, because I can prove——

Judge Hutchinson: All right, I just wanted to see what you are contesting. Then, you say outside of ASCAP's music there is a good deal of other music.

Mr. Frohlich: Yes, sir.

[fol. 940] Judge Hutchinson: Is that so, Mr. Ellis?

Mr. Ellis: It is a difference in degree, your Honor.

Judge Hutchinson: You don't claim that ASCAP controls every piece of music, do you?

Mr. Ellis: No, your Honor.

Judge Hutchinson: But you do know that ASCAP controls a whole lot of it?

Mr. Ellis: If Mr. Frohlich will agree that ASCAP controls possibly fifty percent of the usable music—performing rights to it——

Mr. Boggs: I want to make one comment. Mr. Mills testified about twenty-five thousand pieces of copyrighted music each year, and that only twenty-five hundred or three thousand pieces of that belonged to ASCAP. His statement stands in the record, and this contradicts Mr. Mills' testimony.

Judge Hutchinson: What you are saying—you are overthrowing Mr. Mills' testimony. He had a list of one hundred thousand compositions, a good deal of which was in the public domain, and he could not say what proportion of the music which was not public domain—what proportion of that one hundred thousand was public domain music. He said of the one hundred thousand he had—ASCAP had twenty percent. Do you think if they can bring this case down to a question of whether they have got majority control—is that all that this case stands on? Suppose they had twenty-five percent, they would be a [fol. 941] combination, wouldn't they? In Texas if two or more persons combine to fix a price any article it is a trust and combination. Of course, it may be in Florida that you have got to have fifty-one percent.

Mr. Boggs: Under the 1937 Act a substantial showing is required, but under the 1939 Act, on this price fixing thing, it is two or more.

Judge Hutchinson: What are we under, the 1937 or 1939 Act?

Mr. Boggs: We are under both.

Judge Hutchinson: Is this proof going under Section 1?

Mr. Boggs: Yes, your Honor. ASCAP certainly controls a substantial number.

Mr. Frohlich: That's admitted, your Honor.

Judge Hutchinson: You certainly do control a substantial number or it is a fraud on the public and on this Court for you to be in existence, isn't that it?

Mr. Frohlich: Yes, your Honor.

Judge Hutchinson: Then, what are we fighting for? Let us go ahead and not tie knots here. You are objecting on the grounds that it is not material to the issues in this case?

Mr. Frohlich: Yes.

Judge Hutchinson: Why?

[fol. 942] Mr. Frohlich: It regards something that is not in issue here. We agree that ASCAP has a substantial number of copyrights. Why do we have to encumber the record to show the number of copyrights of ASCAP? You can fill this Court Room up with copyrights from the Copyright Office.

Mr. Ellis: It is one of the defenses interposed by the defendants in this case. Regardless of either one of these Florida Statutes ASCAP is coming into equity with unclean hands and is asking for the aid of a Court in equity in perpetuating its price fixing activities, and we say because of that fact they are not entitled to perpetuate this monopolistic control that they have over the entertainment industry. You are not depending on a Statute at all—you come back to common law principles of public policy and when the proper time comes we have a number of cases showing that the Court frowns on rendering aid to monopolistic combines, and it seems to me that under that sort of defense this evidence is relevant and pertinent.

Judge Hutchinson: In the Nebraska Case, the Court declined to consider whether these contracts were valid. You said that the Nebraska Case controls, and if your Statute is valid your Statute would control, and even if your Statute is not valid you have a right to justice upon the [fol. 943] grounds that they are engaged in something which is monopolistic and contrary to the common law, and, therefore, can't appeal in equity.

Mr. Ellis: Yes, sir.

Judge Hutchinson: But still if you haven't got a Statute, they are entitled to an injunction.

Mr. Ellis: It is price fixing, your Honor.

Judge Hutchinson: It would be an extreme view to say, "We are going to let an unconstitutional statute be enforced against them because it is wrong". What they ask the aid of the Court for is not to enforce a contract. This is not a suit between persons. Now, if you think you have got a broadcasters' suit, we will hear that view. It may be that the broadcasters can contest the enforcement of this contract on the grounds you put up—that they have gone into a contract which is tainted, but that is not this suit. Here are the officials of the State of Florida undertaking to use the power of the State against these people, and you come into Court and say, "Stand aside; they are a pretty rough set of fellows". So far as I am concerned, I would never listen to that plea. They may be rough, but you are roughing them. You are attempting to illegally use the power of the State to oppress people. I am not saying we shouldn't go into that inquiry, but if this Statute is valid we ought to refuse the injunction. If this Statute [fol. 944] is not valid we ought to grant it.

Mr. Ellis: Aren't there numerous types of contracts not a part of any statute enforcement of which have been refused?

Judge Hutchinson: This is not an enforcement.

Mr. Ellis: ASCAP has gone into Court to declare illegal and void the contracts it now has with the entertainment industries in Florida——

Judge Hutchinson: It is asking the Court to stay the hand of the State in exacting penalties against these people for trying to go on with their business.

Mr. Ellis: You will notice one of the clauses—they want the State enjoined from interfering with these contracts.

Judge Hutchinson: At any rate, I suggest authority. I have never seen it. However, if this Statute is invalid, I am not going to refuse these people relief. If you are interested enough in the thing to say we are wrong in keeping the evidence out—if you want us to consult on a ruling, all right. Don't misunderstand me, I am not saying that the attitude of these people in charging monopoly, which is restraint in trade, might not have some conscious or unconscious influence in determining the question of unconstitutionality or illegality. I am not saying it doesn't [fol. 945] have some influence in the case, but if we have a

clear conviction that this Statute is unconstitutional and invalid, then, we ought not to refuse the injunction. So far as the evidence has come out, there is no indication that anybody is very badly hurt or injured. It is just a row between the broadcasters and them. It is not such a question of public policy so as to make a Chancellor say, "We are going to kick these people out". Now, how much time do you want to bring in proof? I think you have got a case that ASCAP controls the majority of the business.

Mr. Boggs: I would be perfectly willing to let your Honor's ruling stand on that, and on this law proposition we will present it properly in our brief.

Judge Hutchinson: If you have only got one or two exhibits on which this point relates, it might be better for us to overrule the objection and take it subject to the objection and let it go in, and to have it in the form of a separate bill of exceptions. This case is going to settle down, and the issue in the case is going to be the precise number of publications which ASCAP holds and the precise proportion which those bear to others. So far as I am concerned, I will give you a bill on it now.

Mr. Ellis: We have got in addition to this witness four other witnesses of like character, and your Honor will [fol. 946] notice that that part of Mr. Richardson's testimony was very brief, and I should think, possibly, Mr. Frohlich on seeing these other exhibits would be willing to stipulate.

Judge Hutchinson: Give the reporter the names of the witnesses and the compilations and it will be in. Objection of the plaintiff overruled.

Stipulation

It is stipulated that the witnesses Jones, Meadows, More, and Sparks would testify that the publisher members of ASCAP and the foreign affiliates of ASCAP were granted copyrights—that is, the present members of the Society and the affiliates were granted copyrights to musical compositions in certain years in the following numbers:

For the year 1933, ASCAP members, 5,174
Foreign affiliates, 3,345
Total, 8,519.

That the total copyrights for 1933 were 25,992, of which 14,796 were unpublished.

For the year 1920, ASCAP members, 7,167
Foreign affiliates, 4,205
Total, 11,372
Total of unpublished copyrights taken out in that year, 31,614.
For the year 1916, ASCAP members, 7,438
Foreign affiliates, 3,496
[fol. 947] Total, 10,934.
Total of all of the copyrights 19,973.
For the year 1913, ASCAP members, 7,009.
Foreign affiliates, 6,819.

All of the said testimony being admitted over the objections of the plaintiffs as to materiality and competency.

(Witness Excused.)

Mr. Frohlich: May I hand up to your Honors the brief we prepared and used in the Supreme Court. On Page forty-six you will find what your Honor just stated as a rule of law.

Judge Hutchinson: I am very glad I have got support. (laughter.)

Mr. Ellis: There are two witnesses I would like to put on—we simply want to remove all possible doubt of the control of ASCAP. I am only going to ask this witness two or three questions after qualifying him. He will testify briefly to that control and also briefly with reference to the mode in which it is exercised.

Judge Hutchinson: All right, that is permissible. However, bear in mind that this is not a case tried before a jury where some particular fact may have dynamic potentialities. It makes little difference to me as regards—well, "Oh, Molly, Come Home to Me." However, we don't mean to say that we shouldn't hear what kind of a business it is.

[fol. 948] Thereupon, to further maintain the issues on their behalf, the defendants produced as a witness one Louis Thomas Belviso, who, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Ellis:

Q. State your name and place of residence, please, sir.
A. Louis Thomas Belviso, Jackson Heights, New York.

Q. State what position you hold in the radio broadcasting industry?

A. I have the position of Manager of the Music Division of the National Broadcasting Corporation.

Q. How long have you been with NBC?

A. Ten years.

Q. And have you been in charge of its Music Department during all of that time?

A. Well, I started out in charge of the program building section, which is called Music Supervision, and, then, gradually we took on other musical activities, and now it is all included in the music division.

Q. State briefly, Mr. Belviso, your education and your experience in the music industry?

A. Well, I was educated at the Yale School of Music, Yale College, and the Institute of Musical Art in New York. I have been directing orchestras of all types since I was fourteen. I started out in the business of building and sell- [fol. 949] ing orchestras to hotels and night clubs. From there I went to the Olymphia Theatres, Inc., a group of thirty theatres which was later taken over by Paramount, and with whom I held the same position only there were many more theatres, from thirty to one hundred; I built stage shows and selected music for motion-pictures.

Q. Have you personally composed musical compositions, and, if so, indicate generally the number?

A. I have composed thousands of incidental bits of music for motion pictures and radio shows.

Q. From your knowledge of the availability of music, can you state who controls the performing rights to the substantial majority of the usable copyrighted music available for public performances for profit in the United States?

A. Yes.

Q. Who controls it?

A. ASCAP.

Mr. Frohlich: Just a moment. I object to that on the ground that the witness hasn't shown himself qualified that he knows of his own knowledge who controls the great majority of available music.

Mr. Ellis: I can qualify him further. He is in charge of all of the programs of NBC—his salary is fifty thousand dollars per year for that purpose.

Judge Hutchinson: What did you say you do with regard to broadcasting programs?

[fol. 950] Witness: I have charge of the Music Division. This has to do in New York with the building of programs and with——

Judge Hutchinson: What programs?

Witness: For NBC.

Judge Hutchinson: Does NBC limit itself to one field and Columbia and the others in the course of a year use the same compositions?

Witness: I would say we used the same compositions, in a general way.

Judge Hutchinson: Your use is not limited to a particular field of music but includes the whole range?

Witness: Yes.

Judge Hutchinson: Your broadcasting company uses about the same pieces as the others?

Witness: I would say so.

Judge Hutchinson: You couldn't know any more about music or have any more opportunity to know who controls it if you represented two broadcasting companies than if you represented one?

Witness: No.

Judge Hutchinson: I think he is qualified. Objection overruled.

Q. Is there available, at the present time, socalled popular music of some appeal and sufficient quality and quantity to operate programs for commercial broadcasting other [fol. 951] than the music controlled by ASCAP?

A. No.

Q. Mr. Belviso, you have something to do with what is called the clearing of copyrighted musical material for the broadcasting company, don't you?

A. Yes, I do. All of the music used by NBC is submitted to my department for music clearance.

Q. Is that just for the United States or for all operations?

A. We determine whether we are licensed to use the music in the United States, and if the program goes to Canada or some other foreign country, if we are involved in a foreign broadcast, we look into the foreign rights.

Q. In preparing musical programs for NBC is it a part of your duties to arrange the right to give public perform-

ances over the radio of copyrighted musical compositions?

A. It is.

Q. You arrange for them through ASCAP and from your other sources?

A. With ASCAP, we have a blanket arrangement.

Q. Are there instances in which you negotiate for and obtain the right to use such material directly with the individual copyright holders?

A. Yes, quite a number.

Q. And is the price or fee that you pay fixed on a per piece or per use basis?

A. Yes.

[fol. 952] Q. Is it fixed for one performance or two or three performances, or any such number as that?

A. Usually, on the ones we have no license for, I make a direct negotiation for a fee.

Q. Those are what you call individual licenses from the individual copyright holders?

A. Yes, usually for a single performance, although, we have a number of private licenses with small publishers for thirty days or so.

Q. And how many of those private licenses does NBC have?

A. Well, I would say six or seven thousand.

Q. Those permit the company to use the material on a per use or per piece basis?

A. These private licenses, if I understood you correctly, are usually blanket licenses passed on to NBC from small publishers or small composers interested in getting his works on the air. Now, as to what you asked me with regard to a single negotiation, we have many negotiations for one performance as a fee.

Judge Hutchinson: I couldn't hear that. What was the question?

Mr. Ellis: Read the question, please. (Question read by reporter.)

Witness: That refers to the miscellaneous items that come up from time to time for which we don't have any blanket license.

[fol. 953] Judge Hutchinson: But the general system is by blanket licenses—not only with ASCAP but with others?

Witness: Yes.

Q. Is there any difficulty in fixing the price of compensation for the per use or per piece arrangement for using such copyrighted music?

A. Usually not.

Q. How long does it usually take?

A. Oh, in most cases merely a telephone call.

Q. Roughly what range do the fees or compensation take?

A. Non-dramatic music?

Q. Yes.

A. They range from five dollars up to five or six or nine. I don't know how they arrive at it; twelve, twenty-two, twenty-five, one hundred.

Judge Hutchinson: How do you find out the owner of the piece?

Witness: Through years of contact we get to know who represent certain pieces.

Q. How do you know he is going to be in when you call him?

A. Well, we don't know as a matter of fact. There is one fellow, for instance, I never call before eleven thirty in the morning, because he never gets up before then, and, then, he goes out to lunch at twelve thirty and doesn't come back until four (laughter).

Judge Hutchinson: You don't wait until the programs go on the air to get your license, do you?

[fol. 954] Witness: No, before.

Judge Hutchinson: The general way is by a blanket license—then you know what you can do?

Witness: That's right. If there isn't a blanket license and we are unable to contact the holder of the copyrights one of those items comes off.

Judge Hutchinson: That is an exception to the rule?

Witness: Right.

Q. You referred to a private license, blanket license, Mr. Belviso, do you mean a license from one individual copyright holder for a number of compositions, but not the kind of a license which is meant to cover an arrangement by a combination or a group for a number of copyright holders?

A. No, in these private licenses, they are usually with one individual who might have one composition, or with one publishing house.

Mr. Ellis: Your witness.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Belviso, you don't want this Court to believe that you can't conduct the business of broadcasting just as economically and as well by means of private licenses on a per use or per program basis as you conduct it now with a blanket license?

A. I didn't say that.

Q. You don't want the Court to believe any such thing?

A. No.

[fol. 955] Q. You didn't even say that?

A. Right.

Q. Does NBC have licenses with the European Societies?

A. Yes.

Q. With SESAC?

A. Right.

Q. How many years have you had a license with that outfit?

A. With SESAC we have recently renewed our license in February; it is on the sixth year.

Q. That's also a blanket license?

A. Right.

Q. And this SESAC controls a great many foreign compositions?

A. A number. Yes.

Q. A number of foreign and American compositions?

A. Yes, sir.

Q. It has quite an extensive catalogue, hasn't it?

A. Fairly.

Q. Do they represent several copyright owners—SESAC?

A. They represent a number of publishers who are copyright owners, I would say.

Judge Hutchinson: In brief, is SESAC a competitor of ASCAP?

Witness: Well, it is in the same business.

Q. But SESAC also has an extensive catalogue?

A. Well, fairly. Its catalogue is not as extensive as ASCAP's.

Q. And SESAC is a competitor of ASCAP, isn't it?

[fol. 956] I wouldn't know just how to answer that.

Judge Hutchinson: The witness may be confused. He may have an idea that SESAC and ASCAP are working

together. Maybe they have got a secret arrangement. They have a list of music which they sell a blanket license for just like ASCAP, haven't they?

Witness: Yes. They are both licensing organizations representing a number of publishers. The essential difference is in quality, and, as I say, the type of contract. The SESAC contracts, at least ours is, is a blanket network contract, and the ASCAP contract is a station contract.

Q. Who is Associated Music Publishers?

A. They are still another licensing organization representing some fifteen odd foreign publishers.

Q. Have they many titles?

A. Well, they have a lot of titles and a lot of public domain music.

Q. And a lot of copyrighted stuff?

A. I would say comparatively little.

Judge Hutchinson: These associations, you say, have a lot of public domain music. How can they sell public domain music?

Witness: They have the copies of the music available. We have a license with them to perform any copyrighted music that they have.

[fol. 957] Judge Hutchinson: What do they do with regard to public domain music? Do they sell the sheet music?

Witness: Yes, they act as agents for the sale of it.

Judge Hutchinson: That doesn't come under the license?

Witness: No, sir.

Q. Have you also a license for G. Ricordi of Milan?

A. We have.

Q. Is that a large publishing concern?

A. Yes, quite a large publishing house.

Q. It controls many thousands of compositions?

A. I would say it has quite a few thousand compositions, and quite a large public domain catalogue.

Q. That, of course, includes Verdi, Mascagni, and Puccini.

A. Well, everything of Verdi's is public domain except "Falstaff".

Q. If you want to play Verdi you have got to get a license from Ricordi?

A. No, not Verdi. With the exception of "Falstaff" everything of Verdi's is in the public domain.

Q. Well, if you wanted to play an arrangement of Verdi owned by Ricordi?

A. Not necessarily.

Q. How about Mascagni and Puccini?

A. Well, it all depends on what you mean by Mascagni. If it is "Osiris" or "Cavalleria Rusticina" that would be in the public domain.

Q. Do you pay them an annual sum for that license?

[fol. 958] A. Yes, sir.

Q. Have you a blanket license from any other concern?

A. Well, we have a blanket network license with the Jewish Society, A. P. Smith, E. P. Sherman, in addition to SESAC and ASCAP.

Q. Do these societies control a great many compositions?

A. Some.

Q. You dip into them, without any formality, whenever you want anything of theirs. There is no contacting and negotiating for a license, is there?

A. Well, it is not quite as simple as that in the case of Ricordi.

Q. You do two kinds of broadcasting, don't you? You broadcast "small" rights and "grand" rights, don't you?

A. By that do you mean non-dramatic and dramatic?

Q. Yes?

A. We do.

Q. If you put on for one hour an opera of Puccini's, and you took seven or eight of his great arias and put them together, that would be a dramatic performance?

A. Yes, sir.

Q. And you would have to get such a dramatic license from G. Ricordi of Milan, wouldn't you?

A. Yes, sir.

Q. If you played one song of Puccini's you might be using an arrangement owned by somebody else?

A. That would be Ricordi controlled.

Q. In other words, they have all of the Puccini?

[fol. 959] A. Well, there is the Rondine.

Q. When, you perform in non-dramatic form you are not required to negotiate for that particular song?

A. That's correct.

Q. Do you find that convenient in your business?

A. Well, it is convenient.

Q. As a matter of fact, you frequently go to the great catalogues for compositions?

A. I don't quite understand you.

Q. Well, suppose you wanted to perform one of the old masters—a Mozart number?

Judge Hutchinson: Is that really relevant? He stated very broadly that he does business on a blanket license.

Mr. Frohlich: I want to show your Honors he can still go safely beyond ASCAP.

Judge Hutchinson: He already said that.

Mr. Ellis: We admit that.

Mr. Frohlich: Will he stipulate that there is a vast reservoir of fine music——

Judge Hutchinson: Not vast.

Mr. Frohlich: A vast reservoir of fine music of the masters to which NBC and other radio stations help themselves, and to which they do help themselves very frequently.

Mr. Ellis: We will admit that, but I think you should admit that much of it is only occasionally usable.

[fol. 960] Mr. Frohlich: We will not admit that.

Judge Hutchinson: I think the witness just testified to that—if you will admit there is a reservoir there.

Mr. Ellis: We admit it.

Mr. Frohlich: I have no more questions.

(Witness excused.)

Judge Hutchinson: There will be a ten minute recess.

(After Recess.)

Thereupon, to further maintain the issues on their behalf, the defendants produced as a witness one JAMES W. BALDWIN who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ellis:

Q. You are Mr. James W. Baldwin?

A. Yes, sir.

Q. Where do you live, Mr. Baldwin?

A. 201 Lincoln Street, Baltimore, Maryland.

Q. Have you held some position with the National Association of Broadcasters, and, if so, state what your connection was?

A. I became associated with them first in 1933, first, in the capacity of assistant to the Managing Director, and in July, 1935, I was appointed managing director of the Association, and I held that position until February, 1938.

Q. Have you also owned and operated commercial broad-
[fol. 961] casting stations?

A. As a major stockholder of a corporation, yes.

Q. While you were managing director of the National Association of Broadcasters, did you have any negotiations or discussions with representatives of the American Society of Composers, Authors, and Publishers concerning the right—the licensing of the right to public performance for profit of the musical compositions controlled by the Society?

A. Yes.

Q. When did you have those discussions and how did you happen to have them? State very briefly how they proceeded and what the nature of them was?

A. As Managing Director, I was under mandate from our member stations and from my Board of Directors, to whom I was directly responsible, for trying to negotiate with the Society a per piece or measure system or plan. Those mandates were in the form of resolutions which had been adopted in conferences, and also in the form of specific instructions from my Board of Directors. The licenses between the Society and the stations were expiring on December 31, 1935, so my conversations with the officers of the Society began, I believe, in August, 1935, and continued through the remaining months of 1935 up to about January 11, 1936.

Q. With whom did you have those discussions as representatives of ASCAP?

A. Well, I talked to their General Manager, Mr. Mills, [fol. 962] and perhaps, Mr. Buck, and their general counsel, Mr. Burkan, and on one of these occasions, in company with our president, I appeared before their full board.

Q. Can you state or indicate the reason you took up those negotiations so far as the position of the broadcasters is concerned? What was the purpose of them? In other words, in addition to the proposals of a per piece or measured service basis, were they satisfied or dissatisfied with the prices?

A. It was not so much a matter of price; in our discussions we never knew whether we were paying too much or too little. The criticism was with a system which required our member stations to pay a percentage of their gross receipts whether they used the Societies music or whether they didn't. They also found criticism with the fact while that was generally true there were some instances where that was not so, and those instances created what our members thought were discriminations. For instance, the socalled newspaper form of contract. It was generally agreed, I think, between our people and the spokesman for the Society in those crucial days of December, 1935, that the details incidental to the operation of a per piece system were so complicated that they couldn't be worked out in the few days that remained before January 1, 1936.

Q. What was the result of your negotiations? Did you get together on any facts?

A. First, we obtained an extension beyond December 31st for a definite period but subject to cancellation on two [fol. 963] days' notice, and in that period of time, it was known to all, to both sides, that the advisory committee which had assembled in New York, by authority of the board, was to work out details for a plan. We were working on that plan and endeavoring in our conversations with the members of the Society to, at least, if we couldn't put in the per piece system to get the kind of system that others had, which required time. As of about January 10th when we had completed our first draft, without notice to us, and notwithstanding the extension which had been granted, and notwithstanding that for the first time we had met the complaint that the Association had not the right to bind its members, more than three hundred stations gave their power of attorney to me to negotiate for music licenses. That information was given to members of the Society, and notwithstanding that power to negotiate, and notwithstanding our——

Judge Hutchinson: Go ahead and state what happened.

Witness: Our members received notice that they must sign a five year extension of the then existing licenses by January 15th or thereafter be considered infringers.

Q. Those are the contracts that you are now operating under?

A. Yes, sir.

Q. From your knowledge of the broadcasting industry, and the mode of operation of the Society known as ASCAP, are you able to say whether the price or rates for the use of their material is fixed by what you call free and open [fol. 964] negotiations or trading, or in some other manner?

Mr. Frohlich: Object to that; the facts speak for themselves.

Judge Hutchinson: That question calls for a conclusion. I don't know exactly what you mean by that.

Mr. Ellis: I asked him whether in making those prices they negotiated in a fair and open manner.

Q. Now, in negotiating for those licenses or arranging for them, are there negotiations entered into by ASCAP?

A. There have been negotiations, I believe, from the beginning.

Judge Hutchinson: I don't understand the answer.

Witness: There have been negotiations from the beginning between the broadcasters, representatives of the broadcasters, and the Society.

Q. How are the prices and terms fixed?

A. By the Society.

Mr. Ellis: That's all.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Baldwin, you had negotiations in 1935 with Mr. Mills, didn't you?

A. I talked with Mr. Mills and with Mr. Buck.

Q. Did you then discuss the terms of the proposed new contract?

A. No terms of any contract was discussed.

Q. Well, what was talked about?

A. Trying to eradicate differences, and get one contract [fol. 965] for all so that all paid the same.

Q. Didn't you know at that time that the newspaper owned stations were negotiating for the kind of a contract you just testified to before?

A. My understanding was that the newspapers had already renewed their contracts early in 1935.

Q. They had made their contracts in 1932, hadn't they?

A. Right.

Q. And the National Association of Broadcasters had negotiated their contracts in 1932?

A. A committee had.

Q. And the National Association of Broadcasters was aware in the year 1932 that the Society was giving newspaper owned broadcasters this kind of a contract?

A. I don't know.

Q. Weren't you told that by Mr. Mills in 1935?

A. My understanding——

Q. Were you not told that by Mr. Mills in 1935?

A. I don't know which was first, the negotiation for the newspaper form or the general form of contract.

Q. Didn't you know in 1935 that the Society was negotiating with newspaper owned broadcasting stations at that time?

A. I knew the newspapers had a special form.

Q. Do you know the reason for that special form?

A. No, sir.

[fol. 966] Q. Did you ever, by yourself, talk with any newspaper owned station in order to find out the reason for it?

A. No, sir.

Q. Do you think the American Society of Composers, Authors and Publishers is a good thing for your broadcasting business?

A. I didn't understand the——

Mr. Frohlich: Read the question. (Question read by reporter.)

Witness: I think it could be.

Q. Do you remember testifying before the Patents' Committee in Washington in 1936?

A. Yes.

Q. Do you remember the following questions and the following answers? The Chairman is saying this.

"The Chairman: Would you be in favor of passing legislation that would be instrumental in destroying ASCAP?

And you answered:

"Mr. Baldwin: No, sir.

"The Chairman: You think ASCAP is a necessity to protect the very interests that you represent?

"Mr. Baldwin: Some central agency. Whether it is the ASCAP or some other, I am not interested.

"The Chairman: Is it absolutely essential for you to deal with some agency? In other words, It is very essential for you to deal with one organization rather than to deal with a group of 1,000 individuals?

[fol. 967] "Mr. Baldwin: It is more convenient, sir.

"The Chairman: You would be sued for infringements every day, if you dealt with individuals. Is not that right?

"Mr. Baldwin: We might be.

"The Chairman: But it is easier to deal with one centralized organization?

"Mr. Baldwin: We think it is without a doubt."

Now, were those questions asked you and those answers given?

A. I believe that is true.

Q. Did you ever formulate a per piece system on behalf of the broadcasters?

A. No, we didn't think we should.

Q. Didn't Mr. Mills ask you to present him with a per piece system formula?

A. Yes.

Q. Did you give it to him?

A. No. May I explain that? That's the thing we were preparing to do in January——

Q. (interrupting:) Why didn't you——

Judge Long: Let him explain his anwer.

Judge Hutchinson: I don't think he has a right to inject it on cross examination.

Q. You may explain.

A. I answered the question no, and I intended to explain that we were endeavoring to work out a formula in January, 1936, when the notice made further negotiations impossible.

[fol. 968] Q. When for the first time did you and Mr. Mills discuss this formula?

A. Well, I expect Mr. Mills and I have discussed the general problems since the first day we met after I was Managing Director of the Association.

Q. When was that?

A. I have stated at a meeting, I believe, in August, 1935.

Q. Had Mr. Mills in August, 1935, asked you to prepare a formula?

A. I can't say whether it was at the first meeting.

Q. Can you give us the approximate month it came up?

A. I know it was discussed during November and December, 1935.

Q. Had that per piece system been discussed by the board of the National Association of Broadcasters?

A. Often.

Q. Had they at any time prior to August, to your knowledge, presented a per piece plan to ASCAP?

A. Not a plan.

Q. Or a formula?

A. Nor a formula.

Q. You know, don't you, that if you were working on a per piece or program basis you would have to send in daily reports of the compositions which you used?

A. Periodically anyway.

Q. If you were paying so much for every performance of every musical composition there would have to be some [fol. 969] method by which you made payment?

A. That's right.

Q. Do you think that is a good thing for the broadcasting business?

A. Yes.

Q. You do?

A. Yes.

Q. Do you remember a report you made on February 3, 1936, to the National Association of Broadcasters?

A. To my Board of Directors?

Q. Yes?

A. Yes.

Q. Do you remember this line on Page 48 of that report? "Records and Reports. Under this heading the revised contract still calls for weekly reports of all compositions including those not controlled by licensor. This feature is objectionable." Do you remember that statement?

A. No, I don't. If you have it there I can check it up.

Q. Will you please look at this document and see if that is an accurate copy of your report (handing paper to witness)?

A. I recall it. It was connected with the Warner Brothers——

Q. (Interrupting:) Did Warner Brothers and the companies owned and controlled by them completely withdraw from ASCAP?

A. Yes.

"The Chairman: Is it absolutely essential for you to deal with some agency? In other words, It is very essential for you to deal with one organization rather than to deal with a group of 1,000 individuals?

[fol. 967] "Mr. Baldwin: It is more convenient, sir.

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Q. (interrupting:) Why didn't you——

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A. Well, I expect Mr. Mills and I have discussed the general problems since the first day we met after I was Managing Director of the Association.

Q. When was that?

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Q. Had Mr. Mills in August, 1935, asked you to prepare a formula?

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A. Often.

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A. Nor a formula.

Q. You know, don't you, that if you were working on a per piece or program basis you would have to send in daily reports of the compositions which you used?

A. Periodically anyway.

Q. If you were paying so much for every performance of every musical composition there would have to be some [fol. 969] method by which you made payment?

A. That's right.

Q. Do you think that is a good thing for the broadcasting business?

A. Yes.

Q. You do?

A. Yes.

Q. Do you remember a report you made on February 3, 1936, to the National Association of Broadcasters?

A. To my Board of Directors?

Q. Yes?

A. Yes.

Q. Do you remember this line on Page 48 of that report? "Records and Reports. Under this heading the revised contract still calls for weekly reports of all compositions including those not controlled by licensor. This feature is objectionable." Do you remember that statement?

A. No, I don't. If you have it there I can check it up.

Q. Will you please look at this document and see if that is an accurate copy of your report (handing paper to witness)?

A. I recall it. It was connected with the Warner Brothers——

Q. (Interrupting:) Did Warner Brothers and the companies owned and controlled by them completely withdraw from ASCAP?

A. Yes.

Q. For how long? For about six months?

A. Yes, sir.

[fol. 970] Q. And, then, you on behalf of the broadcasters were negotiating for a license from Warner Brothers?

A. Yes.

Q. For a per piece system?

A. Yes.

Q. And were you able to work out a per piece system with them?

A. No.

Q. About what percentage of the programs of the broadcasters use music?

A. I have forgotten, Mr. Frohlich.

Q. Suppose you refresh your recollection. Would it be correct to say about seventy per cent of the programs use music?

A. I should say that would be nearly correct. Sixty or seventy per cent.

Q. Is that true today as well as it was in 1935?

A. I don't believe there has been any substantial change since 1935.

Q. But there has been an increase in the gross volume of business done by the broadcasters since 1935, hasn't there?

A. Yes.

Q. Do you recall without any figures about what the NBC took in for time on the air in 1935?

A. NBC?

Q. Yes.

A. No, I don't. We had them but its been four years ago, and I just don't remember. I think the total for the indus-

[fol. 971] try, I believe I recall that figure, was approximately eighty-seven million five hundred thousand dollars.

Q. Do you know what was taken in by the industry for time on the air this past year—1939?

A. Well, I am going to have to guess because I am not engaged in it—I think something like one hundred and twenty-five and one hundred and thirty million dollars.

Q. This has increased steadily over the years since 1935?

A. I believe that is correct.

Q. What did ASCAP obtain from the industry in 1935 for its license fee?

A. The figures furnished me at that time were two million nine hundred and ninety-five thousand dollars.

Q. Do you think that was too much or too little?
A. I don't know.
Q. You don't know?
A. No.
Q. You never expressed any opinion on it?
A. I never did.
Q. Do you know what ASCAP got from the radio industry this past year?
A. No, I don't.
Q. Would you say it obtained too much from the industry?
A. I don't know.
Q. Well, from your knowledge of the business would you [fol. 972] say that the license arrangement between the industry and ASCAP has been of benefit to the industry over the years?
A. The question—it has never been a question of price but of method.
Q. Well, whether it is price or method, hasn't the industry leaped up in gross volume and taken in a great deal more money in the past five years?
A. They have increased their earnings.

Mr. Frohlich: That's all.

(Witness excused.)

Thereupon, to further maintain the issues on their behalf, the defendants produced as a witness one W. Walter Tyson who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ellis:

Q. State your name and place of residence?
A. My name is W. Walter Tyson, Tampa, Florida.
Q. What is your connection, if any, with the radio broadcasting industry?
A. I am President and General Manager of Radio Station WFLA, Tampa, Florida, Vice President of the Florida West Coast Broadcasters, member of the Board of Directors of the National Association of Broadcasters, and also the Florida Association of Broadcasters.

Q. I believe you have been President of the Florida Association?

[fol. 973] A. Yes.

Q. What are your duties as manager of the station? Generally and briefly?

A. Anything pertaining to the business management and direction of the station from a standpoint of operation.

Q. Have you anything to do with arranging for programs or negotiations for musical selections that are broadcast?

A. Yes, sir.

Q. How do you obtain the music broadcast by your station and from what source?

A. We have a license with ASCAP which furnishes us the chief backlogs of music that we use.

Q. Do you have with you a copy of the contract?

A. I do.

Q. What is that?

A. A typewritten copy of the original.

Mr. Ellis: I offer this contract in evidence.

Mr. Frohlich: All of the contracts are in evidence.

Mr. Ellis: Very well, I withdraw the offer. I didn't realize that.

Q. How were the terms of that contract fixed.

Mr. Frohlich: Object to the question, the contract speaks for itself.

Judge Long: As to terms but not as to how it was arrived at.

Judge Hutchinson: Objection overruled.

Q. Answer the question.

[fol. 974] A. We were merely told what the contract was going to be, and conformed with it. We had no negotiations except through the National Association of Broadcasters, and, as I recall, we did give Mr. Baldwin power of attorney to negotiate the contract.

Q. At one time?

A. Yes, sir.

Q. You say you were told you had to take the contract in that form. Who told you?

A. ASCAP really told us. We never voluntarily——

Mr. Frohlich: Object to any voluntarily.

Witness: I merely wanted to explain.

Judge Hutchinson: Suppose you ask him questions and see how you get along.

Q. In what form did you get the notice that that was to be your contract?

A. We have had two contracts; that is what I was attempting to explain.

Judge Hutchinson: In what form did you get notice?

Witness: We got it from ASCAP.

Q. Is there anything you wish to say to explain to make it clear to the Court? Is there anything of any consequence?

A. To this extent, the first contract we had was a contract with the municipality of Clearwater, and that contract was slightly different from the Florida contract which came into being, and the result was we had to operate through the municipal contract.

Q. That was just a formal change?

[fol. 975] A. But it would involve the paying of a sustaining fee which we did not pay on the other contract.

Q. Did or do you have any substantial source for obtaining music other than from ASCAP?

A. It is the only source.

Q. Have you caused to be made up a statement or can you say how much of the income of your station is derived from the use of ASCAP music and how much is derived from other sources?

Mr. Frohlich: Objected to on the ground that there is no foundation for that.

Judge Hutchinson: Objection overruled.

Witness: Roughly about twenty-five per cent—between twenty-five and thirty-five per cent of the income of the station would be classified as not being ASCAP music.

Q. Do you have any competitors in broadcasting?

A. Yes.

Q. Name your chief competitors or indicate them?

A. Station WDAE, Tampa.

Q. Do they also use ASCAP music on this station?

A. Yes, sir.

Q. Is there any difference between the charges made by ASCAP to your station and the charges made to your competitor for the same music?

A. Yes, sir.

Q. Can you explain that difference?

[fol. 976] A. My competitor has the so-called newspaper contract and we have the straight commercial contract.

Q. In other words, the competitor station is owned by a newspaper and yours is not?

A. Yes, sir.

Q. What do you pay and what does your competitor pay?

A. We pay a sustaining fee charge—I can't really testify on that for this reason, I don't know what the other form of contract is. I only have a hazy knowledge of it, and it is a matter of hearsay.

Q. Has ASCAP ever given you a list of its compositions in its control, or its repertoire?

A. We have a card service of some one hundred thousand cards from ASCAP, which was furnished to us by ASCAP, and also we have a list of the SESAC numbers, but we are not a SESAC licensee. I think that they both are incomplete.

Q. From your knowledge of the broadcasting business, state your opinion as to whether or not it is practical to arrange for the use of musical compositions in the field of what is called popular music on a per use or per piece basis.

Mr. Frohlich: I object to that, your Honors, because there is no testimony here by this witness or anyone else as to what a per piece system is.

Judge Hutchinson: What is the purpose of this?

Mr. Ellis: Read the question. (Question read by reporter.)

[fol. 977] Judge Hutchinson: Judge Long said overrule it. Objection overruled. Read the question to the witness.

(Question read by reporter.)

Witness: You asked for an opinion?

Q. Yes.

A. I would say that if the Florida Act was in operation, I believe we could.

Judge Hutchinson: That is as good an answer as you could expect.

Q. You could negotiate such arrangements with individual copyright holders?

A. I believe I could under the Florida Act.

Q. Does a lot of your music come in over the NBC Network?

A. It does.

Q. Do you have a contract with them?

A. Yes, we do.

Q. Will you produce the contract?

A. I have it in a brief case.

Mr. Ellis: I would like to offer the contract with NBC in evidence, and I ask leave to substitute a copy.

Witness: There is an original contract and a photostatic copy of it.

(Thereupon, the said contract dated February 20, 1935, was admitted in evidence, and marked Defendants' Exhibit No. A6.)

Mr. Ellis: That's all.

[fol. 978] Cross-examination.

By Mr. Frohlich:

Q. How many years have you operated a broadcasting station?

A. I have been actively managing a station since 1925.

Q. And in all of those years have you operated under a blanket license with the American Society?

A. For the first two years we had no license at all, and they finally convinced us we should.

Q. In the first two years you were new in the business?

A. Not necessarily. We hadn't been sold an ASCAP contract by the representative in the area.

Q. In those first two years you were using a great many pieces of music which belonged to the members of the Society?

A. We were convinced of it by the Societies' attorney.

Q. You were using copyrighted compositions in those years?

A. Yes, 1925 and 1926.

Q. Did you pay anybody for the use of those compositions?

A. We finally made a blanket license.

Q. Did you pay anybody in 1925 and 1926 for the use of those musical compositions?

A. We were operating as a municipality at that time and we did not.

Q. In the operation of your broadcasting station did you play or perform musical compositions owned by persons other than members of the Society?

A. Occasionally. Yes, sir.

[fol. 979] Q. Did you pay for the use of those compositions?

A. We have paid for them. Yes.

Q. Whom?

A. Individual copyright holders for performance use.

Q. Can you give us the name of one holder you have ever paid?

A. I am not prepared to at this moment, but we have done so.

Q. Isn't it a fact that you didn't take a license until you were told you would be sued for infringement?

A. I think, substantially, that is correct.

Q. And you never voluntarily paid anybody for the use of musical compositions unless you were compelled to enter into an agreement, have you?

A. No, I never testified to that; since then we are more familiar and we have paid.

Q. You testified that about twenty-five or thirty per cent of your programs consisted of ASCAP music?

A. No, sir, I testified that about twenty-five per cent of the programs do not have ASCAP music.

Q. You did?

A. Yes, sir.

Q. So that about seventy-five or eighty per cent do have ASCAP music?

A. I would say that. Yes.

Q. When you made your arrangement or your renewal of your contract in 1935, didn't you know that the National Association of Broadcasters, at that time, were acting in [fol. 980] your behalf with ASCAP?

A. I did.

Q. And you were finally informed that the negotiations had ended and a contract consummated?

A. We were informed that a contract would be offered to me for signature.

Q. Did you write any letters to the Society in which you said you wouldn't accept any contract?

A. No, I don't believe I did.

Q. Did you sign on the dotted line?

A. I had no alternative.

Q. And you sent back the contract signed?

A. Yes, sir.

Q. Do you have any contractual relations with any other association similar to the Society?

A. No, sir.

Q. Do you keep a log of your compositions?

A. We do.

Q. Is it a complete log of every composition played?

A. Yes, but not on the network. Locally.

Q. If you kept a log you would have to have a log of the network programs as well as your local programs, wouldn't you?

A. We have no knowledge of what the network is going to play in advance of the broadcast.

Q. That's covered by the blanket license which the network has with ASCAP?

[fol. 981] A. No, I have an individual station license. That has never been necessary for a station affiliated with the network.

Q. When the network broadcasts you don't have to negotiate with the composer?

A. Yes, sir.

Q. And for your local programs you rely on ASCAP?

A. Correct.

Q. Will you tell us, in your own language what you mean by a per piece system?

A. A per piece system as I understand it?

Q. Yes.

A. A per piece—per use of each individual composition as may be required by the station and each on separate performance.

Q. Now, in order to keep account of these per uses or per performances of each piece, wouldn't you have to keep an extensive log?

A. Yes, we would.

Q. And you would have to keep that for every program you put on, wouldn't you?

A. We are doing that now.

Q. How many hours a day are you on?

A. Seventeen hours.

Q. Do you keep a log of every composition performed on your station?

A. Yes, sir, locally.

Q. And do you furnish that log to anybody?
[fol. 982] A. No one has ever asked for it; it is on file at the station.
Q. It is?
A. Yes, sir.

Mr. Frohlich: No more questions.

(Witness excused.)

Thereupon, to further maintain the issues on their behalf, the defendants produced as a witness one L. S. Mitchel who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Ellis:

Q. State your name and place of residence?
A. L. S. Mitchel, Tampa.
Q. What is your business, Mr. Mitchel?
A. Manager of a radio broadcasting station.
Q. What is the name of the station?
A. WDAE.
Q. Radio Station WDAE?
A. Yes, sir.
Q. This station is located in Tampa, Florida?
A. Yes, sir, at Tampa.
Q. How long have you been connected with the radio broadcasting business, and have you stated what your position is?
A. I am General Manager of the station, and have been for approximately nine years.
[fol. 983] Q. Were you connected with the broadcasting industry prior to that time?
A. No.
Q. Where do you get your music?
A. Mostly from ASCAP.
Q. You have some arrangement with NBC Network?
A. No, Columbia Broadcasting System. We are affiliated with them.
Q. Do you have a copy of your contract or original contract?
A. I have the contract itself.

Mr. Ellis: We can make a copy of it and return the original.

Witness: This is the present contract that is in force now.

Mr. Ellis: I offer this contract in evidence and ask leave to substitute a copy.

Judge Hutchinson: All right.

(Thereupon, the said contract dated January 11, 1940, was admitted in evidence and marked Defendants' Exhibit No. A-7.)

Q. Do you have any substantial other source of music other than ASCAP?

A. We have a license with SESAC but over a long period. We find we use very little of their music because it isn't in shape for public performance.

[fol. 984] Q. Do you have a license agreement or contract with ASCAP?

A. Yes, sir.

Q. How was that negotiated?

A. Well, ours is different than some of them. Back in 1932, there was a group that got together and negotiated the so-called newspaper contract. At that time ASCAP offered two contracts to us—either the standard or the newspaper contract, and we considered the newspaper contract had certain advantages and we accepted it.

Q. Why did they offer to give you that option or alternative?

A. Well, at the time the group, I know who they were, presented arguments to ASCAP to the effect that newspapers were in a position to aid in the music business and we should have a little bit better terms; that's just my recollection of things. I was not a party to the negotiations. In any event, ASCAP thought enough of it to offer it to separate stations owned fifty-one per cent or more by a newspaper in the United States and that contract was sent to us, but, at the same time, they asked us if we would prefer the other.

Q. What is the difference in the rates?

A. The chief difference in the rates after they really get going is in the newspaper contract you don't pay on material that doesn't contain the societies' music other than what we call spot announcements coming between musical programs.

Q. That's under your contract?

[fol. 985] A. Yes, sir.

Q. What about under the other contract?

A. The fixed percentage would be paid on the gross business of the station.

Q. Can you state generally what savings in money your contract gives as compared with what the expense would be under the other contract?

A. I have those figures for 1937 and 1939.

Q. State what the savings was?

A. Five thousand one hundred dollars in round numbers.

Q. Are these the figures you prepared?

A. Yes, five thousand one hundred and eleven dollars and eighteen cents, we figured we saved.

Q. For 1937?

A. For '38 and '39.

Q. Will you state in the record the amounts received by your station from all sources and the amounts received on account of the use of ASCAP music?

A. Say that again, please; I didn't quite understand.

Mr. Ellis: Read the question, please. (Question read by reporter.)

Witness: I can do that for each year.

Q. Just the totals?

A. By years?

Q. Yes.

A. In 1937, $108,740.31 was the gross business, and we [fol. 986] reported on $83,114.87.

Q. To ASCAP?

A. Yes, sir, that was the amount of business we ran that used music. We didn't try to break it down. You want the other years?

Q. Yes, for 1938, and 1939?

A. Gross business for 1938, $102,614.42; we reported to ASCAP on $75,299.05.

Q. 1939?

A. 1939 gross business, $120,937.02, and we reported to ASCAP on $97,442.63.

Q. Do you have any local competition in the broadcasting industry?

A. Yes, WFLA.

Q. That is the station managed by Mr. Tyson?

A. Yes, sir, Mr. Tyson.

Q. From your experience in the broadcasting business, will you state your opinion whether or not it would — profitable or favorable to negotiate and arrange for the use of music compositions with individual holders of copyrighted music based on what is called a per use or per piece basis?

Mr. Frohlich: Same objection. We object on the ground that it is incompetent, immaterial and irrelevant.

Judge Hutchinson: Same ruling. Objection overruled.

Witness: I am not qualified to answer that question, because I don't know.

[fol. 987] Mr. Ellis: Your witness.

Cross-examination.

By Mr. Frolich:

Q. Do you remember receiving a letter from Mr. Mills on or about April 12, 1938?

A. Well, I wouldn't know; I have quite a few letters from him.

Q. I will show you this copy and will you see if you can refresh your recollection (handing letter to witness)?

A. I think I received the letter, and I don't believe I answered it.

Q. You did?

A. Yes. About that time ASCAP started sending back our mail.

Mr. Frohlich: I would like to offer this in evidence.

Mr. Ellis: What is the purpose of it?

Mr. Frohlich: He talks about the per piece system. I think it will throw a little light on this question as a disgruntled broadcaster.

Q. Do you remember this paragraph in the letter, "You are a practical operator. Would you mind telling me with entire frankness and candor just what your preference would be as between the two different methods of securing licenses to publicly perform copyrighted music? ASCAP desires to be constructive in its consideration and treatment of this matter. We desire above all to have a friendly and good will relationship with out licensees"? Did you answer that letter?

[fol. 988] A. If I did answer it I told him we were satis-

fied with the form of newspaper contract, but the amount of money didn't always please us.

Mr. Frohlich: We offer the letter in evidence.

(Thereupon, the said letter dated April 12, 1938, was admitted in evidence and marked Complainants' Exhibit No. 4.)

Q. Under that newspaper contract the guarantee is four times the sustaining fee?

A. Right.

Q. Have you found it a burden to your business to pay a license fee to ASCAP?

A. We haven't found it a burden because we have made it a point to sell broadcasting that contained that music and saved ourselves quite a bit of money that way.

Mr. Frohlich: That's all.

(Witness excused.)

Mr. Ellis: If we can agree that the contracts between ASCAP and NBC, and the contract between ASCAP and CBS—that each contains a provision requiring their important stations to use ASCAP music, we don't need the contracts.

Mr. Frohlich: That, I can't say; we will have to look at the contracts.

Mr. Ellis: I offer in evidence a copy of the mintues from [fol. 989] the Regular Meeting of the Board of Directors of ASCAP, Friday, June 3, 1932, which was produced by the plaintiff.

Mr. Frohlich: There will be no objection if the entire minutes are offered.

(Thereupon, without objection, the said minutes were admitted in evidence and marked Defendants' Exhibits No. A-8.)

Mr. Ellis: I understand that we have a stipulation that counsel for either side may read from, or submit to the Court, the contents of the deposition of Mr. Morris taken in the Nebraska Case in the United States District Court of Nebraska, and at a conference either side will designate to the reporter, after arguments, such other portions that are to be copied in the evidence.

Judge Hutchinson: Let the record show that either side has the right to refer to any part of that record he wants to. Do you want now to limit yourselves to the particular piece you are going to use in that record.

Mr. Frohlich: No, sir.

Stipulation

It is stipulated that the foregoing relates to all of the depositions taken, or evidence, in the case of Buck v. Swan-
[fol. 990] son in the District Court of Nebraska.

Mr. Ellis: We rest, your Honor.

Mr. Wideman: If the Court please, from the standpoint of the complainants the trial is nearing an end, and the point that remains, however, we honestly believe to be a very important part, and it will be directed and confined to one such matter.

At the outset of the trial the Court recognized that there was, first, important questions of law to be considered, and which the Court is not concerned with at the trial, and suggested that, possibly, very few, if any, factual matters were to be developed. We think a good portion, probably, of the testimony that has been offered yesterday and today is in the long run immaterial, but we do think, however, that the chaff has been separated from the wheat, and that the one outstanding factual situation that should be developed—that the burden is upon us to develop, and that is to demonstrate the utter impossibility of complying with the Florida Statute; the impracticability of endeavoring to name in advance a price for each separate performance of music. The impracticability of adopting some theoretical per piece, per program, or per use system which has been intimated to the Court, and which in years gone by has been indi-
[fol. 991] cated and suggested, but which has never been presented full blown to the American Society or to any Court despite much litigation of which the Society has been a party to since its organization in 1914.

Therefore, we do earnestly ask the indulgence of the Court in allowing the rebuttal testimony of Mr. Mills and Mr. Paine. It will be directed to this one subject. It will certainly not take more than an hour and a half or two hours depending on the cross-examination.

Judge Hutchinson: Do you mean the constitutionality of the Act could be—rather, the unconstitutionality of the Act

could be shown if it is impossible of performance, or difficult of performance?

Mr. Wideman: Either one, your Honor—so difficult as to interfere seriously with our right to distribute in Florida and market our property in Florida. It is not a question, as the Court indicated yesterday, of two separate sides of its business, one the ASCAP method of blanket license and the other this per piece system which has been indicated by the broadcasters. It is a question of the life and death of ASCAP in the state of Florida.

Judge Hutchinson: What I am trying to get in my mind, is there a difference in these sections as they apply to combinations and as they apply to individuals. Is there a pos- [fol. 992] sible difference in the bearing of the evidence on the activities of these persons if they act individually or by combines.

Mr. Wideman: There is not, your Honor, as we see it.

Judge Hutchinson: Couldn't the State make some requirement of a combination that it couldn't make of an individual?

Mr. Wideman: Possibly so.

Judge Hutchinson: Shouldn't there be a distinction made on the requirements of an individual or a combine?

Judge Long: As I understand it, you want to introduce the witnesses Paine and Mills for the purpose of showing it is not practicable?

Mr. Wideman: Yes, your Honor, in fact, impossible.

Judge Long: Haven't they already testified to that?

Mr. Wideman: They have just begun to scratch the surface, and it is a vital part of this case.

Judge Long: I understood Mr. Mills to say it would be impossible.

Mr. Wideman: We earnestly ask the indulgence of the Court.

Judge Long: He testified he couldn't do it for this reason and for that reason, and it seems to me like that is repetition.

Mr. Wideman: There will be repetition, but I think you [fol. 993] will agree there will be some enlightenment—the subject has not been fully developed from our standpoint. As a matter of fact, we were uncertain yesterday whether the Court would permit us to show the impossibility of performance of the Act, but when the defendants came along

and were allowed to put in exhibits freely to show why you could comply with it, why, we——

Judge Hutchinson: Judge Long's idea is correct. You shouldn't have them repeat what they have said, and they should not take the stand for the purpose of arguing the case for you. However, you certainly have kept faith with the Court. We will be as patient as our needs permit us to be.

Mr. Wideman: They are going to testify to the facts and that is the reason I have been so emphatic.

Judge Hutchinson: They can't take very long; let's go along and see how we get along.

Mr. Ellis: I think it is foolish and ridiculous to have these gentlemen back on here.

Mr. Wideman: They are individual complainants along with the Society.

Judge Hutchinson: The Court will recess until two o'clock.

(After recess, 2 o'clock P. M.)

Thereupon, to further maintain the issues on their be- [fol. 994] half and in rebuttal, the complainants recalled as a witness one EDWIN CLAUDE MILLS, who, having been previously sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. I show you Defendants' Exhibit No. A-2 being the "Illustrative List Of Musical Compositions And Data Relative Thereto (Excepting Prices) Such As Might Be Filed By A Music Publisher With The Comptroller Of Florida * * *", in this case the Broadway Music Corporation, and I ask you to look at Page One of this list and note the ninth column on that page (handing exhibit to witness)?

A. Yes, sir.

Q. Now, what *you do* find listed as the last column?

A. Schedule of prices for each performance for profit of each composition, Section 4-A.

Q. Please, tell us, Mr. Mills, what the Broadway Music Corporation would have to put in that column in order to obtain revenue for its performing rights in Florida?

A. Well, it would have—the copyright owners would have to, with respect to each of the compositions, establish in advance, in order to have it down on this list, the prices for each and every one of the many types, many different types, of uses for a public performance for profit which there might be of these compositions. May I interject some- [fol. 995] thing? I know this catalogue very well and this catalogue does not contain dramatic works.

Q. How many different kinds of users are there licensed by ASCAP?

A. Well, as many different kinds of establishments as there are which perform—publicly perform copyrighted music. That is to say dance halls, motion-picture theatres, cabarets, night clubs, restaurants, broadcasting stations, circuses, carnivals and a number of other types of establishments that publicly perform copyrighted music.

Q. Do all dance halls operate on a uniform basis?

A. No.

Q. How do you go about listing prices for the various methods of operation for a dance hall?

A. Well, some dance halls operate on what they call a taxi policy; there is no admission charged at all, and those who come pay so much to dance for each dance. Some halls operate by charging an admission per couple——

Judge Hutchinson: You are talking about how dance halls operate, and he is asking about music prices.

Witness: Well, the prices would be fixed according to the operating policy of the dance halls and this depends on its capacity, size, the prices charged for admission, and the various other elements that enter into its profit making possibilities.

Q. For example, would you license a large dance hall that employs an orchestra of five pieces each night on the same [fol. 996] basis as you would some little dance hall that only uses a violin or piano?

A. No, that isn't done and it wouldn't be done. The fee is greater when the use is greater and the profits of the business are greater. The price charged for the license to publicly perform music is relative to the profit possibilities and the use.

Q. Also will you tell us how many types of operations there are of dance halls and how the charges are allocated?

A. Without going into great detail, I would say there are, probably, twelve different types of operations—dance halls operating on different types of policies. Dance halls can be divided into about five size types or classes. For example, the dance hall that will accommodate about fifty couples such as the one called the Nightengale on the outskirts of this town. Then, a dance hall I have in mind in Jacksonville that accommodates one hundred and fifty couples—I don't recall the name of it is another type or class. Then, a dance hall that will accommodate five or six hundred couples such as the Aragon in Chicago which employs two big orchestras playing a continuous musical program with no intermission—when one orchestra stops playing the other one starts. Now, again in those types of dance halls their policy will vary. One might be a free admission place where they sell beer and refreshments and make most of their money in that way.

Q. Let's take the picture theatres. Is the operation of these theatres uniform?

[fol. 997] A. By no means; they again are divided into classes with different operating policies as the basis of classification. There is the very small theatre operating one or two nights a week in very small so-called country towns with a pure picture policy. Then, there is the larger theatre that shows not only pictures but has an organist—a living musician, and a continuous operating policy, operating seven days a week. Then, there is the still larger motion picture theatre that presents prologues—using living talent such as the Oriental Theatre in Chicago, or Radio Music Hall in New York, with a larger audience and a higher price of admission. There are about eight different classes of motion picture theatres, and each classification is for the purpose of determining performing right fees.

Q. Would the fees be different with respect to each classification?

A. Oh, obviously. You couldn't possibly charge the same price per piece or per use to the little theatre in the town——

Judge Hutchinson: In every case you mean that the price is apportioned individually; it would have to be what the traffic could reasonably bear, and in order to cover every conceivable situation you would have to make a very thorough canvas-?

Witness: Yes, sir. I don't like to phrase it that way, but the fellow who can just make a living could not be charged as much as the man that makes huge profits.

[fol. 998] Q. With respect to hotels are there different classifications?

A. Yes, a great many of them. Perhaps, more of them then any type of establishment you have heretofore queried me about.

Judge Hutchinson: It isn't helpful to us to have the enumerations of the various kinds of classifications. He can say there are many kinds—some more profitable and some less.

Witness: Your Honor, that would be true as to types of establishments which publicly perform music.

Judge Hutchinson: I am suggesting that you make your answers in more general form.

Q. How many kinds of establishments and classifications of users would you say there are?

A. Once in my own study of the possibilities of adopting this per use or per program formula for the broadcasters, I analyzed three hundred and sixty different kinds of uses, practical uses, general uses—three hundred and sixty kinds.

Q. Would the copyright owner who made up his schedule with all uses in mind have to come down and obtain information in the State of Florida with respect to these establishments?

A. He would have to come down and get the information or imagine that the State of Florida contained the same diversification as anywhere else. If he did assume that he would have to establish a schedule showing the prices for those different places.

Q. So taking three hundred and sixty as the number of classifications of these groups, there would have to be about [fol. 999] three hundred and sixty different prices with respect to each composition?

A. To do justice to all different types of users. Yes, sir.

Q. Wouldn't the success or percentage of popularity of the particular composition differ in every respect in a publisher's catalogue?

A. Obviously the fee charged for George Gershwin's "Rhapsody In Blue", for example, would be a higher fee than some run of the mill composition.

Q. Having obtained that information for the price schedule, wouldn't the proprietor have to come down here to police it?

A. Yes, sir.

Q. And find out who is using it?

A. Yes, sir.

Judge Hutchinson: He wouldn't have to come down, but he would have to have it policed by somebody in some way?

Witness: Yes, your Honor, it would have to be policed, but this goes further than that. If I may illustrate, the "Rosary" the music was written by Ethelbert Nevin and Frank Stanton wrote the words; both composer and author are deceased. Mrs. Nevin is eighty-five years old and physically incapacitated and lives in New York. Mrs. Stanton is a bedridden invalid living in Atlanta, Georgia, and they [fol. 1000] between them control the performing rights in the "Rosary". It is still copyrighted. Mrs. Nevin could completely decline—I have known them both intimately and personally through the years, to place any price in advance on the use of the "Rosary", and Mrs. Stanton would say, I know by reason of actual experience—she would say, "Mr. Mills, I don't want this used on any program that advertises liquor", and I could multiply that situation many times except for taking your time—she would decline to make a price in advance.

Judge Hutchinson: It wouldn't be material—as to a blanket license you have no such limitation.

Witness: Yes, your Honor, because the same limitations are on us. Gershwin will not permit his Rhapsody In Blue on small——

Judge Hutchinson: I move to strike those things as not material. The personal idiosyncrasies of the composers—I don't see how that is material in this case at all.

Witness: She just wouldn't put the price——

Judge Hutchinson: You shouldn't go into the difficulties that you have because those same difficulties arise under the license.

Mr. Ellis: I make that motion.

Q. Mr. Mills, do you know of your own knowledge whether dance halls throughout the country keep any records or logs [fol. 1001] of their compositions?

A. They do not.

Q. Could they operate if they were compelled to operate on a per piece or per program system?

A. As presently constituted, no.

Q. Isn't it necessary for them to have available at a moment's notice this catalogue of music?

A. Instant notice.

Q. To play encores?

A. Yes. For instance, if an orchestra is playing at a dance and a couple dances by and says, "Play 'Hasty Tasty' next", well, they have to be ready to play it or lose their popularity.

Q. Do you know whether any individual copyright owner has ever licensed any dance hall to use his music?

A. Not to my knowledge.

Q. Did any users of copyrighted music, to your knowledge, prior to the organization of ASCAP apply for licenses to individual copyright owners?

A. No.

Q. Since ASCAP has been established what has been your experience with respect to users voluntarily applying for licenses?

A. That there have been no voluntary applications except as the result of representations made by the Society.

Q. Has that been the general rule?

A. Almost an invariable rule.

[fol. 1002] Q. Could individual copyright owners, without acting in combination, license the use of their compositions here in the State of Florida?

A. Any individual copyright owner is helpless to protect his rights. It is hopeless.

Q. Has that been the history of copyrights?

A. As regards the public performance for profit that's been the history of all copyrights all over the world.

Q. In your opinion, and from your experience and knowledge, is a combination of copyright owners necessary to protect their interests?

Mr. Ellis: Object to the question asked—he is asked to give a legal——

Judge Hutchinson: What was the question.

Mr. Frohlich: Read the question. (Question read by reporter.) Now, will you answer the question.

Witness: In no country in the world since the beginning of the copyright laws has the individual composer been able

to protect his right. They have had to organize these Societies, and where they are not organized their rights have been continuously infringed.

Q. Assuming you had gotten up a complete list of the schedule of prices and the other information which you saw on that exhibit, Mr. Mills, and this list was filed in Tallahassee, can you tell us how the individual copyright owner, [fol. 1003] acting either alone or the individual acting in combination with another individual would go about collecting revenue and collecting the prices on that list?

A. There is nothing in the law that gives him any opportunity to collect the prices that would be set out.

Q. So that he would first have to find out whether it was used?

A. Right.

Q. And having found that out he would have to seek some method of collection?

A. Yes, he would have to put his prices on file and that the composition had been played and then prove he hadn't been paid for it.

Q. There was some testimony this morning, Mr. Mills, about the newspaper broadcasting contract. Will you be good enough to tell us when the newspaper broadcasting contract was negotiated for the first time?

A. In 1932.

Q. And under what circumstances were these negotiations had?

A. There was a long series of negotiations between a committee representing ASCAP and a committee representing the National Association of Broadcasters. As a result of those conferences a formula for commercially operated stations was devised and a contract was drawn up under that formula. The formula was approved by the National Association of Broadcasters and the Society. After it had been approved within a week or so a committee called on us representing the so-called newspaper owned broad- [fol. 1004] casting stations of which there were at that time some fifty-five, according to my recollection. This was in 1932. They represented to us that the newspapers, throughout the country, devoted a great deal of white space to the furtherance of the cause of music, and that they ought to have some sort of special consideration from the composers and authors of music, because of the added interest in music

through them. They wanted to negotiate a special agreement adapted to their particular needs—they didn't operate commercial stations in those days; their chief function at that time was the distribution of weather and crop reports, financial reports and so forth. They seemed to make a good case and we listened to them. Then, we consulted the executives of the National Association of Broadcasters, who had approved the other agreement, and we asked them if they had any objections to our dealing with these newspaper owned stations and they said, no, and these negotiations resulted in a different form of contract—the so-called newspaper owned station contracts. It was adopted and each newspaper in the United States was offered the option of the commercial contract or the newspaper owned contract, and the best evidence of the fact that it is not as advantageous as may seem when compared to the other contract is that of the fifty-five newspaper owned stations at that time only fifteen elected to take that contract. It had certain stipulations that more than balanced its advantages. It was submitted to the National Association of Broadcasters [fol. 1005] and approved by that association before we agreed to make that newspaper contract. It was all open and above board, and this committee that negotiated on behalf of the newspaper owned stations contained members of the board of directors of the National Association of Broadcasters—Walter Dann of the Milwaukee Journal and——

Judge Hutchinson: What is the importance of the names of those members.

Witness: To show——

Mr. Frohlich: I wasn't interested myself in the names.

Q. Were these negotiations had again in 1935 with the newspaper owned stations?

A. No, sir, with the National Association of Broadcasters only.

Q. Did you inform the NAB then that you were renewing the newspaper contracts?

A. Yes, sir.

Q. It was done with their full knowledge?

A. Yes, sir.

Q. Have you ever been furnished by any representative of the broadcasting industry or any other user of music in

the United States a formula for a per piece or per program system of licensing public performances for profit?

A. ASCAP has requested repeatedly that such a formula be presented, and it never has been able to get it from any of them.

Mr. Frohlich: Your witness.

[fol. 1006] Cross-examination.

By Mr. Ellis:

Q. Mr. Mills, how many classifications for uses do you have in Florida now under your blanket license system?

A. Only two classifications.

Q. Those are the only ones you use?

A. No, as between two different types of music.

Q. Classifications of users?

A. Classifications of users?

Q. How many different kinds of contracts do you have in Florida through ASCAP?

A. As many different kinds as there are different kinds of establishments—dance halls, theatres, night clubs, cabarets——

Q. Do you know how many of these?

A. No, sir, I don't. I don't know how many different types of establishments there are in Florida.

Q. You said you fixed your prices for the use of ASCAP music on the profit making possibilities of the use?

A. Yes, sir.

Q. And that's determined by ASCAP, is it not?

A. It is determined by ASCAP and the different type of users through negotiation.

Q. In substance isn't that the same as when they say in traffic circles—what the traffic will bear? Don't you charge as much as the business will reasonably stand?

A. No.

[fol. 1007] Q. What it can stand and keep going?

A. No, sir.

Q. You voluntarily give reductions?

A. Yes, sir.

Q. Well, give us an instance or two in Florida?

A. At the moment my memory doesn't recall one in Florida.

Q. That is all I asked about.

Judge Hutchinson: You asked him generally.
Mr. Ellis: I believe I added in Florida.
Witness: Is the question still limited to Florida?
Mr. Ellis: Yes.

Q. Is there anything in the way ASCAP does business that would prevent it from filing a per piece price just before a user would be authorized to give a public performance which included a piece of its music?

A. No, nothing in ASCAP's method of doing business, but everything inherent in the operation would be involved.

Q. Is there anything peculiar about the music business or your system, that would prevent you, if you had an unusual use, an odd shaped dance hall—a dance hall out of the ordinary, that required your fixing a new price, or assuming you fixed a different price for every dance hall, is there anything that would prevent your forwarding a statement of the price for that use to the Comptroller at the time you made the deal, or ten minutes before?

A. Yes, sir.

[fol. 1008] Q. What would prevent you from doing that?

A. The vastly complicated process that would be necessary in gathering the evidence of ownership of a complete catalogue, or comprehensive catalogue of copyrights, and filing a statement under oath that this was a correct statement of the facts when offered. We don't know them ourselves. This requires an investigation in many different places and many people when these copyrights have passed into an estate. It is almost impossible to do. And the failure to file a complete catalogue, when an illegal use is made—the failure to file a copy under oath, the result is to deprive the owners of his right under the copyright. That's the practical result.

Q. I don't quite get you yet, but I will pass it. Now, one of the stipulations in the newspaper contracts which some of the papers took into consideration and which influenced some of them to take it was the reduced rate, wasn't it?

A. The newspaper form of contract required that the broadcaster taking it must, in any event, pay not less than four times the amount of the sustaining fee; that was to be the minimum payment under any circumstances under the contract. In other words, if the profits which accrued as the result of receipts from the sale of advertising programs did not aggregate an amount four times the amount of the sus-

taining fee, he would have to make a payment of the difference. Then, he was to pay at the beginning of the first year of the contract a percentage of five per cent of his receipts from commercial programs which used ASCAP [fol. 1009] music. The commercial contract required no minimum guarantee, but specified a fixed sustaining fee plus three per cent for the first year, four per cent for the second year, and five per cent for the third year of a three year contract from all receipts from the sale of time. The accountings were to be rendered in the same manner and at the same time. The guarantee on both sides was just the same.

Mr. Ellis: That's all.

(Witness excused.)

Thereupon, to further maintain the issues on their behalf, and in rebuttal the complainants recalled as a witness one JOHN GREGG PAINE, who, having been previously sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. Mr. Paine, do you know from experience how the various rights under the Copyright Act given to a proprietor of a musical composition are divided up?

A. Yes, I do.

Q. With respect to dramatic musical works, can you tell us how these as a rule are owned and held—by whom?

A. Dramatic musical works are divided into a great variety of rights—exclusive licenses or grants to station broadcasters, to road show companies, amateur rights, stock company rights, and various rights of that character. [fol. 1010] In endeavoring to clear the right of a motion-picture or a drama—musical drama, you have to clear everyone of those rights.

Q. Now, these various rights, are they held by one individual?

A. By all kinds of people; sometimes individually and sometimes a corporation. They are always held by different people.

Q. Are the "small" performing rights or any of the performing rights of these compositions frequently in doubt with respect to ownership?

A. Yes, definitely.

Q. That has been your experience in ASCAP?

A. Yes, sir. For example, a composition like "Maytime", we have difficulty in determining whether or not they are in the ASCAP repertoire.

Q. There are frequent litigations?

A. Yes, sir.

Q. Can you give us an illustration?

A. Well, we had a litigation over "Maytime"—in reference to "Maytime".

Q. That was brought by Schuberts against Harms?

A. No, Sherman.

Q. Now, in cases where there are conflicting claims would it be possible for anybody with any degree of honesty to make an affidavit that he owns the performing rights?

A. No, sir.

Q. In cases where copyrights have been renewed have conflicts arisen frequently with respect to the performing rights?

[fol. 1011] A. Yes, sir, "Waltz Me Around Again, Willie", is a typical example of that. When a renewal comes due anybody entitled, under the law, can take out a renewal, and so in this case we have the widow of the composer of the melody, and the widow of the author of the words taking out a renewal, and those two women have grown to a point where they just hate each other. To get any kind of clearance is really a complicated task.

Q. Are they both members of ASCAP?

Mr. Ellis: I move to strike that line of testimony, or any further testimony along this line. That is the right protected by the Constitution.

Judge Hutchinson: What particular harm is he doing? It may not be of any value. It is like the motive for the organization of ASCAP—it is not material if the Statute violates no rights as guaranteed by the United States. If they want to have a little speech on it, it is all right as long as they don't take more than four or five minutes.

Mr. Frohlich: I simply wanted to point out the practical difficulty of complying with the Statute, your Honor. No further questions.

Mr. Ellis: No questions.

(Witness excused.)

Mr. Frohlich: I want to be sure that the depositions we have taken in New York in this case go in. For the record, I will mention the names of the witnesses.

[fol. 1012] Judge Hutchinson: Just say all of the depositions taken by you are offered in evidence.

Mr. Frohlich: And the exhibits with them.

Judge Hutchinson: Very well.

Mr. Ellis: At the hearing in October, 1939, it was announced on behalf of the Attorney General and the States Attorneys that they did in substance accept or not object to an injunction against the enforcement of Sections 2-A, 2-B, and 6 of the Act of 1937. That offer has been pending since that time and throughout this trial. It has not been accepted or acted upon, and I, therefore, withdraw the offer, but I don't mind stating to the Court that the Attorney General and the States Attorneys consider that those sections have been superseded or repealed by the Act of 1939, and that no prosecutions will be instituted under those sections, or any effort made to enforce them against the plaintiffs in this case.

Judge Hutchinson: Wasn't an order granted enjoining them?

Mr. Ellis: I believe temporarily against this entire Act.

Judge Hutchinson: I remember that something was said about that. It was understood that those sections were not to be enforced.

Mr. Boggs: There was some objection by the plaintiffs [fol. 1013] and the Court said in Jacksonville that it would carry that thing over.

Judge Hutchinson: Do you want to withdraw that offer?

Mr. Ellis: I do object to being enjoined.

Judge Hutchinson: On the ground that they do not exist and there is no reason for an injunction, and you are making a statement of record that you do not intend to prosecute under those sections?

Mr. Ellis: Exactly. I don't want an injunction against the Attorney General if the other sections of the Act are valid.

Mr. Frohlich: May I at this time offer in evidence two pages of a Bill which was introduced in 1939 in the Florida Legislature which purported to repeal Sections 2-A and 2-B and 6 of the 1937 Florida Law, which Bill was not passed, and it was introduced at the same time that the 1939 Bill in issue here was.

Judge Hutchinson: If they will stipulate about that.

Mr. Frohlich: I have a copy of the Bill.

Mr. Ellis: It is stipulated that that was a copy of the Bill and the Bill failed.

(Thereupon, the said copy of the proposed Bill was admitted in evidence and marked Complainants' Exhibit No. 5.)

Mr. Ellis: These are to be filed and noted in the record [fol. 1014] at the conclusion of defendants' case, the contract between ASCAP and the National Broadcasting Company, Inc., dated August 31, 1932, as Defendants' Exhibit No. A-9, and a copy substituted, and as Defendants' Exhibit No. A-10, a contract dated August 31, 1932, between the same Society and the Atlantic Broadcasting Corporation which corporation was the predecessor of the Columbia Broadcasting System, and a copy substituted.

(Thereupon, the above mentioned copies of contracts were admitted in evidence and marked Defendants' Exhibits Nos. A-9 and A-10, respectively.)

Mr. Ellis: We are ready on arguments as to the law.

Judge Hutchinson: Wouldn't it be desirable to put some sort of fair limitation on the argument?

Mr. Ellis: I am agreeable to that.

Mr. Wideman: I suggest not more than forty-five minutes to the side.

Mr. Ellis: That is ample, your Honor.

Judge Hutchinson: There will be a ten minute recess.

[fol. 1015] (After recess.)

ARGUMENT TO THE COURT

By Mr. Frohlich:

May it please the Court, I think it will be most helpful to the Court if I analyze these two Statutes. I don't think there is any sense of my going into the evidence at this time. You have heard the testimony, and, I think the thing that will clear up, perhaps, any misconception at this time is an analysis of these two Statutes themselves.

Here is what I view as the basic vice of these two Statutes. I say these two Statutes because they are not two

independent, isolated Statutes, because one followed the other in two years and there was a purpose and an object for putting them on. They were designed, in my opinion, not to prevent monopoly in the State of Florida, because the Sovereign State of Florida has very sound and good laws that prevent monopoly. They were designed to take away from the individual copyright owners of musical compositions in this country the exclusive rights granted to them by the Copyright Act. That is a wide and broad statement, and I am going to try to justify that by showing you how this was done—what the motive was, why it was done, and who was behind it.

Now, who was behind it? I don't believe I have to say. Your Honors have heard the testimony. Draw your own conclusions. But here is what happened. In 1937 when the [fol. 1016] first Statute was passed, like the second Statute, it was divided into two parts. One part was directed against combinations of two or more individuals, and one part was directed against the single owner of the copyright. That appears very readily from Section 1 of the old Act. I will call them for the purposes of this argument, the old Act and the new Act. In that Section, it is provided that it shall be unlawful for these authors and composers, if they constitute a substantial number of persons who own and control copyrights, to combine for the purposes of selling their music. Now, that was directed against the combination. In other words, they said two owners of copyrighted music can't combine where they act to market their product or exact a price. And, your Honors, they use the words 'exact' and 'fix' with sinister implications. The same implication might be applied to a farmers' grange when all of the farmers get together to try to keep up the prices of their products.

Judge Hutchinson: It would be except for the Statute.

Mr. Frohlich: I was only talking in general terms, your Honor. Along this line, there can be no attempt on the part of the copyright owners to combine among themselves to obtain a market for their products, and which they cannot do singly.

In the absence of history in this case, which I have de- [fol. 1017] veloped on the stand, this might be deemed to have been a very correct and good and proper section, but when your Honors have weighed this evidence, you will realize that you can come to no other conclusion and that

is that the individual owners of the performing rights of copyrighted music is as helpless as a babe in the woods. He is helpless, and when Congress enacted, in its Revised Statutes of 1897, this law public performance for profit of a musical composition was made possible, and the Congress of the United States did so to encourage music*la* culture, and to give these people who write music something of value to encourage this art. When Theodore Roosevelt in 1909 got up a compilation of all of the copyright Acts he put in that act public performance for profit of musical compositions and it was enacted. Congress meant something when this law was enacted, and with good reason for the history of the country will show that only until you encourage these people to write do we obtain a culture. In 1856, when, for the first time in this country, Congress gave dramatists the exclusive right of public performance for profit did we have drama—we didn't begin to have drama in this country, your Honors, until that right became a valuable right, and we had no music in this country until Congress came forward in 1897 and 1909 and gave this valuable right and encouragement. It encouraged young men and women to go out and give up their lives to write music for the nation.

This is nothing new, your Honors. It is not a new fight. [fol. 1018] This conflict between creator and user—between the artist and the one who wants to exploit him, has been going on down through the ages, and this, your Honors, is a dramatic moment.

In the 1937 Act—that provided for all authors standing alone. No combination would be able to put a price for the public performance for profit on copyrighted musical compositions which were sold in the State of Florida——

Judge Hutchinson: Section 1 was a general prohibition against the fixing of prices for these things through a combination. What do you say about that section? Does that still exist under the new Act?

Mr. Frohlich: We have the same prohibition. The effect is identical, because under——

Judge Hutchinson: Are we seeking an injunction against Section 1 of the Act of 1937 as well as these sections of the other Act?

Mr. Frohlich: Yes, your Honor.

Judge Hutchinson: Section 1 is merely a statement that people can't fix prices for musical compositions—combina-

tions in the State of Florida, and you think that is invalid?

Mr. Frohlich: Yes, sir. Now, Section 2-A and 2-B provide that the music—the physical sheet music would have to have this price fixed——

Judge Hutchinson: How are you interested in that? Do you want to sell sheet music?

[fol. 1019] Mr. Frohlich: No. We are interested to this extent. When a man had written music ten or fifteen years ago that opened up the entire composition to the public, and he can't touch it if it is in the hands of dealers and jobbers.

Judge Hutchinson: You are interested for your members in Sections 2-A and 2-B although it doesn't refer to combinations at all?

Mr. Frohlich: Right. Then, we have this extraordinary situation. When these compositions were performed outside of the State and heard within the State through hookups on broadcasting stations, why, the copyright proprietor couldn't even sue for infringement; once it is performed, it is gone.

Judge Hutchinson: What section is that?

Mr. Frohlich: Section 6. Now, these sections, which are the worst sections of this Act, were designed to make it extremely difficult for the individual to operate. Apparently, the framers of the Statute thought the prohibition against the combination in Section 1 might not be enough, and to make sure they would not be able to work separately they put in Sections 2-A and 2-B—to make it very difficult, almost impossible, and, then, to make sure once more that they could not operate separately they put in Section 6.

I will say this, that each of these sections—that none of these sections can be split up. They must be taken together. You simply can't take these—you can't take this [fol. 1020] Statute and say one section is bad and the others are good. You have got to say what was the object of these Statutes. Each of these sections are interrelated, and have, obviously, a common purpose, and that common purpose is completely and wholly made apparent when you turn to the new Act of 1939, because there the framers of the Statute thought they would overcome the vices of the old Act. They tried to repeal it and were unsuccessful, and as we argue here both Acts are in force. They didn't make the second Act a monopoly or anti-monopoly act. It was never meant

to be an anti-monopoly statute. If you will look at these sections, you will see how cleverly this was done. Section 4-A which is directed at the combination says: "It shall be unlawful for two or more owners * * *". Now, what is unlawful? They cannot issue a blanket license unless they make their compositions available to the user with the price of each use. Now, this looks like a simple provision, but the testimony taken here shows conclusively it is impossible of performance for the reason that these people are what? Why, they are members of combinations of two or more persons, and they are required to act alone. They are required to act alone, not in consultation with each other, and they are required to file an affidavit that they are acting alone and are not a member of any combination. That is to say, you can be a member of a combination, but don't you dare sit down with a member of the combination and discuss prices. You go out and make up your own prices, [fol. 1021] and, then, you go out and try to get it. Now, how can these poor devils sit down alone and make up prices? Why, they would spend the rest of their lives making up prices for the State of Florida.

Now, bear in mind, your Honors, the inherent vice of this Statute. Nowheres in it is the provision for the payment of royalties. The people that made this Statute knew it couldn't be done, and they didn't take the trouble to provide for payment. There isn't the slightest obligation on the part of the user to pay a penny to the man who has gone out and fixed these prices.

Now, they figured these people couldn't do it, but they took no chances. They said if you don't belong to a combination then you are acting alone, and you have got to file a list in the State of Florida of the compositions that you want to license for public performance. Why is that necessary? If the forty-eight states of this Union pass similar statutes, you are going to have a man with exclusive rights given to him by Congress filing for registration, as he must, compelled to go into every state in the Union and file a list—a terrific burden, aside from the fact that it is wholly illegal. The state has no such power—Congress alone has the power to subscribe penalties, and I say in all equity and good conscience this has a sinister implication.

When you register your work in Washington, with one [fol. 1022] exception, you don't file an affidavit, and that

exception is when you copyright a book. Since 1909, you may file any other work by merely sending an application and one or two copies of your work, and you receive your registration. But here they want the people to swear under oath that they own these performing rights, and as you heard Mr. Paine testify very often these performing rights are in doubt. You heard him testify that with this great organization that many times it is unable to unravel these rights, and it becomes even more baffling when the original owners pass away. And yet they want this affidavit filed and it *it* has one inaccuracy the filer of the affidavit would face perjury charges. That is as far as they go with the individual.

Then, they say, "After you have filed your list and after you have signed your affidavit, we want to make you do something more under Section 4-C." They say, "We will prevent you from licensing your work unless you do it on a certain basis." In other words, you can't obtain royalties on a blanket license. You have got to license your works and take a royalty on a per program basis. That, your Honors, is another serious invasion. Your Honors know that from time immemorial plays and books have been licensed on a royalty basis, and I submit there is no great hardship on a blanket license. For example, suppose a man plays music half the day and has other performances the other half. Now, if he pays for a blanket license, he is not [fol. 1023] paying for that half a day. What he pays for is availability—the instantaneous availability of this big reservoir of music so that he may conduct his business. And did your Honors think for a moment that since 1923 when the radio industry mushroomed up, over night, that it would go to the heights it has reached if it wasn't for this blanket license? Your Honors heard the witnesses testify that they not only took a license from ASCAP, but they took a license from SESAC as well, and their own company recently formed the Broadcast Music Corporation and they are operating and offering a blanket license. Why? Because they can't operate otherwise. That is why they are successful. That is the practical side.

When you try to discuss this subject you cannot get away from its practical side, and it is more than a legal question, although, it has been up on its practical side. I say to your Honors that if these two Statutes so effect the practical operations of these copyrights as to destroy them, then, I say, these Statutes are wholly unconstitutional and

have no business on the books. They have the right to come in here and say you have got to accept service and process. You have got to come with books and if you don't do that we will audit your books. But your Honors there hasn't been a single bit of evidence that ASCAP has ever asked for a dollar it is not entitled to, and if there has been anything said about unreasonable rates I haven't heard it. That is one of the tests. If this organization was oppres- [fol. 1024] sive and held these people down and took the last drop of blood, then, I would say they shouldn't exist. I feel just as strongly about this as your Honors do, and I think I have a fairly good sense of right and wrong.

Here is this organization functioning since 1914—a quarter of a century, and what do we see in that time? A motion-picture business coming up from nickelodians and the radio industry coming up from nothing. You have seen within a short space of time great entertainment industries in this United States growing up and becoming successful. Why, one of the witnesses testified this morning that in 1935 the radio people had a volume of eighty-seven million dollars for time on the air—money extracted from advertisers. This is a tremendous amount of money, and isn't the man and woman who writes music entitled to some of it? Why take it away from him? But I say to your Honors if these Statutes remain on the books, it will be impossible to operate in Florida either singly or as a group. It can't be done. And what will happen? Chaos. Chaos not in one industry, but in many industries. I say in all good faith to your Honors—from the legal aspect, from the moral aspect, and from the practical aspect, these two Statutes should be taken as unconstitutional.

In the Nebraska Case the same thing was involved, and the Court heard testimony for a week and came to the conclusion that the Statute had only one thing for its object, and it put its hand on that section and took it and said it was bad. Again and again the same situation con- [fol. 1025] fronts us here today. When that case came up on motion for a new trial there was produced twenty-two affidavits from the Legislature who testified that they had in mind a monopoly and anti-monopoly statute, and the Court wouldn't listen to them.

Judge Hutchinson: You couldn't prove what the broadcasters did and what the Legislature did.

Mr. Frohlich: Right, your Honor. I have pointed out, I think, in my own humble way, what I conceive to be the bad features of these two statutes, and I am not going to take up the time of the Court with a review of the testimony—I think the Court has an excellent memory as to what has been testified to.

Judge Hutchinson: Is that the whole of your argument?

Mr. Frohlich: I think it is.

Judge Hutchinson: It seems to me that what you have said would appeal to me very greatly if I were a member of the Legislature; as a Legislatureman it would seem to me that the evils which this Act is striking at are very aggravating by this confusion and trouble it is causing. It looks like one of those special acts that goes through a Legislature, but that is no concern of ours. The Legislature may be doing a foolish thing, and if I were to decide this case on the basis that it wasn't a very reasonable Act, I would agree with you right off. I can't see why take the [fol. 1026] copyright owners and hamstring them. It isn't what I think is wise. It seems that the whole question is what rights are due the plaintiffs against a sovereign state when that state undertakes by its legislative voice to declare the public will of that state. As Judges, we are paid to give force to every Legislative act, especially Federal Judges, which does not infringe upon some constitution. I suppose the State of Florida, like every other state, has full legislative powers, and you have to point out something outside of these general views—something in the Federal Constitution or State Constitution which makes these provisions illegal.

Take the first one—Section No. 1, when it comes to a question of State power then the Acts merely make it unlawful for persons to come into the State of Florida and sell compositions the prices for such compositions have been fixed by combinations of the owners. Now, why can't the State of Florida do that?

Mr. Frohlich: Because the number of individuals have certain rights given to them by Congress—certain exclusive rights, and this includes the right to sell them and to market them.

Judge Hutchinson: Do you have any better right than a man does to his horse? I know the rights I have got to my horse. Nobody can ride him without my permission, and the State can't even fix the price at which I will sell

him. Now, as to a copyright, the owner certainly doesn't [fol. 1027] —the Statute certainly doesn't give the owner of the copyright any less rights than it does to his other personal property. Does it, Mr. Frohlich?

Mr. Frohlich: No, sir, your Honor, because those rights that he has are not rights—they are not the same as common law rights, they are rights given to him by Congress, and those rights cannot be taken away by any state.

Judge Hutchinson: And if Congress had said that these persons shall have the right to combine for the purpose of selling—if Congress had undertaken to lay down the measure of this right of copyrights, in my opinion, no state could interfere with it, but as I understand the Copyright Law, Congress has not undertaken to lay down any conditions under which they can vend or protect themselves, except the two hundred and fifty dollars penalty. Now, I am trying to get to where you are standing. Section says, "It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights * * *." Now, I don't believe the State of Florida has got any right to say to the owner of a copyright, you can't sell your copyright in Florida without complying with these restrictions. As my mind runs now, the State has a heavy burden to sustain these exactions upon individual composers, because if you can make this burdensome, and I believe from the evidence it will be, I don't think the State can do it.

[fol. 1028] To me this Act has two separate provisions, one directed against individuals, and, as I see it, the constitutionality of it is very doubtful, because you are dealing with a Federal Copyright which gives a free right to use it. In that sense it is a little better than my horse; the copyright is held by Federal right. Now, when you pass on from there and take all of these sections into consideration, the burden is very heavy on you to show why the State of Florida cannot prevent that combination since Congress didn't say that any number of composers can combine to keep their prices up.

Mr. Frohlich: But Congress said the composer and author has the right to sell it in any manner he pleases. There is no provision against combining. The very fact that Congress has said nothing about a combination——

Judge Hutchinson: Congress didn't affirmatively confer on you the right to combine, and in the absence of that

wouldn't the question of combining be a matter of state law?

Mr. Frohlich: Not in this Statute because in this Statute the prohibition is directed against people who write musical compositions. It is class legislation.

Judge Hutchinson: The interstate commerce clause might help you; this combination was not formed in the State of Florida, it was formed somewhere else.

Mr. Frohlich: I was coming to that. It was one of the points I was going to raise.

[fol. 1029] Judge Hutchinson: You sat down before you came to it. There may be there was something in the combination—if you can't protect yourself in that way, I don't see why we should say Congress has given the copyright owners the right to some complete monopolies.

Mr. Frohlich: The Statute is so worded as to reach only one small group.

Judge Hutchinson: What is that small group?

Mr. Frohlich: The copyrights of writers and composers. The people who write books and plays——

Judge Hutchinson: You think you might get to that under the Fourteenth Amendment—class legislation?

Mr. Frohlich: Yes, sir, pure and simple. It is aimed directly at ASCAP, and not against copyright owners. The Act has done the very thing as was done in Louisiana in the sugar case. They can be prosecuted if th*at* are guilty of the violation of any acts, but to have passed a Statute directly aimed at them——

Judge Hutchinson: In Texas we levied against the Standard Oil Company for many, many years on the grounds that it was a trust not formed in Texas, and the statutes provided that no such combination could operate in Texas.

Mr. Frohlich: That was a general statute, your Honor; it wasn't just aimed at one concern. Now, in the American Sugar Institute Case—it was aimed against them.

[fol. 1030] Judge Hutchinson: That's something. They haven't got the right to strike at one combination without striking at all of them.

Mr. Frohlich: That's right, your Honor.

Judge Hutchinson: If you penalize the theft of cattle would that be valid as to the theft of the hay?

Mr. Frohlich: I can't go along on that, your Honor. It is pretty far-fetched.

Judge Hutchinson: Now, as to the Fourteenth Amendment, what else do you say protects you against that com-

bination. All of the points you are making as to how difficult it is going to be to comply has not very much force because of the testimony of your own people—it might take a little time, but you can undoubtedly get up a list. All of those things don't strike me as much as the question of the copyright. You have got a copyright and Congress has undertaken to protect you, and this Statute is trying to strike it down. Now, there are a lot of people who don't want you to have patents. If that is what these Statutes do, in my opinion, they can't stand, but that is on the theory of conflicting with a granted Federal right. I think it is very well stated by Judge Gardner in this statement here. He stated it very well. He contended that the purpose of this thing was to put ASCAP out of business. I think it was and everybody else thinks it was. I suppose the Statute started out by saying, "Whereas, ASCAP is a [fol. 1031] musical combination and a menace to the people of this State, now, therefore, be it resolved, that we declare ASCAP is a combination that does so and so." You say that's bad; it is picking out ASCAP against all others. But wouldn't you have to show someone else here is doing the——

Mr. Frohlich: It is class legislation because they have gone and passed an Act to stop ASCAP. Now, they can pass a general act.

Judge Hutchinson: You say they are after all of the societies—SESAC, ASCAP and all of them.

Mr. Frohlich: I think your Honor is cognizant of the fact that it was ASCAP that was the recipient——

Judge Hutchinson: As a matter of fact it is unconstitutional if it is directed at a particular group?

Mr. Frohlich: Yes.

Judge Hutchinson: I think I understand your position pretty well.

Mr. Frohlich: One other thing, your Honor, as to the police power in the Supreme Court, first notice for temporary injunction, the defendants there said the State had the right to interfere with patent rights and copyrights where it was an evil, or where the health and safety of its citizens are concerned. In the case of Patterson v. Kentucky the defendant was convicted of selling oil by this statute. He defended and said he had a patent on the [fol. 1032] process and the Court held that the safety of the people, there was a fire hazard, was enough to invoke the police power regardless of the patent.

Judge Hutchinson: You say they haven't done this?

Mr. Frohlich: And I say there has been no evil, and no contemplated evil. ASCAP has been in business for twenty-six years. Where is the evil, and why the necessity for the exercise of the police power. I have no further statement to make, your Honor.

Judge Hutchinson: I think I understand your position. Now, we will hear from the State.

ARGUMENT TO THE COURT

By Mr. Ellis: I am ready, your Honor.

Judge Hutchinson: You will be helpful if you will agree or disagree with my view that there is a distinction between the power of the state as to individuals and as to combinations. Explain to me why there is not a difference.

Mr. Ellis: I think there is probably a difference but I don't think it is material in this case. I think, as your Honor has indicated, that more onerous restrictions could be placed upon a combination by reason of the fact that it is a combination then could be imposed upon an individual who has a copyright. But the view we take of this Statute—the so-[fol. 1033] called restrictions are not unduly onerous on an individual or a combination.

If the Court please, the broad question in this case, of course, was whether by reason of the fact that a copyright is the result of a Federal grant, or because of the nature of a copyright, many of the sections in these Acts are invalid. Substantially that general question must be kept in mind.

Now, the whole case rests upon—so far as the plaintiffs are concerned goes back to one little clause in the Constitution, which I am sure your Honors have considered but which is well to review in this argument. Article 1, Section 8, Clause 8 of the Constitution provides thusly. There is an introductory statement and then it says:

"To promote the Progress of Science and useful Arts, by securing for a limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Now, that is all there is in the Constitution of the United States about copyrights or patents. To promote the progress of arts and sciences——

Judge Hutchinson: Read that again.

Mr. Ellis: I will read it again verbatim.

Judge Hutchinson: Congress has the exclusive rights for patents, but I think the state has something to do with copyrights.

Mr. Ellis: It doesn't except by implication. (Reading:)

[fol. 1034] "To promote the Progress of Science and useful Arts, by securing for a limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Now, I don't contend that the State has any power about granting copyrights. I think copyrights and patents are on the same basis, but that's all there is about inventors or authors under the Constitution. The Federal Government is one of granted powers. The powers not granted were reserved to the people of the United States, which means the states, and the states represent the people. Therefore, unless there is something in the decisions construing that power of Congress to grant copyrights, or something in the nature of a copyright which prevents the State of Florida from enacting laws like this the law is valid.

Now, the case comes before the Court—the Statutes are brought before the Court. The Courts must take up the Statutes with a prima facie function of interpreting the Statutes. If there is any doubt, the Court is bound to sustain them. They must be clearly proved to be contrary to the Federal Constitution.

Let us examine first the nature of the copyright. As Justice Roberts said recently in a gasolene tax case, and, I believe Judge Gardner said almost the same words—the legal effect of the copyright statute enacted pursuant to that clause is simply to confer on the author property, or a corporeal—a species of uncorporeal property which [fol. 1035] is substantially the same as any man has—intangible or corporeal property under the common law. That is all the law says and it is evident that is what it was designed to do—to supply a kind of omission in the field of common law. It left the owner of the copyright in exactly the same position as the owner of a horse or automobile, or in the same position as a manufacturer of automobiles, or any kind of a trade or business, and they are in exactly the same position as any of those people with respect to the operation of the police power of the state. That can be illustrated repeatedly by calling your

Honors' attention to the decisions, which in some instances sustain the power of the state to prohibit entirely the sale of a patented article. In a case where some defendants who were either prosecuted or against whom an injunction was sought, it makes no difference for the purposes of this argument, they were prosecuted because they were operating a lottery, and defendants claimed that could not be done because they had a patent on the manner of conducting the lottery, and that the state couldn't prohibit them on account of this Federal right, and the Court decided against that. And in the same way the sale of various deleterious substances has been prohibited although patented. And I have no doubt that the laws of any state operate against the publication of obscene matter or the broadcasting of obscene material over the radio although that material may be copyrighted. The authority by which those laws were sustained is the same authority under [fol. 1036] which the State of Florida has enacted these laws, and that is the police power. They are in the same field.

Judge Hutchinson: The difference is there is nothing in violation of any police regulations for a man to sell his musical copyrights. You don't require your merchants to register all of their products with the Comptroller, but you just say these holders of musical copyrights have got to do a lot of registering.

Mr. Ellis: There are certain kinds of dealers in various substances who must submit to tests and file reports and put on labels on the packages.

Judge Hutchinson: But what is the necessity for requiring these people to file? I am not talking about monopoly, but what is the necessity for requiring them to file? I don't think you can do that. A man who has got a copyright has the right to sell it through one or to sell it through ten. Section 4-C says, "It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part * * *"; that's the one prohibiting him. Now, why can't he?

Mr. Ellis: If it is played he has that right, your Honor. [fol. 1037] Judge Hutchinson: Then, there is another one down here that says if you let one you must let them all at the same price.

Mr. Ellis: I am not aware of any such section, your Honor.

Judge Hutchinson: Section 4-A says: "It shall be unlawful * * * to publicly perform for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance * * *", now, that's the combination article.

Mr. Ellis: Yes, sir.

Judge Hutchinson: I would like to know why I can't sell. You have got a big business, and I have got my potatoes, and I want to fix the price on the basis of the business you do. It is regulating the way I sell my strawberries. Now, why can't you regulate the way you sell the music?

Mr. Ellis: That's a plausible argument. If it wasn't, I am sure your Honor wouldn't make it. But the way I understand the legal effect of the Constitution of Florida and the decisions of the Supreme Court they lead to this inescapable conclusion——

Judge Hutchinson: I am not saying this exclusively about copyrights, but you could do this with a mule or a horse, and that's what you are trying to do here.

Mr. Ellis: In that respect, I think this is different. [fol. 1038] Judge Hutchinson: Why?

Mr. Ellis: Because the right to a copyright is only such as is granted by a Statute and can go no further than as is granted by Statute and as that Statute is construed by the Supreme Court.

Judge Hutchinson: The rights to a copyright is less than property? Judge Gardner says that is not so.

Mr. Ellis: I don't reach that result in that manner.

Judge Hutchinson: I am not trying to over come you.

Mr. Ellis: I appreciate very much your Honor's suggestions. I started to suggest that the Court indicate the different points you are particularly interested in, and——

Judge Hutchinson: I think I am about through. You can't do anything with these individuals at all because they are not doing anything that is wrong, but to sell a little music by the combination might be different.

Mr. Ellis: Of course, they only sell about six million dollars worth a year. This is considered by some as a legalized racket—the same as the Amenberg Case. Now, of course, I don't view it that way, but many people do, and the Legislature evidently had some thoughts along that line in mind when it passed this Act. This Act is not meant to destroy them, but to curb them. Your Honor will observe from the evidence of the broadcasters—one of them said ASCAP could do a lot of good, and this is not [fol. 1039] intended to destroy them.

Judge Hutchinson: You are talking about ASCAP. I am talking about the individual. What about Section 4-C?

Mr. Ellis: The process of logic upon which I rest my conclusions of the validity of Section 4-C is about like this, in the absence of Statutes, in the absence of this constitutional clause and the Copyright Law, no composer of music would have any copyright.

Judge Hutchinson: No protection, you mean?

Mr. Ellis: No valuable right at all.

Judge Hutchinson: Yes, that is what I mean.

Mr. Ellis: The extent of that right depends, therefore, upon the Constitution, the Statute, and the decisions of the Supreme Court under that. The decisions of the Supreme Court with reference to patents and copyrights all rest upon the same principles, because copyrights and patents are both granted under the identical Constitutional clause. The Supreme Court of the United States in the Ethyl Gasoline Corporation case v. the United States, March 25th of this year—as I understand it, that the holder of a patent has conferred upon him by the act of Congress a right to the exclusive control of that patent to sell it, to split up the interests in it, and even to say, to some extent, what the venders should do with it, but in collecting compensation for the licensing of the right to manufacture or invent a patented article, he cannot lawfully [fol. 1040] exact any compensation except for the use or sale of the patented article to which he has a legal right. His legal right does not extend, and never was granted either by the Constitution or the Act to the exaction of Compensation from anybody, no matter how willing he is to pay it, based upon the accompanying sale of another article, or on the volume of business he does. This is what the Court said, and if I am wrong it is because I have misconstrued the language of the Court.

Mr. Justice Stone said in his opinion, "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention. The extent of that right is limited by the definition of his invention, and its boundaries are marked by the specifications and claims of the patent." Now, right there the extent of a copyright holders right is limited by the extent of his composition. He is not granted a right in anything except that composition.

Judge Hutchinson: What was the real controversy there?

Mr. Ellis: In this case? The Ethyl Gaso——

Judge Hutchinson: Yes. I thought this case was where they tried to regulate prices charged to some person.

Mr. Ellis: What they did in this case, the Ethyl Gasoline Corporation would sell the right to refiners to take its fluid and combine it with oil to make a better grade [fol. 1041] of gasoline——

Judge Hutchinson: Did they refuse to pay the price?

Mr. Ellis: It came up under the Sherman Anti-Trust Act.

Judge Hutchinson: They held that that could not be fixed except by the patent right?

Mr. Ellis: Yes, sir.

Judge Hutchinson: That's all that case held. Did they hold that a patent owner must give his price in a certain, particular form? Did they say a patentee can't say to a man, "I will let you use my patent, and I will base my price on your gross sales?

Mr. Ellis: I don't consider this part of the case was decided——

Judge Hutchinson: Who was suing who?

Mr. Ellis: This was a suit to restrain the Ethyl Gasoline Corporation.

Judge Hutchinson: Who sued them?

Mr. Ellis: The United States.

Judge Hutchinson: The only thing before that Tribunal was whether or not the patentees were in violation of the Anti-Trust Laws; there was no question of somebody trying to force a contract. They got the injunction?

Mr. Ellis: Yes, sir..

[fol. 1042] Judge Hutchinson: You say the case we have been considering holds that a person holding the patent rights can only sell his patent rights for cash—not having

an interest in the business, and not based on the gross proceeds in any way——

Mr. Ellis: I don't mean to say that.

Judge Hutchinson: That's what this Statute says. You can't sell it by taking into consideration the value to the person using it. You have got to make your price based on a particular use; that's pretty limited.

Mr. Ellis: That is not my conception.

Judge Hutchinson: What do you think it means?

Mr. Ellis: My understanding of that section of the Statute is the holder of a copyright of a musical composition is prohibited from charging radio broadcasting stations for the use of that composition—a price based upon the percentage—profits, from one hundred other compositions.

My contention is this that under the definition of the extent of the patent right, as laid down by the Supreme Court not only in this case but in five or six cases that they referred to, the copyright corresponds to musical compositions.

Judge Hutchinson: Suppose a man tells you for a whole year you are not to appear in any case. He retains you not to appear, and now these people restrain you from using you in this case. What is wrong with that? It is merely [fol. 1043] payment for the right to use when called on.

Mr. Ellis: Your Honor has not let me develop my point. My contention, in short, is this, and I am very serious about this. That when a state prohibits that practice of a copyright holder, exacting extra compensation, there is nothing in the Federal Statute—in the Constitution or Statutes, which keeps the state from doing so.

Judge Hutchinson: How can you call it extra compensation when it is the compensation agreed on?

Mr. Ellis: It is extra in that it is not related to the use of the copyrighted article.

Judge Hutchinson: What is the trouble with people making a price on music? What is wrong with that? What police power is involved? There is no harm in it.

Mr. Ellis: I am speaking of the money exacted for the use of a copyrighted article.

Judge Hutchinson: It is for the privilege of using it at any time they want it—every day, every night, every other day. What is the matter with making a contract like that? It is a discrimination to pick out a man that has musical

rights. Why should these people be picked out. It is a violation of the Fourteenth Amendment and of your own State Constitution. You can't discriminate against people that way just because you don't like the color of their hair. It is a violation of the Fourteenth Amendment unless you say copyright people are not protected by the [fol. 1044] Fourteenth Amendment.

Going back to Section 2, how can you put all of these burdens on individual composers. Why should he be subjected to all of these things? What is the reason? Is there a reason?

Mr. Ellis: I think so. However, I would like to get onto Section 4-C, your Honor.

Judge Hutchinson: Certainly.

Mr. Ellis: I want to read to the Court from this opinion——

Judge Hutchinson: Of course, I will treat that opinion with great care.

Mr. Ellis: Here is what the Court said:

"The extent to which appellant's dominion over the jobbers' business goes beyond its patent monopoly is emphasized by the circumstances here present that the prices and market practices sought to be established are not those prescribed by appellant-patentee, but by the refiners. Appellant neither owns nor sells the patented fuel nor derives any profit through royalties or otherwise from its sale. It has chosen to exploit its patents by manufacturing the fluid covered by them and by selling that fluid to refiners for use in the manufacture of motor fuel. Such benefits as result from control over the marketing of the treated fuel by the jobbers accrues primarily to the refiners and indirectly to appellant, only in the enjoyment of its monopoly [fol. 1045] of the fluid secured under another patent. The licensing conditions are thus not used as a means of stimulating the commercial development and financial returns of the patented invention which is licensed, but for the commercial development of the business of the refiners and the exploitation of a second patent monopoly not embraced in the first. The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another than for the exploitation of an unpatented article, or for the exploitation or promotion of a business not embraced within the patent."

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Vol. II

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., APPELLANTS,

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GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

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Now, may it please the Court, the mode of operation of ASCAP, as shown by the evidence in this case, comes within the scope of that definition by the Court. Here is ASCAP which is not the original copyright holder; it is a Society of copyright holders, but it is dominated and controlled by a board of twenty-five directors who use these composers for what? Not for the exploitation of the individual copyrighted composition, but for the development of an entirely different kind of business, and for the exploitation of the business of ASCAP. That is something that was never contemplated by the Constitution or the Copyright Act, and they derive vast sums of revenue in the exploitation of a business which does not come within the scope of the Copyright Act.

Judge Hutchinson: I was arguing from the standpoint of the individual composer all of the time.

Mr. Ellis: Perhaps, I should have thought of that sooner. [fol. 1046] Judge Hutchinson: I said there might be a difference with respect to ASCAP or the combination. I said why should the individual be subjected to these discriminations. I think they have got no business being put under this law. I was talking about the individual. I thought the individual composer might have a better complaint against your Act than the combination.

Mr. Ellis: I submit that it would be applicable to the individual—the right does not extend to the exploitation of a property not embraced within the scope of the right. If an individual collected compensation first upon the use of his composition, say, five hundred dollars from Station WIOD and also two per cent in addition from the proceeds of the station from advertising on account of the performance of six other musical composition to which copyrights were held by other persons——

Judge Hutchinson: That isn't the way the contracts were made.

Mr. Ellis: That's what the Statute complains of. He is getting money for the use of another copyrighted article which really should go to another copyright holder, and every dollar he gets on that is at the expense of another copyright holder.

I didn't intend to take nearly so much time, your Honor, [fol. 1047] but before finishing I would mention the case of the United States v. Allen. In this case appellants were

required to make certain reports and to pay a fee, this is a Kansas Case, and the Court held that was not unreasonable. These requirements are substantially the same. Mr. Boggs has been into the law on this matter and with the Court's permission I will leave the balance of my time to Mr. Boggs.

Judge Hutchinson: All right.

ARGUMENT TO THE COURT

By Mr. Boggs:

May it please the Court, I shall be very, very brief, indeed, but I do want to add one last word to what Mr. Ellis has said, and which I hope, will clear up your Honor's mind entirely about Section 4-C—the one in which there is a prohibition against collecting on programs which are not supplied by the persons licensing the music. I say that regardless of whether it is a combination or persons, whether it is ASCAP or an individual, it is entirely a reasonable requirement from this very one angle. The effect of such contracts as this that take a percentage of the gross business of a radio station for supplying a limited quantity of music to that station—the effect of that is obvious to all; the effect is to change the character of the programs that are given out by that station, for having bought it over a period of years by paying a precentage on their gross business, it seems to me, the inevitable effect on that station is to alter the character of his programs, and deprive [fol. 1048] the public of other programs, not only to his own benefit, but to the benefit of the public. It tends to lessen musical competition in that radio station, and that is just as true whether the people dealing with that radio station is an individual or whether it is a combination such as ASCAP or SESAC.

With reference to that list, I am entirely satisfied with the citation furnished by my colleague, and I think it will answer every doubt which your Honors might have about it —that is, in reference to Section 2-A. A statement was made by your Honor that the authors and composers would be hamstrung by the Statute. I think your Honor then had reference to Section 2-A of the 1939 Act. If your Honor considers it a harsh and burdensome requirement, it will not fall upon the authors and composers, and the persons

least fitted for such a requirement, but as the record in this case discloses the practice of this business is that the authors and composers do not own the musical copyrights. The publishers own them, and I can't think it is much of a hardship on a business man to make the kind of a record made by Mr. Richardson.

Mr. Frohlich complains about the 1939 Statute because he says it makes no provision for the payment of the persons. I say it isn't necessary for this Act to make provisions for payment. Section 8 says:

"It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform [fol. 1049] for profit, in this state, any such composition, or for any person knowingly to participate in the public performance for profit of such composition."

So Florida does protect them. There is nothing in Mr. Frohlich's point there at all.

With reference to the monopoly provisions, I would point out in that connection the case of Strauss v. American Publishers in which the Court declared that a right existing by virtue of a Federal grant does not permit them to engage in restraint of trade.

Turning back to the 1937 Act, I again call the Court's attention to Sections 2-A, 2-B, and 6 of the 1937 Act. The ones Mr. Frohlich said were the worst things in the whole Act. In our view they are entirely out of this case because of the appeal and by virtue of Section 15 of the 1939 Act. Sections 2-A, 2-B, and 6 will be found to lay no duties whatever on the enforcement officers of this State.

As far as saying that these Statutes are aimed at ASCAP, I can't personally give any support to that view at all, because they are so built as to fit perfectly well SESAC or any organization. It must also be borne in mind that all contracts expire at the end of this year, and nobody has a right to forecast what will happen to all that money; I, for one, can't see that the State of Florida has picked out [fol. 1050] ASCAP and made an act for it.

Judge Hutchinson: Take Section 3 of the first Act which makes it invalid—how do you avoid the Constitution?

Mr. Boggs: Your Honor, that is amply answered by authorities which are cited in the written brief that I have

here, and it arises out of the power—the inherent power which the Sover-ign State possesses in the nature of police power, and the things which are necessary for the protection and safety and welfare of the people, which are always found in that category; with reference to the sale of liquor it has been repeatedly held not to offend against the abrogation of contracts——

Judge Hutchinson: That is just an incident in the operation of the Act. Here is a clause under which the Legislature takes directly—the only way to possibly sustain that would be to show the thing invalid at the time the contract was made—that a man could not have rights under that.

Mr. Boggs: That section is related to the monopoly section.

Judge Hutchinson: This monopoly section wasn't in existence when the contract was made, and the contract was then valid, and the State cannot impair the obligations of a contract — unless the contract is in reference to the special matter no vested rights can be obtained.

Mr. Boggs: It is my contention, and you will find ample [fol. 1051] support for it, monopoly is something that has been abhorred at common law, and it doesn't carry——

Judge Hutchinson: If this was a monopoly and forbidden of common law, the Statute wouldn't defeat the contracts because they are already defeated, but if you conclude that these were in restraint of trade—not in restraint but in violation of the law, how can you sustain Section 3 which is directly in the face of the Constitution. Ordinarily, the State can't pass a law impairing the obligations under contract.

Mr. Boggs: We will suppose that some sort of a mild regulation of a business was contemplated, but that doesn't strike at any fundamental pre-existing principles recognized at common law. In a case of that kind the constitution provision takes complete charge and an attempt to discharge that is void.

Judge Hutchinson: How can this be accepted out of that principle?

Mr. Boggs: Because some Chancellor back in England said in common law, monopoly is a thing to be abhorred.

Judge Hutchinson: All right, now, what about these other sections that nobody has talked about? They don't amount to anything?

Mr. Boggs: In the old Act?

Judge Hutchinson: In the first Act that run along with the main Act.

[fol. 1052] Mr. Boggs: If Section 1 of that Act isn't good, the rest of the Act tumbles, if Section 1 is——

Judge Hutchinson: There is no question of these others?

Mr. Boggs: There was some complaint made of the administrative provisions of the Act, although, it wasn't argued by Mr. Frohlich this afternoon. They said that the penalties were to excessive, and our answer to that is they didn't fall under the grade of cruel——

Judge Hutchinson: If it is invalid, the penalties don't matter.

Mr. Boggs: Then, there was some complaint about Sections 11-A and 11-B. They said it was wrong—it will be assumed, however, that the Courts of Florida will not do wrong about that. If those things deny them due process, the Courts of Florida won't do it.

Judge Hutchinson: In Section 4-A you have a prohibition against these copyright owners—I don't believe they could do it. However, they haven't tried to do it.

Mr. Boggs: No, sir. I think it was in the Segram distilling case that the Supreme Court decided that as a state had the power to regulate monopoly, it has also the power to lessen—to give back some of the things which it might have taken away.

Judge Hutchinson: I believe I understand your contention, but I don't know whether I know how to handle it.

[fol. 1053] Mr. Boggs: Thank you, your Honor.

ARGUMENT TO THE COURT

By Mr. Wideman:

Perhaps, may it please the Court, we should say that in the Nebraska Case that this question of inseparability came up rather acutely. The State endeavored to get the Court to regard those provisions wholly as inseparable, which the Court declined to do. It was a vital point in the case, particularly, on motion for a new trial, and I thought we might advise the Court on this matter, particularly, in view of the fact that the Court has discussed several different parts of the Statute as standing on their own feet.

Some mention was made by Mr. Ellis that ASCAP is here using the property rights of others to exploit some other organization, which he saw fit, I believe, to compare with another organization. We simply direct the Court's attention to the fact that ASCAP is a non-profit making association, under the laws of New York, and it has been testified to here that all of its income in excess of seventeen per cent for overhead goes to the individual writers and accomplishes the purpose for which the copyright law was enacted.

Now, there is one other point that may be worth calling to the Court's attention. We have talked so much about affirmative copyrights—I suppose it will not be disputed [fol. 1054] that this property right is like any other property right. A man who owns it has the right to sell it, to say to whom he will sell it, and, as a rule, to say where he will sell it, and, in fact, I think, it has been recognized in reference to copyrights that the right to withhold is just as serious as the right to sell. This new law, as we see it, tells the copyright owners that they may not have that right of withholding, and unless he takes an affirmative act when coming into Florida, and complying with very drastic provisions of the law, his property would be the property of anyones in Florida who wants to hop on it. We think that alone, taken by itself, is a striking illustration of the invalidity of this law.

You- Honor has indicated very strongly that you have in mind regarding these laws as covering two classifications of people—the individuals which you think may apply to them in a different manner than it might be applied to combinations.

Judge Hutchinson: They have called that Kansas Case to my attention. It seems to give the State more authority than they would have with common property.

Mr. Wideman: I am not familiar with the Kansas Case, your Honor, and we will remember to look it up and comment in our brief on that point. I hope your Honor's recollection is wrong.

However, your Honor seemingly is troubled and concerned and wants to be enlightened on the question of whether or not these laws may be held to be unconstitutional [fol. 1055] as applied to individuals and constitutional as applied to combinations. This seems to be the one thing that is troubling your Honor. Now, I don't know whether my thought on that subject is worth anything or not, but

we must, it seems to me, take into consideration the inherent nature of these copyrights. I don't think there is a similar situation in regard to any other industry, at least, I have never been able to find a comparison. If these people have any property they are certainly entitled to the rights and value of that property, and we respectfully contend that we have demonstrated in the testimony, particularly in the depositions, rather than the testimony taken here yesterday and today—that the only way this property can be marketed is through the cooperative effort of the owners of the copyrights. And individual copyright owner standing alone is helpless. That has been the experience—that is not theory.

Several years after 1914 when ASCAP was organized, and as Irving Berlin testified, they were discouraged for a long time, and it was not until 1921 and 1922 that they were able to get the first public performance for profit. Prior to that time not a dime, so far as the records disclose, had ever been paid to a copyright owner. I think we have got to take into consideration the unique nature of the subject matter, and for your Honor to say you are inclined to hold this law unconstitutional as applied to individuals, but it may be constitutional as applied to a combination of individuals——

Judge Hutchinson: You understand, of course, that that [fol. 1056] was merely suggestive.

Mr. Wideman: I understand. But for your Honor to say that means absolutely nothing to the copyright owners realizing the value of their property, and unless this law is declared to be unconstitutional with regard to two or more people our effort here is gone. It doesn't do us a bit of good.

Judge Hutchinson: The right of associations like ASCAP and SESAC to exist is really at stake?

Mr. Wideman: That's right. When you go to talking about combinations and monopoly, I have always understood that State laws and Federal laws had reference to the curbing of some evil, restraint in trade—holding down the freedom of commerce. That is the justification for any law of that nature. But what is the evil here? Where is any holding up of prices demonstrated in this case? Where is there any restraint in trade, or restraint in competition? That is another unique thing about this music business. It is a commodity that is not subject to competition. It not only can be marketed in one way, but it is the only commodity that I know of that is not subject to competition. A broadcaster

wants to put on a program, for example. It may be serious music, standard music, or jazz music, but they want to put on that particular music. Now, what good is it going to do the broadcaster if he wants to play "Alexander's Ragtime Band" and Irving Berlin tells him he can play it for twenty-[fol. 1057] five dollars and Von Tilzer comes along and says, "I will sell you, 'Waltz Me Around Again, Willie', for twenty dollars"? It is silly. It simply is not there, and in those respects this sale of copyrighted music is unique. This has got to be recognized in order to preserve it. It seems to me that all of those things have got to be considered on this question of the combination. Where is the evil? What is the evil to be eliminated? I don't know what it is, and I haven't heard suggested what it is. As a justification for the exercise of the police power, haven't we got to have something to curb for the public good? The people we have done business with are satisfied.

With just those thoughts and conclusions we want to thank the Court for its patience and generosity in giving us an opportunity to establish our case. There is so much that can be said about this thing and we feel that only a very, very small part of the ground has been covered, but we think the material part of it has been covered by these twelve depositions and the testimony to which the Court listened yesterday and today.

Judge Hutchinson: The Court will recess until further notice.

[fol. 1058] (Depositions and testimony taken in the case of Gene Buck, et al., vs. Harry R. Swanson, et al., to be used in this case by stipulation of the parties in open Court.)

SIGMUND SPAETH, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. Doctor Spaeth, what is your full name and address?

A. Sigmund Spaeth; business address, 220 West 42nd Street, New York; home address, Westport, Connecticut.

Q. What is your occupation?

A. I have the title of "tune detective" on the radio. In a way, that describes my activities. I have used the researches, studies and analyses of music that I have made all my life for entertainment through broadcasts, through lectures, through other forms of educational entertainment, through motion pictures. I have written over a dozen books popularizing music. I have written a number of magazine articles. I have taught music, especially in the University of Hawaii, Honolulu. In fact, my activities all having to do with music, the analysis of music, the popularization of music, and to a certain extent I have composed music and written words for music.

Q. Can you give us the names of the books you have [fol. 1059] written?

A. Well, the best known book is perhaps "The Art of Enjoying Music". That is used as a text book in over fifty schools and colleges. My book, "Behind the World's Best Music," that is used by commentators on the radio. I have written, "Great Symphonies, How to Remember and Recognize Them," in which I set words to the best symphonies. I also wrote a book called "The Common Sense of Music," which was the first attempt to make music intelligible to the layman.

Q. When was that written?

A. 1924.

Q. Are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. When did you become a member of that Society, about?

A. So far as I remember the date, it was about 1922; it was before 1930. I haven't my contract; they would have a record of the exact date. I would say 1922 or earlier.

Q. Had you prior to your joining the Society written musical compositions or words of musical compositions?

A. Yes, I had done that sort of thing during almost my entire life, certainly since I am in New York, which is 1912, and before that in college, and while teaching at Princeton University; I have always been fairly active in the creation, arrangement and adaptation of music of all sorts.

[fol. 1060] Q. Can you give us the names of some of the pieces you have written?

A. Yes. My membership in ASCAP is based chiefly on my lyrics. As a writer of words I have written words of the

song, "Down South," which has been very popular and had, I believe, a number of performances on the air. It was recorded in 1906. I wrote the words for a song by Franz Lehar called "My Little Nest;" the full name is "My Little Nest of Heavenly Blue." That was performed on the air.

I wrote the words for a song called "Chansonette," with music by Rudolf Friml. That song had considerable popularity and appeared recently as "The Donkey's Serenade," although my lyrics do not appear there.

There was a song called "The Madrigal of May," a song used by John Barrymore in his production of "The Jest", for which I wrote the words.

I have written various other lyrics, and among my compositions is a setting of humorous poems, "Jabberwocky," a nonsense poem, which I set to music, published by Schirmer. I have published several other choral numbers, chiefly for male voices.

Q. Had you written any of those pieces you have just mentioned, prior to 1914, or prior to 1922 when you joined the Society?

[fol. 1061] A. None of those which I have just mentioned, no, but I had written—yes, some of them had been published before I joined the Society. I had written the lyrics which I spoke of, they had been written before the time. I had written various college songs, some of which have since been published. One song appears now in the Haverford College Song Book, called "Haverford Harmony." I used a similar tune in a "Song of Kiwanis." I was National Chairman of Music for two years. That is an organization similar to Rotary. I was editor of the Kiwanis Song Book.

Q. Are you a citizen of the United States?

A. Yes, by birth.

Q. By birth?

A. Yes, born in Philadelphia, Pennsylvania.

Q. Prior to the time that you became a member of the Society, had you ever received any compensation for the performance rights in any of the works that you had written or composed?

A. No, none whatever.

Q. When for the first time did you receive any compensation for your performance rights?

A. At the end of the first year, or at the end of the first quarter I got the membership in ASCAP.

Q. So far as you remember that was about 1922?

[fol. 1062] A. Yes. It might have been a year earlier. It was shortly after I joined the staff of the American Piano Company, which was in 1920, because I know that one of the songs which made my membership possible was "Chansonette".

Q. Prior to the time you joined the Society had you ever made any effort to ascertain whether any of the works written by you had been publicly performed for profit?

A. I had no way of checking up. I simply assumed that it would be a hopeless task, and I never made any definite effort to get any return from those works. Of course, the works that were published finally—when I say finally, I mean works of the more commercial type than the ones I had written at college—when those were published, I received royalties on sheet music; but I received no returns until I joined ASCAP.

Q. Did you receive royalties on mechanical reproductions of your compositions?

A. Yes.

Q. From whom did you receive those?

A. Mostly from the firm of E. B. Marks Music Company. They published most of my works. Some came from Schirmer and some from Boston Music Company.

Q. Have the copyrights on any of your works been renewed?

[fol. 1063] A. No; they were most of them written within twenty years.

Q. When these works come up for renewal will they be renewed by you in your name, if you are alive?

A. I presume so.

Q. Have these works a value for renewal purposes?

A. Yes.

Q. Are you in a position to demand advance royalties for the renewal of your works at that time?

A. That depends on the value of those works in the eyes of their publishers. I would be inclined to try to get an advance royalty if I could.

Q. Taking all the works you have written and composed over the years; assuming they are to be renewed some day after the 28 years original copyright had expired, would you say that these renewals have a substantial value to you?

A. Yes.

Q. Can you state for the record what you think they are worth?

A. That is hard to say. Two or three of the songs for which I wrote the words have had a very heavy sale. They have become standard. Take "Down South", it was the theme song of the "Show Boat". It is constantly on the air. It is very popular. I think that song will be very [fol. 1064] popular because the tune goes back to 1890. I was asked to write a modern lyric around 1920 to bring it back to popularity; and that occurred, because that song was very popular; therefore I have drawn sheet music royalties on that lyric and I expect that copyright to be renewed and to continue to draw on it.

Similarly, the song of Franz Lehar, a great composer; that song has great value. It was played as a violin solo by Kreisler. Those two numbers have a great value. In addition to which I have several collections of old songs, the best one of which is "Read 'Em and Weep," "The Songs You Forgot to Remember." Those collections are used as text books, and they have been used as material on the radio. Many of those songs are available only in my books.

I expect to keep those copyrights under my control permanently.

Q. What would you say was the value of a song like "Chansonette", to you?

A. That is not a good example, because "Chansonette" as a song has practically ended its life through being turned into "Donkey's Serenade". I only wrote the words. I have no interest in the present words, although the motion picture company paid me something for the right to use the [fol. 1065] song. Therefore, eliminate that lyric. But "Down South" had a very definite value.

Q. What value would you say it had for renewal?

A. If I were asking for an advance of royalty on that I would ask for perhaps $500. It is pretty hard to judge those things.

Q. What would you expect to take in by way of royalty during the additional twenty-eight year period of that renewal?

A. That would be very difficult to say. The actual sheet music royalties, records and mechanical reproductions on a song don't approach the real value of the performing rights. The performing rights of a song like that are very much more valuable to me.

Q. What would you say would be the value to you for the renewal period?

A. It would be very difficult for me to say.

Q. Can you give me some estimate?

A. I would say perhaps two thousand dollars, maybe more.

Q. What would be the value of the Franz Lehar work?

A. I would say the same.

Q. "The Madrigal of May," what would be the value of that for the renewal period, for performing rights and everything else?

[fol. 1066] A. That would be perhaps somewhat less, because it has never been performed.

Q. What would be the value of the "Jabberwocky"?

A. That would be impossible to estimate. It is a setting for male chorus. Its performing rights and other rights would be perhaps as much as the other. I am not inclined to be overoptimistic of these things. I am judging from the returns I have had in the past. I am not, of course, a song writer in the sense that Irving Berlin is, but I have had my returns. My returns through ASCAP have always been in excess of my returns from publishing.

Q. When you wrote your songs as a rule you entered into a contract with publishers?

A. Yes.

Q. Under that contract does the publisher agree to pay you royalties?

A. Yes.

Q. On the sale of the sheet music?

A. Yes.

Q. And on mechanical reproductions?

A. Yes.

Q. There are provisions in your contract for performing rights, are there?

A. None whatever.

[fol. 1067] Q. Now, did ever any user of that music, any hotel or restaurant or any night club or motion picture company or any motion picture exhibitor or any radio station, apply to you for the right to have a license to publicly perform for profit any of the musical compositions that you published prior to your joining up with the Society?

A. No. I think that my works were used fairly often without any permission; but radio was in its very early days then so radio wouldn't have been interested.

Q. Have you a wide knowledge of the music profession?

A. Yes.

Q. Are you familiar with the people in it?

A. Yes.

Q. You know something of the customs and usages of the business?

A. Yes.

Mr. Nye: What are we going to do about objections? I want the record to show that the parties stipulate that either side may make such objections to the testimony as they wish at the time it is read in evidence.

(Discussion off the record.)

Mr. Nye: I want to object as to the materiality of all of [fol. 1068] the questions and also object to all questions and answers pertaining to the value of renewal of copyrights as highly speculative, for the reason there is no foundation for the opinion of the witness on this point.

Q. Now, Dr. Spaeth, can you tell us what you received by way of royalties from the American Society of Composers, Authors and Publishers for each year that you were a member of that Society since 1922?

A. My first classification, which I assume was a rather low one, paid me annually royalties of $80, and I paid $10 a year out of that, so that my net return for a good many years, for more years than I want to think back on, but it was several years before I got out of that $80 class. That has gradually been raised, and then I received the princely sum of $400 a year.

Q. What did you get by way of royalties per year from "Chansonette,- from the sale of sheet music?

A. Those royalties were never very large; I can't tell the exact amount, but comparatively small amounts.

Q. What would you call a comparatively small amount?

A. Perhaps from twenty to forty dollars a year.

Q. What did you get from "The Madrigal of May"?

A. Even less.

Q. "Jabberwocky"?

[fol. 1069] A. Less than fifteen dollars a year from both those.

Q. What did you get from your collection of choral works?

A. Those chorals, they have all run about the same thing. My sheet music royalties, the aggregate has never been very large. The entire total would represent perhaps a few hundred dollars a year, say; certainly not enough to live on. My best return was from "Down South."

Q. What did you get from that?

A. Pretty close to a hundred dollars a year.

Q. For how many years?

A. Ever since about 1920.

Q. What would be the total of your royalties from sheet music each year?

A. I don't think that any year I have drawn sheet music royalties of over $300, or perhaps $400 a year.

Q. Would that be an average?

A. The average would be no more than $300, perhaps $250.

Q. What would you say would be an average? Strike an average if you can.

A. $250. a year.

Q. Do you get anything for mechanical rights on any of your compositions?

A. I included my mechanical rights in that. My royal- [fol. 1070] ties statements from my publishers since 1920 have not averaged more than $250 a year, including mechanicals. My share of the mechanicals is 33 and one-third per cent.

Q. Did you get as much as $250 each year for the period that you have been publishing music?

A. No. My most recent royalty statement, which is the one which is freshest in my memory, was a little more than $50; that was from Marks; Marks has most of my publications; I have very little from anybody except Marks; so that by this last statement of fifty some odd dollars I feel that $250 average during the year is fairly liberal. There have been years where it ran more than that, $300 to $400.

Q. Has there been any diminution of the returns to the writers from the sales of sheet music, if you know?

Mr. Nye: I object to that; no foundation for the witness's knowledge.

A. I would speak from my own experience, so far as I am concerned.

Q. This is not an answer. Are you acquainted with song writers?

A. Yes, with a good many of them.

Q. Do you also know publishers?

A. Yes.

[fol. 1071] Q. Do you know Irving Berlin, Inc.?

A. Yes.

Q. Do you know the members of Carl Fischer, Inc.?

A. Yes.

Q. And G. Schirmer, Inc.?

A. Yes.

Q. E. B. Marks?

A. Yes.

Q. Harms?

A. Yes.

Q. Do you know any other publishers?

A. Yes, I know J. Fischer & Brother; the Boston Music Company; Shapiro, Bernstein & Co.; Feist; Robbins; I know executives and others in all of those firms.

Q. Do you know of your own knowledge whether there has been a diminution of royalties received by these publishers from the sale of sheet music since 1922?

Mr. Nye: I object to that as calling for a conclusion.

A. Yes, I do know. I do know that there has been a steady and very definite diminution.

Mr. Nye: I object to the answer, except the word "Yes," as not responsive.

Q. Do you know what that has been due to?

[fol. 1072] Mr. Nye: I object to it for the reason it is immaterial, and also no foundation.

A. Yes.

Q. What has it been due to?

Mr. Nye: I object to it as speculative, no foundation.

A. It has been due to the gradual encroachment, first the phonograph and later the radio, which interfere very strongly with the sale of sheet music, by taking the place of sheet music in the home.

Q. Has that diminution been very substantial?

Mr. Nye: That is objected to as calling for a conclusion, speculative, no foundation.

A. Yes.

Q. Have you seen any diminution in the royalties that you received from your own compositions in the past sixteen years?

A. Yes.

Q. Has that diminution been marked, substantial?

A. Yes.

Mr. Nye: Give me an objection as to the materiality on all of that.

Q. Which of your songs in the last two or three years has been played on the radio to any extent?

[fol. 1073] A. "Down South."

Q. When was that played on the radio?

A. I couldn't give the last time, but I was told I received——

Mr. Nye: I object to that as not responsive.

Q. Finish your answer.

A. When I say I was told, I received a written record from my publisher of the figures for 1936, which is the last year on which complete figures are available, and the complete figures——

Mr. Nye: I object to that as not responsive and not the best evidence.

Mr. Frohlich: Let him finish his answer.

Mr. Nye: I withdraw that.

A. (continued) The figures given me by my publisher on "Down South" show it has been played on the air over five thousand times during 1936.

Q. How many copies of the sheet music were sold during 1936 of that song?

Mr. Nye: I object to that as immaterial.

A. I couldn't give you the exact figures; certainly not more than two thousand.

Mr. Nye: You mean two thousand pieces?

The Witness: Two thousand copies of sheet music, cer-

[fol. 1074] tainly not more, and probably less.

Mr. Nye: The one piece, "Down South," you are talking about?

The Witness: Yes.

Q. Did you find that the figures of performing over the radio had any effect at all upon the sale of sheet music of your composition?

Mr. Nye: Objected to as speculative, no foundation having been laid.

A. Yes; the figures prove it quite definitely.

Mr. Nye: I move to strike out the answer as a conclusion and not a statement of fact.

Q. Is the sale of sheet music stimulated or retarded by the broadcasting of the composition?

Mr. Nye: Same objection.

A. Definitely retarded.

Q. You said the figures have proved that. Have you some figures?

Mr. Nye: Objected to as immaterial.

A. My royalty statements have consistently shown a smaller sale of sheet music as compared with a larger distribution through radio. The biggest year in radio, 1936, was my smallest in sheet music royalties up to that time. It has been still smaller since that time.

[fol. 1075] Q. Now suppose, Doctor, that you were acting alone and independently of a substantial number of other composers or writers, would you be able to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska?

Mr. Nye: I object to that as calling for the conclusion of the witness, no proper foundation laid, and speculative.

A. I would have no way of judging or fixing such price.

Q. If you were to fix the price of a composition for the public performance for profit, what would you have to take into consideration, in the State of Nebraska?

Mr. Nye: Objected to as calling for the conclusion of the witness, not the proper form of hypothetical question; no foundation.

A. I would be guided by the possible interference with my local sales of sheet music and mechanicals.

Q. What would you have to take into consideration, to fix the price for public performance for profit?

Mr. Nye: Same objection.

A. If I had to fix such a price I would be inclined to price it in accordance with the profit that I thought the user was making and I would try to charge him just as [fol. 1076] much as I could reasonably in accordance with his business.

Q. Would you have to take into consideration the nature of the use?

Mr. Nye: Same objection to all these questions.

A. Yes.

Q. Would you have to take into consideration the establishment at which the composition would be performed?

A. Yes.

Q. Would you have to take into consideration the size of the orchestra or the nature of the artist or singer who performed the composition?

A. Yes.

Q. Would you have to take into consideration the size of the establishment and the business that it does?

A. Yes.

Mr. Nye: I also object to all these questions as extremely leading.

Q. Tell me all of the factors that you would take into consideration if you were to fix and determine the price to be charged for the public performance for profit of one of your compositions?

A. I would take into consideration the profit likely to be made by the user, the size and importance of the estab- [fol. 1077] lishment concerned, the elaborateness or complicity of the production, the size of the potential audience, and lastly, the possible effect upon my own returns in other ways from that same territory.

Q. Would you have to do that, Doctor, with respect to each and every place in the State of Nebraska, which would use your composition for public performance for profit?

A. Yes.

Q. Are you in a position financially to make investigations in the State of Nebraska with respect to the establishments of the various users of music in that State?

A. No.

Q. Are you able to employ investigators within the State of Nebraska for the purpose of eliciting that information?

Mr. Nye: Objected to as immaterial and calling for the conclusion of the witness.

A. No.

Q. Are you in a position financially or otherwise to employ investigators for the purpose of detecting infringements of your compositions within the State of Nebraska?

Mr. Nye: Same objection.

A. No.

[fol. 1078] Q. Are you in a position financially or otherwise to engage lawyers to bring suits to protect you against infringements in the State of Nebraska?

Mr. Nye: Same objection.

A. No.

Q. Have you ever been in the State of Nebraska?

A. Yes.

Q. Have you ever heard any of your compositions played in the State of Nebraska?

A. I have played them myself.

Q. Have you heard others play them?

A. No, I can't say that I have, but I have numerous times played my compositions at the Ad-Sell Club in Omaha. I appeared at a night club there where they were doing one of my songs.

Q. Would you be able to fix a price to be charged for the public performance for profit, at the time your compositions are published?

Mr. Nye: Objected to as immaterial and speculative.

A. It would be impossible to fix it in general; it would have to be specially fixed for each performance.

Q. So that if you publish a composition, at the time the composition is published and sold in the State of Nebraska, [fol. 1079] would you have any way at that time to put on that composition the price to be charged for the public

performance for profit of that composition in the State of Nebraska?

A. No, I couldn't put such price on it.

Q. When you publish a piece, who does the publishing and selling, you or the publisher?

A. The publisher.

Q. Have you given any of your publishers at any time on any of the compositions that you have published, the right to fix a price for the public performance for profit of your compositions within the State of Nebraska?

Mr. Nye: I object to that as not the best evidence.

A. The answer is no.

Mr. Nye: Add to that an objection as to materiality.

Q. Have you ever received any royalties from any of your publishers on any of your compositions, for the public performance for profit of any of your compositions?

Mr. Nye: I object to that as immaterial.

A. I don't remember receiving any. The only royalties which would come under the head of mechanical. That is off the record.

[fol. 1080] Q. Do you wish to retain to yourself the right of public performance for profit in any of your musical compositions at the time that they will be renewed, when the original term of copyright expires?

Mr. Nye: That is objected to as immaterial, calling for a conclusion of the witness, and speculation.

A. I always expect to control the performing rights to my compositions either personally or through such an organization as ASCAP.

Q. Would you allow your publisher to fix the price for public performance for profit on any of your renewal copyrights?

Mr. Nye: Objected to as calling for a conclusion and speculative.

A. I would not allow that.

Q. Would it be to your advantage to control the price for the public performance for profit of any of your musical compositions at a future date?

Mr. Nye: I object to that as calling for a conclusion, speculation, and immaterial.

Q. Apart from the sale of sheet music?

Mr. Nye: Same objection.

A. Would it be to my advantage to control the price for [fol. 1081] public performance for profit?

Q. Yes.

A. It would be, but I can't conceive such a possibility.

Q. Supposing such a possibility and there were no Society and you were acting as an individual, would it be to your advantage to control in the future, apart from the sale of sheet music, the public performance for profit of your respective compositions?

Mr. Nye: Same objection, and also it is in improper form for a hypothetical question.

A. My answer would be, it would be profitable if possible, but I can't conceive of the possibility.

Mr. Nye: I move to strike out the answer, except the words, "It would be profitable," as not responsive.

Q. Assuming that there were no Society, assuming that you were acting as an individual author, would it be to your advantage if you published your compositions to retain to yourself the right to public performance for profit and to fix a price for that right at a future date?

Mr. Nye: Same objection as to the last question.

A. I would be compelled to fix such a price if I had no other means of protection.

[fol. 1082] Mr. Nye: I move to strike out the answer as not responsive.

Q. Will you explain your answer, "It would be profitable if it were possible"?

Mr. Nye: Same objection to that question as to the other two.

A. I mean by that that I cannot conceive of the possibility of carrying out the necessary details and machinery for protecting all or even a substantial part of the public performances of my copyrighted works anywhere.

Mr. Nye: I move to strike out the answer as not responsive, speculative.

Q. Why would it not be possible?

A. Because it has been my experience that no one will ever pay for such a thing as a copyrighted piece of creative art unless the person is forced to do so.

Mr. Nye: Note my objection to the last question as calling for a conclusion and immaterial. I move to strike out the answer for the reason that it is argumentative and not a statement of fact.

—. Is this your last contract with the Society, Doctor, dated June 28, 1935 (handing paper to the witness)?

A. That is right.

[fol. 1083] Q. Is that your signature and the signature of Joe Young, Secretary?

A. That is right.

Mr. Frohlich: I offer it in evidence.

Mr. Nye: I object to it as immaterial.

(The document just offered was received in evidence and marked Plaintiffs' Exhibit No. 1, of this date.)

Q. Assuming that there are 367 users of copyrighted musical compositions in the State of Nebraska, what would you have to do to protect your performing rights in that State, if you were acting alone?

Mr. Nye: I object to that as calling for speculation; no foundation.

A. I would have to check every possible performance of my work by keeping track of all the activities of all of those users, by engaging clerical assistants in the State of Nebraska, or in some such way keeping check.

Q. Would that involve the outlay of money?

A. It would involve the outlay of so much money that I couldn't start to do it.

Mr. Nye: Objected to as immaterial.

Q. How much money do you estimate that would require?

Mr. Nye: Objected to, no proper foundation laid, specu-

[fol. 1084] lative.

A. To be done properly it would require the engagement of a clerical assistant at a salary of from two to five thousand dollars a year, plus incidental expenses.

Q. How about a lawyer?

Mr. Nye: Same objection to that question.

A. The necessity of legal services would greatly add to the expense.

Q. How much would you say it would cost?

A. If I retained a lawyer to protect me in the State of Nebraska in addition to retaining a clerical representative in the State, I imagine my total bill per year would run certainly well over $5,000.00, somewhere between five and ten thousand dollars a year.

Mr. Nye: I move to strike out the answer to both the last questions, as speculative, and not statements of fact.

Q. Are you financially able to make that expenditure?

A. By no means.

Q. Would you be required, if you were acting alone, to have investigators go round from place to place in Nebraska to look out for the performance of your compositions?

Mr. Nye: Objected to as calling for a conclusion.

[fol. 1085] A. Yes.

Q. Would these investigators have to go round to practically all the 367 users in Nebraska?

Mr. Nye: Same objection.

A. Yes.

Q. Would they have to go round there frequently?

Mr. Nye: Same objection.

A. Yes.

Q. Have you taken that into consideration in estimating the cost?

A. Probably not.

Q. How much do you think it would cost to make a proper investigation to detect infringement of your compositions in the State of Nebraska and to protect them by infringement suit?

Mr. Nye: Same objection.

A. It would be difficult to estimate the cost of any such action, and such action could hardly be initiated unless I had some representative, some prior representation there. The action would undoubtedly increase the expense and undoubtedly make for a larger return. I would consider that expense in addition to a lawyer to protect my interest, I would consider that in this State an expense which could not now be estimated, depending on the amount of time [fol. 1086] spent in the matter and the amount of work required by the report of my local counsel.

Mr. Nye: I move to strike out all the answers as to the speculation of this witness as to the cost of doing business in the State of Nebraska, for the reason that they are not within any knowledge that the witness has.

Q. Are you familiar with the problems of an infringement suit, Doctor Spaeth?

A. Yes.

Q. Have you frequently testified as an expert in infringement suits?

A. Yes.

Q. Have you testified for me?

A. Yes.

Q. Do you know something of the defenses that are put in in those suits?

A. Yes.

Q. Are you familiar with the requisite amount of skill and experience required to try an infringement suit for copyright?

A. Yes.

Q. Do you think you could engage a lawyer in the State of Nebraska to protect your interests, for less than $5,000 [fol. 1087] a year?

Mr. Nye: Objected to as calling for a conclusion; matter not within the knowledge of this witness.

A. I have no way of telling that; I was judging by the possible figure for a retainer which would imply no special work; but I am quite aware that any lawyer engaged in actual litigation must charge fees that must average $5,000 or more a year.

Q. Are you in a position to pay that fee?

A. No.

Q. From time to time when your compositions were published were rights granted to producers or manufacturers of mechanical records and piano rolls to use your compositions?

Mr. Nye: Objected to as immaterial.

A. So far as I know, no such records were ever made of any of my compositions.

Q. Didn't I understand you to say that some one made some records of one of your compositions?

A. Yes; "Francita's Serenade"; the piece is known by two titles; "Francita" from the title of the operetta by Franz Lehar, in which appeared a serenade whose title as a song—it was originally from the German—was "Blaues [fol. 1088] Himmelbett", literally "Heavenly Bed of Blue". The necessities of general, shall *be* say, purity of American publications forced me to change the "Heavenly Bed" to "A Little Nest," and the song came out in this country as "Heavenly Nest of Blue".

Q. Who published that?

A. E. B. Marks.

Q. Did E. B. Marks grant mechanical rights to it?

A. Yes.

Q. Did you receive royalties for the mechanical rights?

A. Yes.

Q. Do you know whether this particular record was by Kreisler?

A. He made that violin record. I am not sure that I shared in that record, because Fischer also made a record by Jeritza; I also shared in that record. My recollection is that of the mechanicals I received no royalty. I know Kreisler did make a record on the music of that piece.

Q. Did you receive royalties from the record made by Jeritza?

A. That song came later, because it was sung by Richard Tauber at several concerts. That was one of the popular songs in his repertoire and he performed it publicly several times.

[fol. 1089] Q. Did the manufacturer of the record made by Jeritza have the right to license anyone to publicy perform for profit that composition?

A. No, not so far as I know.

Q. Did you ever give any publisher that right?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Did E. B. Marks ever give that right, so far as you know?

Mr. Nye: Same objection.

A. No.

Q. Have you any control over the manufacture of that record, that Jeritza record, with respect to the public performance for profit?

Mr. Nye: Same objection.

A. Personally I have no control.

Q. Have you any control over the sale of those records?

A. Only through my publishers.

Q. Has your publisher any control over the sale of those records?

A. Presumably the publisher can restrain the manufacture- of the records from using them in any way except as a phonograph record.

Mr. Nye: I want to make an objection to that last ques-[fol. 1090] tion—the subject matter is not within the knowledge of the witness; the matter is fixed by law, as I understand it.

Q. Has the publisher the right to interfere with the sale of the record as a mechanical record?

Mr. Nye: Objected to as calling for a conclusion; matter not within the knowledge of the witness.

A. The publisher could probably interfere with it if he found that the sale was intended for public performance not included in the contract between the record company and the publisher.

Mr. Nye: I move to strike out the answer as not responsive

Mr. Frohlich: I consent to it.

Q. Forgetting the public performance, has the publisher or have you any control over the sale or disposition of these mechanical records once they are made by the manufacturer of the records?

Mr. Nye: I object to that as calling for a conclusion as to a matter controlled by law.

A. So far as I know, I have no control.

Q. Do you wish to continue your present contract, Exhibit 1, with the Society?

[fol. 1091] Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Is the contract now being carried out by the Society and by you?

Mr. Nye: Same objection.

A. Yes.

Q. Have you been receiving royalties from the Society since June 28, 1935, under this contract?

Mr. Nye: I object to that; same objection.

A. Yes.

Q. Do you consider this contract of value to you?

A. I do.

Q. What value do you place on it in dollars and cents?

Mr. Nye: Objected to as calling for speculation of the witness, not a statement of fact.

A. The value at the moment is $400 a year to me.

Q. Is there reasonable likelihood that this contract will be continued upon its expiration?

Mr. Nye: I object to the question as calling for speculation.

A. Yes, there is.

Q. As a matter of fact, since you have joined this Society you have executed a similar contract each five-year period with them?

[fol. 1092] A. Yes.

Q. Have you reason to believe that you will continue to execute similar contracts each five years with the Society so long as you live?

A. Yes.

Mr. Nye: Same objection.

Q. Have you reason to believe that your royalties under this contract and the renewals of the contract will continue at the same rate of royalties or possibly a greater rate of royalties?

Mr. Nye: Objected to as calling for speculation by the witness.

A. Yes.

Q. What do you base that hope on?

Mr. Nye: I object to the question as calling for speculation, not a statement of fact.

A. I base that hope on the fact that since the records show that my compositions, my work, has become more and more widely used on the radio and in other ways for entertainment, that the Society will more and more recognize that fact and reward me accordingly so far as reasonably possible.

Mr. Nye: I move to strike out the answer as clearly not responsive, and hypothetical, speculative, not stating any facts.

[fol. 1093] Q. Now, if this existing contract between you and the Society, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from the Society?

Mr. Nye: I object to that as calling for a conclusion, speculation, and immaterial.

A. I see no reason to think so.

Mr. Nye: I move to strike out the answer as not responsive.

Q. If this contract, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from the users in the State of Nebraska for the public performance for profit of any of your compositions?

Mr. Nye: I object to the question as calling for speculation, calling for a conclusion.

A. I would definitely receive no return, unless I found ways of forcing a return. No, I would not.

Mr. Nye: I move to strike out the answer except the word "No".

Q. If this contract, Plaintiffs' Exhibit 1, were cancelled, would you receive any compensation from any other source anywhere for the public performance for profit of your compositions?

Mr. Nye: That is objected to as immaterial; speculative.

[fol. 1094] A. No, unless I found ways of turning up each use and spending the necessary funds to secure a return.

Mr. Nye: I move to strike out the answer, all except the word "No", on the ground that it is not responsive.

Q. Have you the funds with which to enforce your rights and to obtain royalties for the use of your compositions for public performance for profit, if this contract, Plaintiffs' Exhibit 1, is cancelled?

Mr. Nye: I object to that as immaterial; having been asked and answered and gone over in detail.

A. No.

Q. Have you some knowledge of the radio business?

A. Yes.

Q. You yourself are a commentator and broadcaster?

A. Yes.

Q. And have been for some years?

A. Almost since the very start of radio.

Q. Do you know whether or not radio stations in the State of Nebraska frequently perform compositions that emanate outside of the State of Nebraska?

Mr. Nye: I object to that; no proper foundation laid.

[fol. 1095] A. I do know that.

Q. Will you tell us on what you base that information?

Mr. Nye: Objected to as immaterial.

A. I base that information on my knowledge of net work broadcasting in which I have frequently taken part and in which I know that various stations in the State of Nebraska are active.

Mr. Nye: I move to strike out the answer as stating a conclusion only.

Q. Please define "net work broadcasting", Doctor.

Mr. Nye: I object to that as no foundation having been laid.

A. Net work broadcasting is one which originates at one central station such as in New York and is carried over a number of local stations connected with that station.

Mr. Nye: I move to strike out the answer as a statement of a fact which is clearly not within the knowledge of the witness.

Q. How are these stations connected up?

Mr. Nye: Objected to; no foundation laid; immaterial.

A. I am not a scientific expert, but my feeling is that the local station——

Mr. Nye: I object to any statement of what his feeling [fol. 1096] is.

A. (continued) My knowledge of broadcasting is that local stations are connected by direct wires with the central station.

Mr. Nye: I move to strike out the answer on the ground that it is a statement of fact not within the knowledge of the witness.

Q. Have you ever yourself broadcast over net work stations?

A. Yes.

Q. What stations?

A. I have been on the NBC on both Red and Blue net works, the National Broadcasting Company; and also Columbia net works, many times.

Q. When you say "NBC", what do you mean by that; what does that stand for?

A. NBC means National Broadcasting Company, which controls two net works, that is to say, two groups of local stations, one of which is known as the Red net works and the other as the Blue. One of these net works originates in the New York station WEAF, and the other in the New York station WJZ.

Mr. Nye: I move to strike out the entire answer, and object to the question on the ground it is wholly immaterial.

[fol. 1097] Q. To what parts of the country are these broadcasts which originate in New York City carried by the broadcasting company?

Mr. Nye: Objected to as immaterial; no proper foundation.

A. All over the country.

Q. Are they carried into the State of Nebraska?

Mr. Nye: Same objection.

A. I am certain there are stations in the State of Nebraska that are connected with those stations.

Q. Do you know KOIL in Omaha and Council Bluffs?

Mr. Nye: Objected to as immaterial.

A. Yes.

Q. Do you know WOW in Missouri?

Mr. Nye: Same objection.

A. Yes.

Q. Do you know what net work those two stations are affiliated with?

Mr. Nye: I object to the question as immaterial; no foundation laid.

A. No, I do not.

Q. If these two stations just named were on the National Broadcasting Company net work, would the broadcast performances that emanate from the New York stations of [fol. 1098] the National Broadcasting Company be carried over these local stations?

Mr. Nye: I object to that as clearly not within the knowledge of the witness.

A. The answer is Yes, and it is my impression they are quite large stations.

Mr. Nye: I move to strike out the latter part of the answer, from the words, "It is my impression".

Q. Assuming you were acting alone and no longer a member of the Society, and you broadcast one of your compositions outside of the State of Nebraska or you licensed the broadcast of one of your compositions outside of the State of Nebraska at some station, say in New York, would you be willing to have a radio broadcasting station in the State of Nebraska rebroadcast that performance without any payment to you?

Mr. Nye: I object to the question as immaterial, calling for speculation, not a proper hypothetical question.

A. My attitude would be the same as toward the fee for my actual performance, which is always larger if it is given on a net work broadcast than if it is given on a local station alone.

[fol. 1099] Mr. Nye: I move to strike out the answer as clearly not responsive.

Q. Are you willing to have a radio broadcast in the State of Nebraska perform one of your compositions without paying you anything therefor, providing such performance comes in from a broadcasting station located outside of the State of Nebraska?

Mr. Nye: I object to that as wholly immaterial; calling for a conclusion.

A. I am not willing to have such broadcast made unless the payment at the source includes payment for local broadcast.

Mr. Nye: I withdraw the objection; let the answer stand.

Q. Were any of your works ever broadcast in foreign countries?

Mr. Nye: Objected to as wholly immaterial.

A. Yes.

Q. Did any of those foreign countries broadcasting your works send the performances into the United States on short wave?

Mr. Nye: I object to that as wholly immaterial; not within the knowledge of the witness.

A. I beg your pardon; I misunderstood your former question. My works have been broadcast to foreign countries. [fol. 1100] I have not initiated any broadcast in foreign countries.

Mr. Nye: I move to strike out the voluntary statement of the witness; not responsive to any question.

A. The question was, whether my works had been broadcast in Europe. I misunderstood the question.

Mr. Nye: I move to strike that out also.

Q. Do you transact any business in Nebraska?

Mr. Nye: I object to that as immaterial.

A. Not at the moment.

Q. Have you any agent in Nebraska?

Mr. Nye: Objected to as immaterial.

A. No.

Q. Are you willing to have Nebraska courts take jurisdiction over your property at this time?

Mr. Nye: Objected to as immaterial.

A. No.

Mr. Frohlich: You may examine.

Cross-examination.

By Mr. Hotz:

Q. Doctor, how old are you?

A. I am fifty-three.

Q. You say that the ASCAP is a necessary organization [fol. 1101] for you and others similarly situated, do you not?

A. Yes.

Q. Largely in the protection and detection of violations of the copyright act, isn't that true?

A. I would say more than that; for the general protection of the performing rights of my creative works.

Q. The public performance rights. But the Society does fix the public performance licenses, does it not, the organization does fix prices?

Mr. Frohlich: I object to that as incompetent, irrelevant and immaterial.

A. Prices, so far as my individual works, are by no means fixed, since I draw my royalties simply on the classification, the amount of public performances that my works are getting. But I have never had any indication from the Society that an individual price was stipulated for any work of mine nor have I ever been told that the blanket license that is paid by the year by users was in any sense fixed.

Q. Who determines the price of the public performance rights that ASCAP charges the users; who determines it?

A. The executives of ASCAP determine that.

Q. What amount of the copyrighted music of the United

States would you say was controlled in that manner by ASCAP?

Mr. Frohlich: I object to that on the ground that this [fol. 1102] witness is not qualified; no foundation for that question.

Q. If you know.
A. I have no knowledge of it.
Q. Is it a substantial figure?
A. Yes.
Q. Very substantial?
A. ASCAP includes the majority of the popular composers of standing.
Q. When you receive money from ASCAP you don't receive it on the basis of your compositions that have been used; you receive from them a sum of money which is determined by the classification to which they assign you; isn't that right?
A. That is true, but the classification is assigned on the basis of the frequency of the public performance of my works.
Q. According to whose determination?
A. The determination of a classification committee working with all the statistics available, gathered in multitudinous ways.
Q. Have you attended meetings of the board of directors of ASCAP at any time?
A. I have attended some meetings of the Society and I [fol. 1103] have attended a meeting of the classification committee.
Q. Are you on it?
A. I am not a member of the board of directors and therefore never attended them.
Q. Were you, ever?
A. No.
Q. As a member you have nothing to do with the electing of that board of directors?
A. I have my vote.
Q. Did you ever vote?
A. There have been votes every year; there are ballots sent out, so far as I know.
Q. Do you of your own personal recollection remember of ever having cast a vote for director of the Society?
A. Well, whether for the board of directors or not, I don't

know. I know I am a voting member of the Society and have a right to express my opinions and have expressed them before the classification committee and have also expressed them to Mr. Buck, the President.

Q. What sort of things do you remember voting on, as a member of that Society?

A. There have been votes at our annual business meeting on general questions of policy, and there are frequent votes as to members of committees, and then the classification [fol. 1104] committee would be appointed, which of course is a very important committee, and committees which would hear any complaints that might come up, or anything of that sort. In other words, if a member of ASCAP ever has any complaint or anything he wishes to bring before the executives it is always easy to do so.

Q. Of course you have a grievance committee of some sort. Did you ever read the articles of association of ASCAP?

A. Yes, I have read them.

Q. What particular thing did you ever vote on as a member of that organization, that you recall; just tell me one thing?

A. I have already answered that question. I said my recollection is I voted at various times on members of committees, like the grievance committee and classification committee.

Q. You mean you elected them?

A. Yes, I think there have been votes on them.

Q. When?

A. I am not familiar enough to say that; I know there are a number of ballots sent out.

Q. You know that the articles of association of ASCAP provide that the directors are elected by themselves; they [fol. 1105] are the ones who elected the directors, the directors themselves; isn't that true?

A. I know that a great deal of machinery of ASCAP has been handled by—I won't say a little group, but a group that could be called the directors, a group in whose hands the Society as a whole has been very glad to leave these important problems. They are able men.

Q. Who are those men; who are the chief men in charge of the ASCAP situation?

Mr. Frohlich: I object to that as characterizing, incompetent, immaterial.

A. I frankly couldn't answer that because I don't know well enough. The men I know personally in ASCAP are men for whom I have the greatest respect and in whom I have the greatest confidence—Gene Buck, Mr. Paine, the general manager, and Mr. Mills; they are my chief contacts; they are the men to whom I write or talk if I have any ideas or suggestions.

Q. Those three men stay here in the City of New York, do they not?

A. Yes; not all the time.

Q. They are the moving spirit largely of the Society, are they not?

Mr. Frohlich: I object to that question on the ground that [fol. 1106] it is characterizing, incompetent and immaterial.

A. I would by no means limit myself to those men as being the guiding force of ASCAP. They are the men who I happen to have my contacts with.

Q. Who are the guiding lights of ASCAP, in your mind? I want to get your view on that subject; as a member of that Society I want your views who they are.

A. They are officers and general manager. Mr. Mills was former general manager. They are the three men who are the most important men in ASCAP. There are important men and writers; I know Mr. Deems Taylor; he is a director; Mr. Bernstein, and others.

Q. Mr. Berlin?

A. I know other men but I don't come in contact with them officially.

Q. These men, that is, Buck, Mills and Mr. Paine, those three gentlemen, they devote their sole and exclusive time to the business of ASCAP, do they not?

A. Yes, so far as I know.

Q. Can you give me an idea, based upon the experience that you have had, of about the percentage of the copyrighted music that ASCAP controls, in the manner in which it does its business?

[fol. 1107] Mr. Frohlich: I object to the question on the ground it is incompetent, irrelevant and immaterial; no foundation laid for it; the man is not qualified; nothing to do with the case.

A. I don't know the exact percentage.

Q. I didn't ask you the exact percentage; about what percentage?

Mr. Frohlich: Same objection.

A. I would be guessing, and I would rather not guess. I know a rather large percentage of copyrighted music is controlled by ASCAP.

Q. It is more than half of it, wouldn't you say?

Mr. Frohlich: Same objection.

A. I couldn't say.

Q. Do you know where that information could be obtained?

A. Yes.

Q. Where?

A. In the copyright office in Washington.

Q. In the copyright office in Washington, compared with the records of ASCAP; isn't that true?

A. Very true, that is to say, the catalogue of ASCAP, which I imagine is available, could be compared with the full copyright list in Washington, and my guess is that it [fol. 1108] would be found that a tremendous number of compositions are copyrighted every year in Washington by non-members of ASCAP.

Q. There is no objection to anyone copyrighting any music they want to mail down to Washington, with two dollars?

A. It is a very small matter to send in an application. There is a great deal of that music available and the composers are very anxious to have their music played on the radio and made available.

Q. As a matter of fact, ASCAP controls, does it not, all the music, substantially all the music that has merit?

Mr. Frohlich: That is objected to on the ground it is improper, incompetent, irrelevant and immaterial, no foundation for it; nothing to show that this witness is qualified to speak on the subject.

A. My answer to that question, from my wide knowledge of music in general, is that ASCAP controls an infinitesimal amount of the music of merit in the world.

Q. I mean the copyrighted music.

A. All music was copyrighted at one time. You have raised the question, by your question, of the available music which is in the public domain; it outnumbers tremendously [fol. 1109] the amount of material which is controlled by ASCAP,—that I know.

Q. You are speaking now of copyrighted music?

A. All that music was copyrighted originally, but so much of it is now in the public domain that it is available to any radio station or artist,—music in the public domain which includes all the folk music of the world and all the music of Bach, Beethoven, Wagner, Schubert and hundreds of other composers, all of which is available at any time if a user wishes to make use of it.

Q. Those men were all great artists?

A. Those were the greatest, all of greater importance in the history of music than any particular member of ASCAP. If you say the great music of the world you must include the great masters of music in the public domain.

Q. They were undoubtedly happy in the thought that they had contributed greatly to the art of music?

Mr. Frohlich: I object to that; you are arguing with the witness.

A. Most of those composers received very little for the composition of their music. But since most of them are dead for many years, the law says their works are in the public domain and open to the use of anyone who wishes.

Q. In connection with the falling off of sales of sheet [fol. 1110] music, did I understand you to say that your particular compositions with your publisher show about two thousand copies a year that they were selling now?

A. Not now; that was at the top.

Q. At the top two thousand copies a year?

A. Yes.

Q. Now it has gone down to what figure?

A. My last royalty statement, as I said under direct examination, was a little over fifty dollars, representing the six months' period.

Q. Translated into number of copies, that is how much?

A. It can be figured out in this way: my share as a writer of the words is one-half, a cent and a half per copy; there is a royalty of three cents per copy divided between the music and the words. On the lyric "Down South", which is my best composition, I have drawn one and a half cents and 33 and one-third from mechanicals; add all that together and also take into consideration that that check of slightly over fifty dollars represents not only "Down South" but several other works, it couldn't possibly have sold more than a few hundred at the outside.

Q. A few hundred?

A. In the last year. My mathematics may not be very good.

[fol. 1111] Q. There is no objection to increasing the price of sheet music if the author or composer and publisher wish to do it?

A. No objection except the good old rule of supply and demand. That law still works.

Q. If you get the price up too high it just won't sell?

A. Sheet music has always been priced as high as could reasonably be expected to be collected. The prices of sheet music couldn't be put higher than they have been. The tendency is to lower prices.

Q. If you are receiving $400 a year now from ASCAP for public performance rights and if the public performance rights are included in the price that you and your publisher fix at the time that the music is sold and collected when the music is sold so that you had a public performance price added right in there, you would have no complaint to make whatever about infringement of public performance rights?

Mr. Frohlich: I object to that on the ground that it is speculative; incompetent.

A. My only answer to such a question is, the possibility has never been suggested, and it seems to me entirely inconceivable that a publisher should be able to control public [fol. 1112] performance rights or to put a price on it. If you compare the $400 return that I have received in the past year from ASCAP with this 4,000 performance of only one song on the air, and compare that with what I got from sheet music, you will see why I smile.

Q. Have you ever read the Nebraska statute that is in question?

A. I am not sure that I have. I only know in a general way what it is.

Q. What price does your publisher charge for your sheet music when he sells it?

A. Of course, he figures on the basis of a wholesale price.

Q. What is it?

A. Usually about twelve or twelve and a half cents.

Q. Per copy?

A. Yes. It varies, depending on type of music, the sort of piece, whether a production number—that will be sold

at a higher price; a piece of movie music will be sold for more.

Q. If the public performance rights will be included in the sales price and the sales price were arranged by yourself and your publisher high enough to cover a substantial and reasonable income for yourself, then you would have no necessity of an organization such as ASCAP?

[fol. 1113] Mr. Frohlich: I object to that question as speculative and assuming a state of facts not in evidence.

A. I think I can answer that by saying that my total returns from sheet music would be zero; it would be nothing. If the price were put up to include anything at all for public performance rights the sale of sheet music would cease automatically.

Q. Where do you assume that the money is coming from that you get from ASCAP?

A. I know very well where.

Q. Where?

A. From the users, of which a very considerable percentage is paid into the treasury, which is divided among those whose works are entitled to recognition.

Q. You don't suppose those people would cease to use music simply because the public performance price was put on the music?

Mr. Frohlich: That is objected to as speculative and calls for the operation of the witness's mind; it is something he does not know about,—asking what users might or might not do; it is incompetent and immaterial.

A. I can answer that question in this way; I believe [fol. 1114] that they would automatically cease to use it because they couldn't afford to pay the price which the publisher would want; and the case was very clearly proved when the Warner Brothers with their publishers ceased; rather than pay the prices that Warner expected them to pay, they said, "We would rather not use your music," and no Warner music was used during that entire period; the entire time that Warner was outside the ASCAP the music of Warner was boycotted by the radio stations and all others using music.

Mr. Rotz: I move to strike out the entire answer as not responsive.

Q. Warner Brothers were assuming a similar position to music that ASCAP did?

A. Yes.

Q. And it became necessary for users of music to have two licenses if they wished to be free from infringement?

A. They didn't have to have two licenses, if they wanted to substitute the Warner license for the ASCAP license. I have heard of no cases where anyone chose the Warner license in place of the ASCAP license. In most cases I found that the user simply refused to deal with Warner. The only exceptions were certain small stations. Warner licenses were so much higher than the comparatively small [fol. 1115] charge by ASCAP. Users of music in general refused to do business with any such concern like that which controlled large publishers and several motion picture houses and controlled one of the large motion picture companies.

Q. Do you know of any publishing houses that publish vocal and instrumental music, of any size or consequence, that are not members of ASCAP?

A. Any large publishing houses?

Q. Or are they all in the Society, largely?

A. I am not sure, because there are large publishing houses abroad.

Q. I mean, in the United States?

A. In the United States? I don't know of any, but I might be wrong. My impression is——

Q. All or substantially all are in it?

A. Yes, I think they are all members of ASCAP.

Q. When a man copyrights a piece of music or goes to his publisher and makes a deal with his publisher, does he negotiate? Tell us how this is done.

A. The publisher gets a contract and the composer gets a contract as the creator of the work, which is a written contract. There is a contract known as the regular song writers' contract, which always calls for the payment of royalty on the basis of three cents per copy of sheet music, [fol. 1116] to be divided between the writers of the music and the words. Each man gets the same. Recently, with some exceptions, the usual share of the mechanical reproductions is thirty-three and one-third.

Mr. Frohlich: Have you completed the answer?

A. (continued) The main thing is, the publisher assumes the expenses of publication and he agrees to bring out the composition and to exploit it and to pay the creator this royalty.

Q. In other words, the creator of music is helpless without a publisher, so far as getting his composition on the market is concerned; is that right?

A. No; I would hardly admit that.

Q. They would have to do their own publishing?

A. Yes. Sometimes——

Q. Irving Berlin——

Mr. Frohlich: Let him answer.

Q. You have answered the question. It is sometimes done. Irving Berlin is a good example of it? Irving Berlin publishes his own compositions?

A. Irving Berlin was first handled by various publishers before he organized his own publishing house. A man is always free to publish his own compositions.

Q. The publisher gets one-half of the money that ASCAP [fol. 1117] collects from music users throughout the country, including Nebraska?

A. I don't know the figures, but my impression is that the total receipts for distribution are divided equally between the publisher members and the writer and composer members.

Q. And the bill of complaint says that there are about 123 publisher members and they publish a list of them. Those 123 publisher members, then, receive one-half of the net proceeds that come into ASCAP from the State of Nebraska and elsewhere, according to your version; isn't that right?

A. I don't know the details of that; I imagine that is correct, but I am not an officer of ASCAP, and I don't know.

Q. Do you know how many composer members there are in the Society?

A. No, I don't know the exact number.

Q. I want to find out what you know about this Society. What is your best judgment as to the number of members?

A. I know that the Society has its European affiliations.

Q. I am not talking about its European affiliations. I am talking about ASCAP composer membe.s.

A. I haven't checked the total members. I imagine it runs between seven and eight hundred.

[fol. 1118] Q. Now, the money, then, that ASCAP takes in is divided between those persons that compose this half or the other, whatever they are; the composer members; and the other half, the 123 publishers?

A. I am not sure that is so. You are asking now questions that I am not in a position to answer at all. I haven't that type of mind. My mind doesn't work about those matters. I know my own problems and what ASCAP means to me. As to the publishers, I can't say.

Q. When Warners pulled out of ASCAP or settled its differences with them, do you know anything about ASCAP'S refusal to reduce its fees to compensate the users for the withdrawal by Warner?

A. I don't know the financial details of the situation at all.

Q. Have you ever tried to figure out a plan of collecting your public performance rights at the time that copyrighted music was sold; have you ever put in any time or thought on that subject?

A. I have to be convinced that I could work out any plan.

Q. You never tried it?

A. Yes, I have tried to keep track, for my own personal satisfaction, of the performances that were made, and I frequently get letters from people asking if something of [fol. 1119] mine can be performed at a certain place, and if it is a charity where they are not making a profit out of it I have given a permission without bothering ASCAP at all. Another place where they want something where they are making a profit, I said I had no right to do so.

Q. There is no separation of the funds that you derive from the users of copyrighted music, by ASCAP; is that true?

A. Any separation?

Q. No separation of the funds? They don't go out and collect royalties on your music and turn it over to you?

A. No. The beauty——

Q. I am not asking you about the beauty; I am asking what ASCAP does.

A. ASCAP deals with lump sums, which it distributes equitably.

Q. Give us the dates of your copyrighted music.

A. I can't do that off hand.

Q. You can't do that off hand?

A. No. The records are with my publishers, mostly E. B. Marks. They run roughly from 1920 or a little earlier; some are earlier than that; they run over the last 18 or 20 years.

Q. When is your nearest expiration of copyright that you can give us?

[fol. 1120] A. I imagine "Chansonette" would probably be the nearest one for renewal, and that has rather lost its value by being superseded by "The Donkey's Serenade." "Chansonette" you know was something I worked out with Friml in my early days with the American Piano Company. I am not thinking seriously about renewals; they are at least ten years ahead of me.

Q. When you estimated for Mr. Frohlich the value of your copyright, you were merely speculating, were you not, on those figures?

A. I was judging by the average return during the years I have been drawing royalties and the possibility of royalties for the future, and I was naturally somewhat influenced by the confidence that I have in the compositions.

Q. How long have you been getting $400 a year from ASCAP?

A. Only during, I think, the past year, at the outside. I think this is the second year I am on that classification.

Q. It was increased up to $400; it was never cut down?

A. It was never cut down? Yes, I think once my classification was reduced.

Q. What did you say it was before you got $400?

A. I think it was $80 a year.

Q. How long was it $80 a year?

[fol. 1121] A. Five or six years, is my impression. I am talking simply from a general recollection. It finally raised, and this final jump to $400 was from 200; from 200 to 400; it was doubled.

Q. Was it increased due to the popularity of your music?

A. It was due particularly to the fact that I was getting more use of my music than ever before.

Q. How do you know?

A. Because I had the figures. I was given the figures by ASCAP—my publishers, I mean, who had gotten them from ASCAP investigators.

Q. How does ASCAP judge that?

A. There are paid people who do that work, paid, I imagine, by ASCAP.

Q. It is largely over the radio, isn't it?

A. Radio is by far the largest user.

Q. Then the present value of your public performing rights is fixed at $400 is that right?

A. That is the way it is estimated by ASCAP at present.

Q. Suppose they decide to pay to you $200 instead of $400, what would you do about it?

A. I would probably object and would have to be shown good and sufficient reason for the change. In fact, once [fol. 1122] when I was reduced I objected.

Q. What did you do?

A. I came to the classification committee and stated my grievance.

Q. Suppose it had not complied with your request, what would you have done?

Mr. Frohlich: I object to that as highly speculative.

A. I think I would be free to resign from the Society.

Q. Then you wouldn't have gotten anything.

A. I don't see how I could. I have to trust ASCAP to give me a square deal, and I try to do my part. I trust my publisher the same way. He gives me a split of the royalties; I have no way of checking the figures; he told me he sold 100 copies of "Down South" and I have to accept that.

Q. You have no way of knowing the value of your public performance rights, for instance, next year; there is no way of estimating that?

A. No.

Q. You have no way of estimating nor of figuring in two or three years from now on the balance of the period of your copyright?

A. I have never had any value set upon my public per- [fol. 1123] formance rights until I became a member of ASCAP. There was no public performance value in any of my work. Whatever value there is in the future is due to my membership in ASCAP; otherwise it would cost more than it would bring me.

Q. It would depend on the deal that you and your publisher might work out, is that right?

A. My publisher would do nothing about that. My publisher is too concerned with selling sheet music. My pub-

lisher has never shown any interest in trying to protect my public performance rights. My publisher knows I am well taken care of by the Society.

Q. In the radio broadcasting from the emenating station here in New York, it comes out to Nebraska, does it not, by wire?

Mr. Frohlich: Objected to; if you state that as a fact we will concede it.

A. That is my impression.

Q. After it goes to Nebraska by wire it is re-broadcast in the local station; isn't that true?

A. Essentially I imagine that is what happens. I am not a scientist; I don't know the exact process. I know a program emanating in a New York station is distributed through various local stations, which I assume is through wires and which could be called re-broadcasting. I am not [fol. 1124] familiar with technical terms.

Q. A copyrighted program originating here in New York and picked up in Nebraska must have, in order to grow into being or use, a local broadcasting station out there in Nebraska where it is picked up and re-broadcast; is that true?

A. No; there are stations in New York powerful enough to be heard directly in Nebraska. I am quite sure of that.

Q. What ones, for example?

A. I think WOR, among others. I was on WOR here in New York on a purely local broadcast,——

Q. Not as a practical matter?

A. I might say as a matter of fact I received letters from Oklahoma and Texas, where I was heard at that time.

Q. That is an exceptional case, isn't it, Doctor; not a practical proposition?

A. You asked me whether it was necessary to have a local station in Nebraska in order to hear a New York broadcast. I have had the experience of getting letters from Texas, after a local New York broadcast. There is also station WLW in Cincinnati, a tremendously powerful station, which does not require a net work at all. I think WLW has proved that it has gone into all the States of the United States, I think.

Q. You have testified, have you not, in infringement [fol. 1125] suits?

A. Yes.

Q. About what kind of copyright infringement suits were

those; between individuals that were quarreling about prior rights?

A. Usually a case of that sort is between an individual and a publisher, and sometimes a motion picture company where a copy of music has been used on the screen. An individual, as a rule, is trying to collect money from a publisher or from a motion picture company and says that his melody or his song has been stolen. In most of those cases I have appeared for the defendant because I always appear on the side which I feel is right in the case, and in the majority of the cases the plaintiff is merely imagining the fact that his music was taken, and that is the first thing for me to show. That is usually in a suit in which the individual is suing a publisher or motion picture company.

Q. Have you ever testified in a case where the public performance rights were involved?

A. No, I don't think so. I would like to correct that last answer. There were a couple of cases in which public performance rights were definitely involved. There was a case in Syracuse in which a certain road house or some such [fol. 1126] place of entertainment was trying to prove that every song, every popular song published, was in the public domain, because all these songs were based on the seven notes of the diatonic scale and the twelve tones of the chromatic scale, and therefore Irving Berlin or any other composer couldn't legally copyright any of his compositions. They actually tried to retain me as a witness on their side. I, of course, told them that *that* their case was ridiculous. I then appeared for ASCAP to clear up a situation which was obvious, that since the United States had given a copyright for these numbers they are, therefore, entitled to legal protection; and even if one could find material that appeared many times, that its creator has put it together in this particular way, for which the United States Government had given him a copyright, and they were entitled to protection. That was a case where performance rights were included.

Q. Your publisher has the right from you, does he not, to give copies to users occasionally, particularly broadcasting companies and leading artists?

A. He has a right to give away such copies as he considers helpful for promotion of the number.

Q. As advertising?

A. Yes.

Q. What is one of the methods of popularizing a piece [fol. 1127] of music that you know now?

A. The only way of popularizing music is by having it heard.

Q. And that, I presume, is the job of your publisher largely?

A. The publisher is principally interested in that; the creator is also.

Q. It is usually the publisher's job?

A. It should be, but if a publisher is not as largely interested in a composition as I am, I am trying to help it along, and I have done it.

Q. You advise with your publisher and fix the price that your sheet music is to sell, do you not?

A. No, the publisher does that.

Q. He decides that entirely?

A. Yes, he decides on the price that he thinks can get the best market.

Q. The composer, then, has nothing to do with the price that he gets for his sheet music? You want to go on record as saying that?

A. I wouldn't say that he has nothing to do with it. Of course he is consulted. I happen to be a writer of books also, and I am consulted by my publishers; but if they think [fol. 1128] that it will bring two dollars, that is the price, although I think the proper price should be one dollar and I know I will not get as much by pricing it at two.

Q. So you do sit down and work it out with your publisher?

A. That is stating it a little too broadly. My publisher says, "I think we can sell this for such and such a price," and I agree.

Q. What way do you have of checking with your publisher the number of copies he has sold?

A. I have no way at all.

Q. Except his records?

A. I have to take my publishers word for it. If I thought a clerical error had occurred I should think that was justification for examining his records. I have no reason for thinking that a music publisher has falsified his records. He is doing the clerical work that I haven't the time to do or the facilities for doing.

Q. ASCAP doesn't do that for you?

A. With regard to performing rights.

Q. As to your publisher?

A. ASCAP is not interested in sheet music returns; that is my problem.

Q. You and your publisher?

[fol. 1129] A. Yes.

Q. About what is the division that you have on sheet music with the publisher, between yourselves; what is the relative division of the price?

A. A song that will sell at wholesale for perhaps twelve or fifteen or perhaps twenty cents—I don't know if it goes as high as that—my share is three cents if I have done the words alone, the publisher carrying the expense of printing, exploitation, cover design, and promotion in general.

Q. What is the biggest source of income of ASCAP? What is its biggest source of income? I want to know what you know about that as a member.

A. I have never inquired into that, but it is my assumption that radio contributes the largest sum to the income of ASCAP.

Q. Do you know how much it is annually?

A. No, I do not. I had some figures on that a year or so ago. I referred to them in some lecture, but I haven't them now.

Q. Do you know what the total income of ASCAP is annually?

A. I know it has risen gradually. I know it passed the [fol. 1130] three million mark, and it may have risen to four.

Q. Where are the publishers of music located, largely; in what part of the United States?

A. New York is the chief center.

Q. Do you know of any large publishing house that is not a member of ASCAP?

Mr. Finkelstein: I object to that; it has already been asked and answered.

A. I will be glad to answer the question again, because I happen to know of a great many so-called publishers. In the music industry they are known as "song sharks". They publish a great many compositions. I know of one that has 80,000 clients, for each of whom they have pub-

lished one piece, which has been entered by the United States Government at Washington. These so-called sharks are constantly offering to radio stations; they are trying to do what a regular composer finds it impossible to do; they make claims which are absurd.

Q. Claims of what?

A. Claiming to be publishers and distributors. I think it has been proven that they collected a million dollars from amateurs, obtaining money from gullible amateurs. I have been fighting against these song sharks, but I know from my contacts with that business, if you can call it a busi- [fol. 1131] ness, that there are thousands of compositions published and copyrighted every year outside of ASCAP, and if one such concern actually has 80,000 clients, which I believe is true, that concern might be called a larger publisher than anyone in ASCAP at the moment.

Q. Is there any merit to the publications of an organization such as you have mentioned, that makes fools out of people?

A. There is occasionally.

Q. By accident somebody will have something meritorious?

A. In fact, many songs do not arrive at publication which undoubtedly are worthy.

Q. The thing that I am trying to bring out, Doctor, is that the substantial number of all of the publishing music houses, that is, publishing houses that put out vocal and instrumental music, are members of the ASCAP organization.

A. I would say that a substantial amount of this popular music of commercial value is controlled by ASCAP.

Q. That is all for that. How do you pay this ten dollars to ASCAP, this membership fee? Do they bill you for it and you send them a check for $10, or do they just take it, deduct it?

A. I get a bill and I send a check.

Q. And you send a check in?

[fol. 1132] A. That is the way it has always been done. I have never known of any deduction, so far as I know, and I always paid my dues regularly.

Q. Buck, Mills and Paine are paid salaries, are they not?

A. My impression is that they are. I can't imagine anyone doing that amount of work——

Q. —for nothing. Do you know what Mr. Buck's salary is?

A. No, I do not.

Q. Do you know what Mr. Mills' salary is?

A. I do not know what any of those salaries are.

Q. Nor Mr. Paine?

A. No.

Q. Is Mr. Mills a composer, writer or author?

A. I don't know him in that way.

Q. Is that true of Mr. Paine, that he is not an author, composer or writer?

A. They have both been connected with publishing members, I am sure.

Q. I am getting at whether they are publisher members?

A. No.

Q. Nor composer members?

A. No.

[fol. 1133] Q. I think Mr. Buck claims to have written compositions?

A. Buck is definitely a composer and writer. He did a great deal of work.

Q. How many years has it been since he did anything?

A. Buck's most recent writings have been largely for the Dutch Treat Club. He may have done things for professional shows. He was always one of the leading writers for Ziegfeld Follies. I know that Buck worked for the Society for several years without a cent of salary; I remember an annual meeting at which it was talked about.

Q. Do you know whether Buck draws from the Society any income from public performance rights?

A. My feeling would be that if he has any compositions still protected by copyright he would have a perfect right to that. I don't know the circumstances.

Q. What was your answer?

A. My answer was that if he still has any productive work still protected by copyright, he draws royalties, and they were perfectly justified. Mr. Buck is in the double position of being a creative writer and also a salaried official.

Q. As I understand it now, as a member of that Society, who fixes the price, we will say, that the broadcasting stations, for example in the State of Nebraska, pay to ASCAP?

[fol. 1134] A. As I understand it, it is fixed by our board

of directors or some committee working for that special purpose.

Q. Is that true of all other users?

A. I think that is true. I don't think any one individual decides upon those rates. The rates are fixed after very careful examination. I know that in the case of motion picture theatres——

Q. That is all; you have answered the question. The point that I wanted to bring out further, Mr. Witness, is that they fix whatever charges or licenses that are collected for your music in the State of Nebraska.

A. It doesn't apply to me alone; the license is always a blanket license. Our committee, whatever it is, arrives at these rates through a careful examination of the profits made by the users in that locality; and it is definitely fixed in the case of a motion picture theatre by the number of seats in that theatre, something like one cent a seat.

Q. It happens to be ten cents.

Mr. Bennett: Ten or fifteen cents a year.

A. Per year? A ridiculously small sum; it is a very small sum, since they are so dependent on music. I thought it was a month.

Q. Doctor, do you know a definition, as applied let us [fol. 1135] say, to modern dance music, for such compositions as would be termed "popular" as distinguished from "standard"?

A. The distinction usually applied is that a popular work is transient or ephemeral, and a standard work is a lasting one. A popular work depends for its return upon a short and very happy life. A standard number depends on a long life, not necessarily so happy.

Q. Do you know of any popular music, now that you have given the definition, now in the public domain?

A. Yes.

Q. Give us some.

A. For example, all the songs of Stephen Foster; every song of Stephen Foster was written as a popular song.

Q. Under your definition would it not become standard now, under your definition?

A. It is still a popular song, however. Every popular song writer hopes that some of his popular songs will become standard in time.

Q. We are talking about today, Mr. Witness; we are talking about today. What I want you to answer, if you can, in the light of the definitions you have given, is, do you know of any popular, modern popular music that is in the public domain?

[fol. 1136] A. Yes; a very good example is the tune of "Loch Lomond" which is very popular at the moment, a tune in the public domain. The sheet music of it has been tremendously popular.

Q. Was that ever copyrighted?

A. It was a folk song. The sheet music was copyrighted only so far as the arrangement was concerned. Now, take the music of "Loch Lomond"——

Q. You have given that one. Any others?

A. Yes. I have mentioned Foster. I want to point out a specific song; the song of "Oh, Susanna" was a campaign song for the Republicans. Mr. Landon used that song. It achieved a new popularity and certainly arrived at a sale of sheet music as the result of that. It was a popular song.

Q. Then you say that all of Stephen Foster's songs are in the public domain?

A. Yes, they are all in the public domain.

Q. Have you ever taken it up with Mr. Buck? Do you think he would agree with you on that?

A. Yes. It is available to anybody, as Foster wrote it. The original publications, which are in the library at Pittsburgh at the Foster Memorial, are in there. Anybody can use it.

Q. Is that true of "Loch Lomond"?

A. Yes. There is a copy of "Loch Lomond" in prac-

[fol. 1137] tically every song book in the world. When a man makes an arrangement of it, that is copyrighted.

Q. When the public becomes acquainted with it, do they want the original melody or do they want the modern arrangement?

A. The public must have the combination of both. The original melody is a necessity as a basis for the variations that modern swing puts into that basis. The reason the old tunes are being dragged out is because not enough modern melodies are being brought out by our men, so they bring out the old tunes and arrange them effectively.

Q. So that those new arrangements are kept copyrighted?

A. Yes; and any arranger in a studio or motion picture

house or restaurant could take those tunes and make his own; and many of them do.

Q. ASCAP has a great amount of those copyrights under its control and supervision?

A. A very small percentage as compared with the original compositions which it controls.

Q. Give us some three or four outstanding musical compositions where the modern arrangement has been copyrighted and which otherwise were free but for that?

A. "Loch Lomond" is a very good example.

[fol. 1138] Q. That is copyrighted; that is, the modern arrangement is copyrighted?

A. "Loch Lomond", I don't know how many arrangements there are; "Loch Lomond" is open to unlimited arrangements. I used a negro spiritual, "Oh, Yes;" I arranged that myself; I get royalties on the arrangement. A tune recently declared in the public domain is "Home on The Range".

Q. That is what I want to get at. Why do you say it was declared in the public domain?

A. Because there was some argument as to its origin. It was proved to have been written in Colorado. There was some litigation which determined it was not an infringement.

Q. It was free?

A. It was an old cowboy song. It appears in the Rotary Song Book; they get credit for the arrangement.

Q. Their arrangement?

A. Yes. I think the first man who arranged "Home on The Range" was David Guion; I think he was the first man to arrange it. He also arranged "Turkey In The Straw;" that was another old arrangement; and "The Arkansaw Traveler".

Q. You have used an illustration, "Home On The Range." Can you give us, of your own knowledge, any useful arrangement of that song that is not copyrighted; do you have anything in mind?

[fol. 1139] A. Yes.

Q. What, for example? I mean useful for commercial practical use.

A. You will find "Home On The Range" printed, I think, in a number—at least a dozen—of song books of the general type which contain most of the public domain material—

in the Kiwanis and Rotary Song Books, and there is a book called "Everybody Sing".

Q. What I want you to exclude from your answer are those pieces of music that are in use for limited purposes. I want you to tell if you can those where there is a public performance right that is being collected upon. Can you tell any arrangement of "Home On The Range" where public performance rights are collectible, that is dedicated to the public domain, ordinarily would be collectible, I mean?

A. I believe there must be some such arrangements. The arrangement that occurs in a general song book. Of course, where there is a new arrangement, such arrangement is the property of the arrangers. It remains the property of the orchestra leaders. They are jealous of those properties.

Q. They are of some value to an orchestra leader in building up his music library?

A. Yes; they are very jealous of them. I can refer you to two articles which I wrote for Cosmopolitan. The article [fol. 1140] on "Jazz" sets forth that case very clearly. The leaders don't want it published. They hold onto it. It is their own manuscript.

Q. How are public performance rights handled in regard to such pieces?

A. There is no way to get them; they are carefully guarded. If anyone picked them up from a radio performance they would be sued immediately.

Q. Those orchestras and those people control their own public performance rights?

A. Yes, for their own pieces, for a limited number of pieces.

Q. Are there a large number of authors and composers that you know that are not members of ASCAP?

A. There are many. All these so-called would-be composers; of course, the country is full of those. The very fact that a composer must have five songs published before he can become a member holds the number down considerably.

Q. Before a person can get into ASCAP he has to have the approval of the Society's directors?

A. Any person who has had published five pieces of music by a recognized publisher, not privately, is eligible to ASCAP. The record is then examined, and if the pieces are either of a type that represents a popular commercial or

[fol. 1141] of a type that represents a musical value—and we have many such composers in ASCAP—then that person is elected to ASCAP.

Q. What do you mean by "recognized publisher"?

A. By "recognized publisher" I mean a publisher who does a legitimate business at a definite address and who brings out songs regularly, in fact, who maintains an office force and does business in a way that any reputable concern would. In other words, I can make myself a publisher by bringing out only one piece of music, but I wouldn't be a recognized publisher.

Q. Are there any recognized publishers that you know about that are not members of ASCAP?

A. There may be; I am not prepared to say.

Q. It would be the exception if there were?

Mr. Finkelstein: Objected to. There is no foundation for that.

Mr. Hotz: You qualified the witness as an expert.

A. I would have to go through the list; I would have to check it up.

Q. Have you a list of publisher members of ASCAP here? Otherwise I would be glad to furnish one.

A. Actually I think I have seen such a list.

[fol. 1142] Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do you know, Doctor, of any association of users of music?

A. The National Broadcasters Association.

Q. Do you know of any other association?

A. Well, there are all kinds of associations of theatrical managers and so on.

Mr. Nye: We object to that as immaterial.

Q. Do you know of any association of motion picture exhibitors?

Mr. Nye: That is objected to as immaterial.

A. Yes.

Q. Any dance hall association?

A. Yes.

Q. Do you know whether any of those associations ever negotiated with the Society with respect to rates?

Mr. Nye: Objected to as not within the knowledge of the witness.

A. I imagine that there was.
Q. Have you heard of the Hotelmen's Association?
A. I know there is such an association.

(Recess until 3:45 p. m.)

[fol. 1143] (Deposition of Edwin H. Morris.)

(After Recess.) 3 p. m.

Edwin H. Morris, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your name and address?
A. Edwin H. Morris, Oak Lane, Hummocks Road, Larchmont, New York.
Q. What is your occupation, Mr. Morris?
A. Music publisher.
Q. With what firm are you connected?
A. Harms.
Q. Harms Incorporated?
A. M. Witmark & Sons, Remick Music Corporation.
Q. How long have you been connected with those companies?
A. Since 1929.
Q. What is your official connection with the companies at this time?
A. Vice-President.
Q. Have you anything to do with the management of the business of those companies?
[fol. 1144] A. Yes, I manage the companies.
Q. How many years have you been engaged in the publishing business?
A. Approximately ten.
Q. Do you know the other publishers of music in the City of New York?
A. Yes, quite well.

Q. Have you an acquaintance among the authors and composers of music in the City of New York?

A. Yes.

Q. Your companies, are they members of the American Society of Composers, Authors and Publishers?

A. Yes.

Mr. Frohlich: Will it be stipulated that the contracts between Harms, Inc., Remick Music Corporation and M. Witmark & Sons and the American Society of Composers, Authors and Publishers are substantially identical with the contract, Exhibit 2?

Mr. Nye: The same in form and substance.

Mr. Frohlich: It is stipulated that the contracts between the members of the American Society of Composers, Authors and Publishers and the Society, including contracts [fol. 1145] of writers, and contracts of publishers, are substantially the same as the contract Exhibit 2 in evidence.

Q. Mr. Morris, where is the main office of Harms, Incorporated?

A. 1250 Sixth Avenue.

Q. Where is the main office of Witmark?

A. They are all the same.

Q. All the companies that you represent are located in the same place?

A. The same building.

Q. Are they occupying those offices under any leasehold?

A. Yes.

Q. Do you know how long a lease you have there?

A. Five years with an option for five more.

Q. What rental do you pay under that lease?

A. Do you want each company?

Q. Yes.

A. This is not accurate.

Q. Give us an approximate figure.

A. Approximately 12-5.

Q. For each company?

A. For all; I can't give you the separate amounts.

Q. $12,500 would cover the rental for all the companies?

[fol. 1146] A. Yes.

Q. Have you many employees?

A. Approximately fifty to sixty, that is in that particular division.

Q. Harms, Inc. is engaged in the business of publishing sheet music?

A. That is right.

Q. And has it specialized in any particular kind of sheet music?

A. For a number of years, production music, show music.

Q. What do you mean by production music?

A. Legitimate theatre.

Q. You mean that Harms, Inc. publishes musical compositions that are contained in musical shows that are produced upon the spoken stage?

A. Musical shows, that is right.

Q. Is M. Witmark & Sons specializing in the same kind of music business?

A. No, not in recent years; popular and picture compositions.

Q. Did they formerly specialize in production music?

A. In former years, some years back.

Q. What kind of music business does Remick Music Corporation do?

A. Popular and some picture.

[fol. 1147] Q. Have you a form of contract which is typical of the contract entered into between Harms, Inc. and its writers and composers for its production music?

A. I think I have.

Q. Will you be kind enough to produce that contract?

A. Here are two contracts, one for Lew Fields and Vincent Youmans (producing papers).

Mr. Frohlich: I offer them in evidence.

(The papers just offered in evidence were marked Plaintiffs' Exhibit No. 15, of this date.)

Q. Have you another form of contract between Harms and a composer or writer?

A. Yes; George Gershwin (producing paper).

Q. Is this all one contract?

A. And Cole Porter.

Q. You have produced a contract between Harms and George Gershwin and a contract between Harms and Cole Porter?

A. Yes.

Mr. Frohlich: I offer them in evidence.

Mr. Nye: I object to the materiality of these exhibits.

(The papers just offered in evidence were marked respectively Plaintiffs' Exhibit No. 16, and Plaintiffs' Ex-
[fol. 1148] hibit No. 17, of this date.)

Mr. Frohlich: May we be permitted to make photostatic copies and to include the copies in the record in place of the originals, with the same force and effect as the originals?

Mr. Nye: Yes.

Q. Will you outline very briefly to us, Mr. Morris, the procedure followed by Harms, Inc. in arranging for the publication of sheet music pursuant to a contract such as the contracts that have just been received in evidence; what is done?

A. The composer submits a number for publication. If it is acceptable it is published in regular sheet music form, and if we intend to exploit it to any degree it is necessary to have dance orchestrations and vocal orchestrations. That about covers the material necessary.

Q. Is it customary for Harms Inc. to copyright its musical compositions as unpublished works or as published works?

A. I am a little confused on that. I believe we follow both practices.

Q. Is there any set practice on it?

A. Maybe you can clarify that a little more.

[fol. 1149] Q. Do you frequently or do you at all, after you have obtained the rights of a composition from the author or composer, refrain from publication by registering such composition for copyright under section 11?

A. Quite frequently. If it is our intention to publish we send a manuscript.

Q. When you thereafter publish the composition then you copyright it as a published work?

A. Yes.

Q. Is there any particular reason why Harms, Inc. sometimes copyrights a work as an unpublished work instead of a published work?

A. Yes; so as to protect the composer as well as ourselves.

Q. Is it done in order to keep the publication from interfering with any other rights in the composition?

A. I don't quite understand that.

Q. Well, now, your company specializes in production numbers. When a production is on the stage it appears in the production, the particular composition to which you have obtained the rights from the author and composer; is it desirable from any financial or business point of view to permit the composition to be played on the stage before the composition is sold to the general public?

A. I haven't had much experience with shows. That is [fol. 1150] a field I haven't handled. Mr. Max Dreyfus handled that.

Q. Is it the practice of Harms, Inc. on occasion to restrict musical compositions?

A. It has been, yes.

Q. What compositions are restricted by it?

A. At the moment?

Q. At the moment.

A. Very few at the moment; in the past there was quite some number.

Q. What compositions were restricted?

A. "Rhapsody In Blue"; a good many of the productions such as "No, No, Nanette," "Hit the Deck," "Scandals", and numerous other musical comedies.

Q. For how long a period were some of these compositions restricted?

A. A number of them were on the Society's restricted list for several years.

Q. Was there any particular reason for restricting those compositions?

Mr. Nye: I object to that as calling for speculation.

Q. Does the restriction of a composition bear any relation to the performance of the number on the stage or in a motion picture?

[fol. 1151] Mr. Nye: I object to the question as calling for a conclusion.

Q. Is there any relation between those two things?

A. No.

Q. So you can't tell us why you restrict these compositions?

A. Yes, I can tell you.

Q. Why?

Mr. Nye: Objected to as calling for a conclusion.

A. Most of the producers request that numbers be restricted so that it won't in any way injure the musical play during its run, and I believe in some of the agreements it is stipulated that the right of restriction rests with the producer.

Q. If the particular number so restricted were played, were open to the public and could be performed on the radio and in hotels and elsewhere, would that affect the life or value of the composition in the production or in the picture?

A. Yes, I believe it would; it would shorten the life.

Q. It would shorten the life of the production or the picture?

A. Yes.

Mr. Nye: Give me an objection before that last answer; [fol. 1152] calls for a conclusion and opinion, without foundation.

Q. Do you know how much money is invested in these musical productions—the average musical production that is put on as a musical?

Mr. Nye: No foundation; calling for a conclusion and speculation.

A. I can give you one specific play that I happen to know about, "Fifty Million Frenchmen", approximately $275,000.

Q. Who produced that play?

A. Getz.

Q. E. Ray?

A. Yes.

Q. Did that play contain any songs published by Harms Incorporated?

A. It did.

Q. What were the names of the songs?

A. I will have to refresh my memory. I may get a little help from the boys here if they can remember it. It is very difficult to remember titles.

Q. Were any numbers restricted by Harms, Inc.?

A. The entire score was restricted during the run.

Q. That was restricted during the full run of the play in New York?

[fol. 1153] A. Yes.

Q. Did I understand you to testify that you came to Harms, Inc. about ten years ago?

A. Approximately nine or ten years ago.

Q. Approximately at that time can you remember the names of any outstanding hits that were published by Harms Inc.?

A. I would much prefer to use one of the other companies which I am much more familiar with.

Q. Which company are you much more familiar with?

A. Witmark at that time.

Q. Can you tell us what outstanding hits were published by M. Witmark & Sons?

A. During the first year I remember "Tiptoe Through The Tulips," "Painting The Clouds With Sunshine," "Song of The Nile."

Q. How many copies of the sheet music of those songs were sold, if you know?

A. In the case of "Tiptoe", approximately 650,000; "Painting the Clouds," 700,000; "Song of the Nile", about 450,000.

Q. Can you tell us the names of any recent hit songs published by M. Witmark & Sons?

A. "Vini Vini."

Q. Is that an outstanding popular hit?

[fol. 1154] A. Yes.

Q. And about how long ago was that published?

A. About six months ago.

Q. Can you tell us approximately the number of copies of sheet music that were published?

A. About 45,000.

Q. Does that represent about tops in the sale of sheet music today?

A. Pretty near; there are occasionally hits that may run more, but that is about it.

Q. Has Harms, Inc. or Witmark or Remick sold any millions of copies of any composition in the last five years?

A. There hasn't been any of those since I have been in the business.

Q. What is the life of a hit song today.

A. Depending on the type, from six to ten weeks.

Q. What was the life of a hit song published ten years ago, published by one of your companies?

A. Six months.

Q. In your contracts with composers and writers do you undertake to pay them a percentage of the moneys received from the manufacture and sale of mechanical reproductions of their compositions?

A. Yes, we do.

[fol. 1155] Q. Has that been the practice in all of your contracts over the years?

A. Yes.

Q. Do you have any contracts with any composer or writer under which you undertake to pay such writer or composer for any public performance for profit of their composition?

A. No.

Mr. Nye: I object to the question as calling for a conclusion.

Q. Your companies own the copyrights of the compositions published by them?

A. Yes, that is right.

Q. Do they license manufacturers of piano rolls and disk records to mechanically reproduce the compositions, under written contract?

A. Yes.

Q. Have you with you any form of contract?

A. I don't know whether I have that or not. No, I have not.

Mr. Nye: We will stipulate that it is the same in substance, if it is. Let him look at it (handing paper to the witness).

The Witness: That is the same.

Mr. Frohlich: It is stipulated that the mechanical repro-

[fol. 1156] duction contracts issued by Harms, Inc., Remick and M. Witmark & Sons, are substantially identical with Plaintiffs' Exhibit 12.

Mr. Nye: We agree to that, in substance.

Q. Under your contracts with mechanical companies do you reserve any control over the sale of the records and piano rolls by those companies, in the State of Nebraska?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, the contract calls for what we call home consumption.

Q. Are these companies permitted to sell these disks in the State of Nebraska and in other States of the Union?

A. Yes, every State.

Q. You don't appoint these companies as your agents to fix the price or collect any moneys for you on any rights in connection with the public performance for profit of those compositions, do you?

A. No, we do not.

Q. Would you be willing to permit those companies to fix a price and to collect any moneys for you for the public performance for profit of these compositions within the State of Nebraska?

[fol. 1157] Mr. Nye: Objected to as calling for a conclusion and speculation.

A. No.

Q. Let me read to you a section of the Nebraska law which is at issue in this case (reading Section 2, subdivision "(A)" of Legislative Bill No. 478).

Now that I have read this section of the act to you, would you be able—when I say "you" I mean your companies, Mr. Morris—would you be able to determine and fix a price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska for all uses and purposes?

Mr. Nye: I object to the question as calling for conclusion, speculation; no foundation.

A. No.

Q. Have copies of your musical compositions been sold within the State of Nebraska over the years?

A. Yes.

Q. Have they been sold to jobbers and dealers within that State?

A. Yes.

Q. Do any of your companies have any branch offices in the State of Nebraska?

A. No.

[fol. 1158] Q. Now, the copies of the compositions that were sold to dealers and jobbers in the State of Nebraska are now property of the dealers and jobbers?

A. Yes.

Q. Have you any control over them or can you demand them back?

Mr. Nye: Objected to as calling for a conclusion.

A. No.

Q. If you were to determine and fix the price to be charged for the public performance for profit of your copyrighted musical compositions within the State of Nebraska, what factors would you have to take into consideration?

Mr. Nye: Objected to as calling for speculation.

A. Well, the number of licenses.

Q. Assuming that there are 367 establishments in the State of Nebraska that use music, copyrighted musical compositions published by your firm, how would you go about it to determine what price each of those 367 establishments would have to pay you on each one of your compositions for public performance for profit?

Mr. Nye: Objected to as calling for speculation.

[fol. 1159] A. I wouldn't know how to go about it.

Q. Would you be able to fix at this time the price for the television rights of any of your compositions within the State of Nebraska?

Mr. Nye: Objected to as calling for speculation; wholly immaterial.

A. No.

Q. Have you any data or information in your possession now from which you can determine the value of any composition published by you with respect to the television rights within the next twenty-eight years to come?

A. No, I have not.

Q. Have you any facilities now that would help you to ascertain in which of the establishments in Nebraska your music is being used without the payment of any license fee?

A. No.

Q. Would you have to employ anybody for that purpose if you wanted to obtain that information?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, we would.

Q. Suppose you wanted to determine what establishments were correctly playing your music copyrighted by [fol. 1160] you and what establishments were infringing on your music, how would you go about it?

Mr. Nye: Objected to as calling for a conclusion.

A. I would have to employ people and send them all over the State of Nebraska.

Q. Would you have to employ a lawyer to bring suits for infringement where there were infringements?

Mr. Nye: Objected to as calling for speculation.

A. Yes.

Q. Would the people that you would employ for the detecting of infringement have to be skilled in music?

A. They would have to be experienced in our business.

Q. Are you familiar with salaries paid to people who are skilled in music?

A. In what vocation, what type of work?

Q. For the purpose of investigating?

A. No. I assume any men in that field would be all right.

Mr. Nye: I move to strike out the answer except the word "No".

Q. You said you would have to have a staff of people in Nebraska. Does it mean that you would have to have an office there?

[fol. 1161] Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Can you give me an estimate of what it would cost to employ a staff of clerical help and attorneys to protect your rights within that State?

Mr. Nye: I object to the question; no foundation laid for the witness's knowledge; also calling for a conclusion.

A. I could not determine what the lawyers' fees would be, but we would undoubtedly have to spend a substantial amount of money, a great deal more than we could afford, for that service.

Mr. Nye: I move to strike out the answer as not responsive.

Q. Can you give us an idea in dollars and cents?

A. We will estimate that we would put on one man in charge at $5,000 a year,——

Mr. Nye: I move to strike out the answer.

A. (continued) —and clerical help.

Mr. Nye: I move to strike out the answer; assumes facts not in evidence; it being clear that the witness is speculating and is not expressing an opinion on any reasonable foundation therefor.

[fol. 1162] Q. Would you have to engage an office down there?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes, we would have to open quarters there.
Q. Would you have to put some men there?
A. Yes.
Q. Would you have to pay rent?
A. Yes.
Q. Would you have to pay the salary of the man in charge?
A. Yes.
Q. How much do you think you would have to pay?

Mr. Nye: I object to the question as calling for the expression of opinion without proper foundation.

A. Based on present salaries paid men doing the same type of work for the Society, I assume at least $5,000.
Q. Your firm has had experience over the past twenty years with attorneys in New York in trying infringement cases on copyright work?
A. Yes.
Q. You are familiar with the fees paid those attorneys?
A. Since I have been in the business.
Q. For ten years?
[fol. 1163] A. Yes.
Q. What would it cost you to employ a lawyer skilled in copyright law to bring infringement suits down there?

Mr. Nye: Objected to as calling for a conclusion; no foundation being laid for the witness's knowledge.

A. I don't know the lawyers in Nebraska very well. It is pretty hard to give you a figure down there.
Q. If you were to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the State of Nebraska, at the time copies of your compositions were first sold in that State, would you be able at this time to fix in advance a price ade-

quate and fair to you and to the user for the full period of the copyright?

Mr. Nye: Objected to as calling for a conclusion; speculation; no foundation having been laid.

A. I don't think we could do it.

Mr. Nye: I move to strike out the answer for the reason that it is clearly based on speculation and not on knowledge.

Q. Could you determine at the time that you first sold a copy of a composition in the State of Nebraska what the [fol. 1164] vogue and popularity of that number would be in the future?

Mr. Nye: Objected to as calling for a conclusion.

A. No.

Q. Does it take a considerable period of time to find out whether a composition has any popularity or becomes valuable to the user?

A. A composition can become popular, depending on the nature of the composition, in a few months or a few weeks in some cases, but as to the value for the future that as very difficult to determine, as to whether it will have any lasting value.

Q. Would the size of the establishment in which your composition is to be played in the State of Nebraska have anything to do with the price to be charged for the public performance for profit of your composition?

Mr. Nye: Objected to as calling for a conclusion.

A. Yes.

Q. Would the size of the audience reached have something to do with it?

A. Yes.

Q. Would the extent of the use have something to do [fol. 1165] with it?

A. Yes.

Q. Would the nature of the establishment have something to do with it?

A. Yes.

Q. Would the profits made by the establishment have something to do with it?

A. Yes.

Mr. Nye: I object to all these questions as extremely leading.

Q. Would these factors that I have just mentioned vary from week to week?

Mr. Nye: Objected to as calling for a conclusion and speculation.

A. Yes.

Mr. Nye: And leading.

Q. Do your companies participate in the royalties paid by the Society each year?

A. Yes.

Q. What royalties did they receive from the Society in the year 1935?

A. Just a moment. M. Witmark & Sons, $30,716; Remick, $67,108; Harms, $94,615.

Q. What moneys did they receive in 1936?

[fol. 1166] A. Witmark, $42,275; Remick, $35,008; Harms, $50,545.

Q. What moneys did they receive in 1937?

A. Witmark, $89,843; Remick, $75,413; Harms, $137,358.

Q. Do you consider your contracts between Harms, Remick and Witmark and the Society valuable to you?

Mr. Nye: Objected to as calling for opinion.

A. Yes, we do.

Q. What do you value those contracts at in dollars and cents?

Mr. Nye: Objected to as calling for a conclusion and speculation, without foundation.

A. Just how do you mean?

Q. In dollars and cents; what are your contracts worth, with the Society?

A. A great deal, an immense amount; I can't give you an exact figure; it would be speculation.

Q. Are they important to your business?

Mr. Nye: Same objection.

A. They are the life of our business.

Q. Without those contracts could your company stay in business?

Mr. Nye: Same objection.

A. It would be the difference between staying in business [fol. 1167] and going out of business.

Q. Are those contracts the chief source of your revenue today?

A. Yes.

Q. Are you willing to have those contracts with the Society declared invalid?

Mr. Nye: Objected to as calling for a conclusion; immaterial.

A. No.

Q. Does Harms, Inc. publish a catalogue of its compositions?

A. Yes, we do.

Q. Have you brought such a catalogue with you?

A. No, I have not.

Q. Does Witmark publish a catalogue?

A. Yes, all these companies have catalogues.

Q. You haven't got them with you?

A. No.

Q. When did Harms become a member of the Society, do you know?

A. In 1914.

Q. When did Witmark become a member?

A. 1914.

Q. When did Remick become a member?

[fol. 1168] A. I am not certain of that date; I think it was the same.

Q. Do you know of your own knowledge prior to 1914 if either of those companies ever received from any source whatever any moneys for public performance for profit of the compositions published by them?

A. No, they did not.

Mr. Frohlich: Your witness.

Cross-examination.

By Mr. Bennett:

Q. Mr. Morris, I think you said you were a director of the American Society of Composers, Authors and Publishers?

A. That is right.

Q. Are you a member of any of the committees of the Society?

A. No, I am not.

Q. How long have you been a director?

A. About five years.

Q. I notice in giving the income you received from the Society in 1935, 1936 and 1937, there is a very marked discrepancy between the figures of 1935 and 1936. Can you explain the reason for that?

A. Our companies withdrew from ASCAP at the end of 1935 in an effort to set up our own performing rights bureau.

Q. When you say "our companies" you mean Witmark, [fol. 1169] Remick and Harms?

A. Yes.

Q. Who owns those companies?

A. Warner Brothers Pictures.

Q. What other companies does Warner Brothers own?

A. We have some other companies that are subsidiaries, such as New World, T. B. Harms, Shubert—that is about all I think of.

Q. Were those companies all members of ASCAP prior to January 1, 1936?

A. Yes.

Q. Did they withdraw from ASCAP?

A. Yes.

Q. Do you know the total amount of money paid to all of the Warner companies, the Warner owned companies, by ASCAP during 1935?

A. Approximately $300,000.

Q. When did you give notice that you were going to withdraw from ASCAP?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. Probably in November of that year; I didn't handle it so I can't give you definite dates on that.

Q. Did you have anything to do with the other Warner-[fol. 1170] owned companies other than those three other subsidiaries?

A. Yes.

Q. You handled those along with Witmark, Remick and Harms?

A. Yes.

Q. What are your duties as Vice-President?

A. Selection of songs for publication, contact between the New York office and the studio and the engaging of writers, and the general overseeing of what we call the professional department, people to exploit the songs and the sales, and of course my duties *as* ASCAP as director.

Q. You said that part of your duties are sales?

A. That is right.

Q. Will you state approximately the gross amount of sheet music sales by Warner Bros. subsidiaries for the first six months of 1935?

A. I don't have those figures.

Q. Can you approximate it?

A. No, I couldn't even hazard a guess.

Q. Can I refresh your recollection?

A. You may.

Q. Suppose I tell you that your first six months sales were $585,000 for 1935?

Mr. Finkelstein: I object to the entire testimony as [fol. 1171] being incompetent, irrelevant and immaterial, not within the issues.

A. I just couldn't tell whether that figure is anywhere near the right amount at that time.

Q. You are in charge of sales?

A. No, general supervision. Our sales are broken down in accordance with types of merchandise.

Q. Can you state approximately what your sheet music amounted to for any of the companies, either Witmark, Harms or Remick?

A. For each period?

Q. Yes.

A. No, I could not.

Q. Can you state the amount of your sheet music sales for the first six months of 1936, for those companies?

Mr. Finkelstein: Same objection.

A. For 1936? No.

Q. Can I refresh your recollection on that?

A. Yes.

Q. If I told you it was $140,000 approximately, does that help you?

A. No.

Q. Don't you know as a matter of fact that your sheet music sales in the first six months of 1936 materially de-
[fol. 1172] creased?

A. Yes.

Q. Don't you know approximately how much that decrease was?

A. No.

Q. You don't know that it was 75 or 50 per cent of what it was the preceding year?

Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial; the witness has already answered and said he does not know.

A. No, I do not.

Q. Your records will show that, will they not?

A. Yes.

Q. Your records will show the amount of sheet music sales?

A. Yes.

Q. Can you ascertain that figure by calling your bookkeeping department or whatever department has charge of your records?

A. Yes, I believe I could.

Q. Will you do that?

A. Yes. Do you want me to get it afterwards or now?

(Discussion off the record.)

Q. Mr. Morris, on January 1, 1936, what did the music
[fol. 1173] companies that you represent do with respect to selling licenses for public performance for profit of their copyrighted works?

A. I can't give you much information there because I did not handle it and had nothing to do with it.

Q. You don't know?

A. I have a very vague idea.

Q. You don't know how many licenses were issued for the Warner Bros. music companies?

A. No, I do not.

Q. Do you know the amount of license fees?

A. That we collected?

Q. That you collected?

A. No, I couldn't tell you that.

Q. Prior to the withdrawing from the Society you made surveys, did you not, to determine the ratio of the perform-

ances of Warner compositions with respect to the entire ASCAP catalogue?

A. Yes, that was done.

Q. Will you state approximately the ratio between Warner Brothers companies' performances and ASCAP as a whole?

A. I believe there were around 20 or 22 per cent.

Q. Are you talking about performance or the ratio of [fol. 1174] income received by the Warner group from ASCAP?

A. The performance as I remember it.

Q. Don't you know that checks made at that time showed between 30 and 40 per cent?

A. No, I do not.

Q. When did Warner Brothers subsidiaries return to ASCAP, re-enter as members?

A. July of 1936.

Q. Why?

Mr. Finkelstein: Objected to as calling for speculation; hypothetical; incompetent, irrelevant and immaterial to the issues.

Mr. Bennett: The witness is an official of the companies and has testified that he handled various phases and supervised various phases of the business; that he is a director of ASCAP, has been for the last five years, and it must be within his knowledge as to why they returned to the Society.

A. Mr. Warner made that decision. He decided that the method that we had undertaken was not practical or good business.

Q. What do you mean by "good business"?

A. The fact that he could not make it a paying proposition.

[fol. 1175] Q. You mean you couldn't make it a paying proposition as a non-member of ASCAP?

A. I don't believe that entered into it, as I remember; simply that the expense of contacting licensees and the local expenses that were incurred because of the infringements made it physically and financially almost impossible.

Q. What was the ratio of performances of Warner copyrighted music during the first six months of 1936 as compared with prior years?

A. During the period that we had withdrawn from the Society?

A. Q. Yes.

A. Very small, I think. I don't know what it was.

Q. To what do you attribute the smallness, when you say it was used from 20 to 22 per cent prior to January 1, 1936?

Mr. Finkelstein: Objected to as hypothetical and speculative; no proper foundation; incompetent, irrelevant and immaterial.

A. The terms that were asked were not agreeable to the radio people.

Q. You mean by that you could not sell licenses to perform, is that it?

A. Not at the fees we were asking.

Q. Do you know what fees you were asking?

[fol. 1176] A. No, that I am not familiar with, although in general I know we wanted considerably more money than we had been getting.

Q. Will you state whether ASCAP commencing January 1, 1936, reduced its license fees to licensees in proportion to the amount of copyrights withdrawn by Warner Bros. when they left the Society?

Mr. Finkelstein: I objected to the question on the ground that it is incompetent, irrelevant and immaterial, on the ground that this man was not connected with the Society in January 1936 and there is nothing to show that he has any knowledge of what ASCAP did in that respect, and no proper foundation.

Mr. Bennett: He was a director at the time.

A. There has been so much talk back and forth, that I want to get it straight. I was not a director in January 1936.

Q. You were in December 31, 1935?

A. No, not during the last two months; I had been replaced by Mr. Herman Starr.

Q. Do you know whether the fees of ASCAP to the licensees were reduced by reason of the loss of the Warner copyrights?

[fol. 1177] A. I don't know what they did.

Q. You really don't know?

A. No.

Q. Don't you know as a fact that ASCAP refused to reduce the fees?

Mr. Finkelstein: I object to that on the ground it has already been answered, and on all the other grounds heretofore stated.

A. No, I do not.

Q. Have you gained that knowledge since you again became a director of ASCAP?

A. There has never been any discussion on the point.

Q. Please answer yes or no. Have you gained that knowledge?

A. No.

Q. You never heard that ASCAP refused to reduce its fees to compensate for the loss of the Warner copyrights to its licensees?

A. No.

Q. Approximately how many copyrights are owned by each one of the Warner subsidiaries, owned by you?

A. Each one or the total?

Q. You may give the total for the whole group, if you wish.

[fol. 1178] A. I would say more than six thousand; how many more than that I don't know; I don't know the exact amount.

Q. Mr. Morris, do you know of any publishers regularly engaged in the music publishing business who are not members of ASCAP?

A. I know of one or two publishers that handle catalogues. I do not consider them in the publishing business of the same nature that we are.

Q. Do you know of any reputable publishers that are not members of ASCAP?

A. No, I do not.

Q. Would you say then that substantially all of the publishers regularly engaged in sheet music publication and sales are members of ASCAP?

A. I believe so.

Q. Do you know whether the publishers regularly maintain lists of their copyrighted compositions similar to the catalogues that you have?

A. No, I don't believe they do.

Q. Is it the practice of most of them to maintain such catalogues?

A. I don't believe so.

Q. Are your catalogues complete; that is, do they contain all of the copyrights which are owned by the respective [fol. 1179] companies?

A. I believe so.

Q. Now, in connection with your sales of sheet music, referring back to that fact a moment, do you compete with other publishers in exploiting and selling your sheet music?

A. No.

Q. Why do you say you do not compete?

A. Well, we are dealing with copyrights and we are the only ones having that particular song, that composition.

Q. Do you maintain a staff for the purpose of exploiting?

A. Yes.

Q. If you did not exploit by plugging, as it is called, what would happen to your compositions?

Mr. Finkelstein: Objected to as speculation.

A. I don't know; I have never tried.

Q. Why do you do it?

A. Because I believe it is a proper method of conducting our business.

Q. Isn't it a basis for advertising your wares?

A. It is a basis of selling.

Q. If there is no competition then you don't need to exercise any ingenuity for selling?

[fol. 1180] A. How can we bring it to public attention if we do not take it around and show it?

Q. Q. Surely, unless you are competing with one of the others or many of the other publishers the public would come to you?

Mr. Finkelstein: Objected to as improper in form, arguing with the witness; speculation.

A. I don't believe so.

Q. Then as a matter of fact you are competing with the other publishers of sheet music?

Mr. Finkelstein: Same objection.

A. No, I don't believe that.

Q. Mr. Morris, as director of the sales isn't it your duty to see that the purchaser of music purchases copyrighted compositions owned by your companies in preference to buying compositions of some other publishers?

A. No, that has no function with selling; that is no part

of the duty of the sales manager or anyone directing sales. We are selling "Vini Vini", and some one else is selling "Love Walked In". The public can buy them both so far as we are concerned. We don't care. Because we are the only publishers of "Vini Vini".

Q. But you make an effort to have "Vini Vini" put on the program to the exclusion of some other composition [fol. 1181] owned by someone else, isn't that true?

A. We don't work on that basis. We simply try to get our number on. We want our number heard.

Q. If your number is on, then that excludes necessarily someone else's number at that particular time?

Mr. Finkelstein: Objected to as argumentative, hypothetical, speculative.

A. An orchestra leader can only play so many numbers on a program.

Q. Who fixes the price at which the performance rights for the copyrighted compositions owned by your companies are made available to users of music?

A. The administrative committee, I believe, of the Society. You are talking about performance rights, public performance rights?

Q. That is right. You are talking about the American Society of Composers, Authors and Publishers?

A. That is right.

Q. From your experience as a music publisher and as a member and director of the American Society, will you state whether it is not a fact that approximately ninety per cent of the usable music, commercially usable music, is copyrighted and covered by the Society's license?

Mr. Finkelstein: Objected to; no proper foundation; noth- [fol. 1182] ing shown that the witness knows anything about it; has not been qualified; and incompetent, irrelevant and immaterial to the issues.

A. There are many compositions that are not the property of the American Society, such as Associated Publishers and people like that.

Q. That doesn't answer the question. (The pending question was read by the stenographer.) I will say, commercially usable music for public performance for profit.

A. I am not an expert on that; I can't answer that.

Q. You testified that all of the reputable musical pub-

lishers regularly engaged in the music business are members of the Society. Who as a practice owns the copyrights of musical compositions?

A. The publisher.

Q. Does that help you to answer the question propounded?

Mr. Finkelstein: Same objection.

A. I understand what you want. The only thing is, there are many compositions throughout the country by different people that I don't know anything about.

Q. I am talking about commercially usable copyrighted music.

A. That is what makes it difficult; I don't know.

[fol. 1183] Mr. Finkelstein: I object to the form of the question, misleading.

Q. Let me state it this way, then. What percentage of the copyrighted music comes under the ASCAP license today? When I say today I mean at the present time.

A. Copyrighted music?

Q. Yes.

A. I haven't the faintest idea.

Q. What would be your best opinion?

Mr. Finkelstein: I object to the question as calling for speculation, hypothetical, witness has already answered it; incompetent, irrelevant and immaterial.

A. I can't give you any more information; I don't know.

Q. Would you say that there was 90 per cent, or that that is too much or too little.

Mr. Finkelstein: Same objection, and on the further ground that counsel is attempting to compel the witness to answer something that he has already answered.

A. I couldn't fix it, Mr. Bennett.

Q. What percentage do the catalogues of your particular companies bear to the whole of ASCAP music?

A. That I don't know. The total number of copyrights?

[fol. 1184] Q. Approximately.

A. I haven't any idea.

Q. As a director of ASCAP you know the method by which royalties are divided amongst the members?

A. Yes.

Q. Is it not a fact that one of the things taken into consideration in the distribution of the royalties is the number of copyrights?

A. Yes, that is true.

Q. In respect to the income, then, the ratio of the amount received by you and the other members of ASCAP, what would you say that the total of your copyrights bears to the total? You must have that knowledge.

Mr. Finkelstein: No foundation laid for the question; incompetent, irrelevant and immaterial.

A. I can't measure the copyrights that way.

Q. Would you say it was ten per cent?

A. I couldn't say.

Q. Fifteen?

A. I haven't the slightest idea.

Mr. Finkelstein: Same objection.

Q. Mr. Morris, who receives the highest amount from ASCAP of any of the publishing companies?

[fol. 1185] Mr. Finkelstein: Objected to as incompetent, irrelevant and immaterial.

A. I believe Harms, Inc.

Q. Do you know who receives the second highest?

Mr. Finkelstein: Same objection.

A. No, I don't know.

Mr. Bennett: That is all.

Q. Mr. Morris, have you received and do you now know the gross amount of sheet music in dollars sold by the Warner music subsidiaries during the first six months of 1935?

A. Yes.

Q. Will you state the amount?

A. $696,782.90.

Q. Do you know the gross amount sold by the same companies for the last six months of 1935?

A. $715,000.

Q. Now, will you state the gross amount of sheet music sales by those companies for the first six months of 1936, when the companies were not members of the American Society of Composers, Authors and Publishers?

A. $229,000 even.

Q. Will you state the date on which the companies re-
[fol. 1186] turned to membership in the Society?

A. July, 1936.

Q. Will you state the gross amount of sheet music sales for the last six months of 1936, during which period the companies were again members of the Society?

A. $616,000.

Mr. Bennett: That is all.

[fol. 1187] (Deposition of Ella Herbert Bartlett)

Buck v. Swanson.

1450 Broadway, New York, N. Y.,
May 25, 1938, 10 a. m.

Met pursuant to adjournment.

Appearance: as before.

Ella Herbert Bartlett, called as a witness on behalf of the plaintiffs, having been first duly sworn, did depose and say:

Direct examination.

By Mr. Frohlich:

Q. What is your full name and address?

A. Ella Herbert Bartlett, 116 East 68th Street, New York City.

Q. Mrs. Bartlett, are you the daughter of the late Victor Herbert?

A. I am.

Q. Have you any brothers or sisters?

A. I have a brother.

Q. What is his name?

A. Clifford Herbert.

[fol. 1188] Q. You and Clifford were the only children of Victor Herbert?

A. Yes, the only living ones.

Q. What was your father's occupation in his life time?

A. Composer, or shall I say musician.

Q. Is that everything that he did?

A. Composer, conductor; I suppose that about covers it.

Q. Did he follow the profession of composing music for many years?

A. Yes.

Q. Are you able to tell us, without looking at any list or document and without refreshing your recollection from any such list, the important works that your father composed?

A. The important operetta, do you mean?

Q. Yes.

A. "M'lle Modiste," "Red Mill", "Naughty Marietta," "Babes in Toyland," I am trying to remember——

Q. Would your recollection be refreshed if I show you a list of these works which appeared in your affidavit which you made in this case?

A. Yes.

Q. Will you look at this list (handing paper to the witness)?

[fol. 1189] A. Do you want the biggest ones?

Q. You may just look at this list.

A. "M'lle Modiste," "Naughty Marietta," "The Century Girl," "Old Dutch," "The Cinderella Man," "Prince Ananias," "The Wizard of the Nile," "Serenade," "Idol's Eye," "Cyrano de Bergerac," "The Answer," "Singing Girl," "Viceroy," "Dolly Dollars," "Babette," "Tattooed Man," "Wonderland," "It Happened in Nordland," "Song Birds," "Camille," "Prima Donna," "Red Mill," "Sweet Sixteen," "The Duchess," "Only Girl," "Princess Pat," "Enchantress," "Lady of the Slipper," "Velvet Lady," "Eileen," "The Debutante," "The Madcap Duchess," "Madeleine," "Natoma," "Sweethearts," "My Golden Girl," "Girl In The Spotlight," "Orange Blossom," "Dream Girl," "Angel Face," "Her Regiment," "Oui Madame,"

Q. Can you name a few of the shorter compositions that your father composed, or would it help you to refresh your recollection if I show you this list which I have?

A. It helps me. I know some of them.

Q. Will you please look at this list (handing paper to the witness)?

A. These are largely orchestral things, piano pieces and things of that kind: "The Whiteman Suite," "Suite Romantique," and "Suite Columbus." And then little in-

dividual numbers: "Fluerette," "Souvenir," "Sunset," "Devotion," "Dream On," "McKinley March," "22nd [fol. 1190] Regiment March," "The Irish Rhapsody," "Al Fresco," "Heart Throbs," "The Belle of Pittsburgh," "Badinage," "Indian Summer," "Pan Americana," "Yesterthoughts," "American Fantasie," "Valse a la Mode," "American Rose Waltz," "Christ is Risen," "Air de Ballet," "Woodland Fancies," "Punchinello," "Star Light Waltz," and "Forebodings." Of course, those are not complete.

Q. This is just a partial list of the works composed by your father?

A. Yes.

Q. Did these compositions which you have just mentioned, that is to say, the light operas, and operettas and musical comedies in the first group, and the shorter pieces in the second group, attain popularity and celebrity in their day?

A. Yes.

Q. Were they well known to the public?

A. Yes.

Q. Were any of these operettas that you mentioned in the first group successful operettas?

A. Yes, I would say most of them.

Q. Were they successful both financially and artistically?

A. Yes.

[fol. 1191] Q. Have you ever been in the State of Nebraska yourself?

A. No. I have been to California. Do you go through there then?

Q. No. Now, from time to time as your father composed these compositions and short compositions that you have mentioned, did he enter into contractual relations with music publishers for the publication of the sheet music of the compositions and of the scores of these operettas and musical comedies?

A. Yes.

Mr. Frohlich: We will offer in evidence as Plaintiff's Exhibit 19, an agreement between Victor Herbert and M. Witmark & Sons, dated June 8, 1910, a copy of which is annexed as Schedule VI to the affidavit of Ella Herbert Bartlett verified June 8, 1937, and submitted in support of the motion for temporary injunction.

Exhibit 20 is an agreement between Victor Herbert and M. Witmark & Sons dated April 2, 1914, a copy of which appears as Schedule VII annexed to said affidavit of Ella Herbert Bartlett.

Mr. Nye: We object to the two exhibits as immaterial.

[fol. 1192] Mr. Frohlich: Will you stipulate that copies of the two contracts just described and offered in evidence, which appear as Schedules VI and VII to said affidavit, are true and accurate copies of the original contracts? I make the statement that they are.

Mr. Nye: We so stipulate.

(The copies of the two contracts just offered in evidence as Plaintiffs' Exhibit No. 19 and Plaintiffs' Exhibit No. 20, were marked accordingly.)

Mr. Frohlich: It is stipulated that the following contracts are original contracts, objection as to foundation waived:

Plaintiffs' Exhibit 21-A. Agreement between Victor Herbert and M. Witmark & Sons, dated September 6, 1898, with respect to the comic opera "Fortune Teller."

Plaintiffs' Exhibit 21-B. Agreement dated April 9, 1905, between Victor Herbert and M. Witmark & Sons, relating to musical and dramatic composition entitled "M'lle Modiste."

Plaintiffs' Exhibit 21-C. Agreement dated October 23, [fol. 1193] 1906, between Victor Herbert and M. Witmark & Sons, relating to the musical play entitled, "The Red Mill."

Plaintiffs' Exhibit 21-D. Agreement dated March 27, 1903, between Victor Herbert and M. Witmark & Sons, relating to the musical and dramatic composition entitled "Babes In The Woods."

Plaintiffs' Exhibit 21-E. Agreement dated the 16th day of —, 1919, between Victor Herbert and T. B. Harms and Francis, Day & Hunter, relating to the musical composition tentatively entitled "Little Miss Wise."

Mr. Frohlich: I offer in evidence these five contracts just described as Plaintiffs' Exhibits 21-A to 21-E inclusive.

Mr. Nye: Objected to as to materiality.

(Copies of the documents just offered in evidence as Plaintiffs' Exhibit No. 21-A to Plaintiffs' Exhibit No. 21-E, consisting of five documents, were marked accordingly.)

Q. These seven contracts that have just been received or marked in evidence as Plaintiffs' Exhibits 19, 20, 21-A to 21-E, do they represent typical contracts that were made [fol. 1194] from time to time between your father and his various publishers?

A. Yes.

Q. You are familiar with the terms of all of these contracts, all of your father's contracts?

A. I am familiar with them.

Q. "The Red Mill" was a musical comedy, wasn't it?

A. Yes.

Q. And had a long and extended run?

A. Yes.

Q. This contract, Plaintiffs' Exhibit 21-E, which refers to "Little Miss Wise," was that a tentative title?

A. Yes.

Q. Was the play produced under this contract later?

A. Yes.

Q. What was the new title?

A. "Angel Face."

Q. This contract, Plaintiffs' Exhibit 21-D, which refers to "Babes In the Woods,"—was that a tentative title?

A. Yes.

Q. Was that title later changed?

A. Yes.

Q. What was the new title?

[fol. 1195] A. "Babes in Toyland."

Q. This play, "The Red Mill," that consisted of many musical parts, didn't it?

A. Yes.

Q. There were opening numbers and opening choruses and finales and ensemble numbers throughout the play, isn't that so?

A. Yes.

Q. That division into smaller musical units is true as to every one of the musical operettas and musical comedies that your father wrote?

A. Yes.

Q. Do you know approximately how many copyrights of separate musical compositions were obtained on the "Red Mill"?

A. That one operetta alone?

Q. That one operetta alone.

A. I don't know. Offhand I would say about thirty, something like that.

Q. Would it refresh your recollection if I show you this list which you had attached to your affidavit in this proceeding?

A. Yes.

Q. Will you look at this list, Schedule I, and see if that [fol. 1196] will refresh your recollection? (Paper handed to the witness.)

A. Yes. These are all the different arrangements, too; that is the reason I didn't know; here are six arrangements for the same number.

Q. This list contains all of the copyrights obtained on the operetta "The Red Mill"?

A. Yes.

Q. Does the list include various arrangements of the same composition?

A. Yes.

Mr. Frohlich: I offer in evidence this schedule I attached to Mrs. Bartlett's affidavit in the same proceeding, being a list of all of the copyrights that were obtained on the separate compositions including all of the arrangements of those compositions from time to time on the play, "The Red Mill," deemed marked Plaintiffs' Exhibit No. 22.

Mr. Nye: To which offer it is objected as immaterial. We waive foundation.

(The paper just offered in evidence was deemed marked Plaintiffs' Exhibit No. 22, of this date.)

[fol. 1197] Q. I call your attention to the operetta "Naughty Marietta," and ask you whether that was a very successful and well known operetta of your father's?

A. Yes, very.

Q. Would your recollection be refreshed if I show you Schedule II attached to your affidavit in this proceeding, with respect to the number of copyrights that were obtained on the separate musical numbers in that play (handing paper to the witness)?

A. Yes.

Q. Does that schedule truly represent the copyrights of the various compositions and of their various arrangements?

A. Yes.

Mr. Frohlich: I will offer it in evidence and ask that it be deemed marked in evidence, This Schedule II attached to Mrs. Bartlett's affidavit, being the list of all of the copyrights obtained from time to time on the various numbers contained in "Naughty Marietta"; to be deemed marked Plaintiff's Exhibit No. 23.

Mr. Nye: Defendants waive foundation, and object to the offer as immaterial.

(The paper just offered in evidence was deemed marked Plaintiffs' Exhibit No. 23, of this date.)

[fol. 1198] Q. Was "Mademoiselle Modiste" a well known play or musical comedy composed by your father?

A. Yes.

Q. Did that likewise contain separate musical compositions?

A. Yes.

Q. Were various arrangements made from time to time of a number of those compositions?

A. Yes.

Q. Would your recollection be refreshed if I were to show you this document purporting to contain a list of the various arrangements which were copyrighted from time to time, being Schedule III attached to your affidavit in this proceeding?

A. Yes.

Q. Will you please look at this list, Mrs. Bartlett (handing paper to the witness)?

A. Yes.

Q. Does that schedule truly represent the copyrights of the various compositions and of their various arrangements?

A. Yes.

Mr. Frohlich: I will offer in evidence this schedule III and ask that it be read in evidence and deemed marked in [fol. 1199] evidence as Plaintiffs' Exhibit No. 23. The document offered in evidence is Schedule II attached to Mrs. Bartlett's affidavit on the motion for temporary injunction, being a list of the copyrights and of the various compositions and of the arrangements of a number of those compositions that were contained in the play "M'lle Modiste".

(The document just offered in evidence was deemed marked Plaintiffs' Exhibit No. 24, of this date.)

Mr. Nye: Defendants waive foundation; and object to the offer as immaterial.

Q. "M'lle Modiste" was originally copyrighted, according to Schedule III, in October, 1905; in that correct?

A. Yes.

Q. Were there from time to time renewals of various copyrights of the musical numbers contained in "M'lle Modiste"?

A. Yes, they have all been renewed.

Q. All the compositions of "M'lle Modiste"?

A. Yes.

Q. With the possible exception of some of the later arrangements that have not yet expired?

[fol. 1200] A. Yes.

Q. I show you a list purporting to be the renewals of the copyrights of a number of compositions of "M'lle Modiste", and I ask you if it refreshes your recollection and whether you can testify from your own recollection after looking at this list whether these renewals are accurate (handing paper to the witness).

A. I would say so.

Mr. Frohlich: I will offer in evidence the document entitled "Renewals of Copyrights—M'lle Modiste", consisting of two pages annexed to Mrs. Bartlett's affidavit in that same proceeding, to be deemed marked Plaintiffs' Exhibit No. 25.

Mr. Nye: Foundation waived; we object to the offer as immaterial.

Q. I show you this document entitled "Schedule IV Red Mill," and ask you whether you can testify, looking at this document, whether or not this represents a true and correct statement of original copyrights and renewals of the musical compositions in the "Red Mill" (handing paper to the witness).

A. Yes.

Mr. Frohlich: I offer in evidence this document entitled [fol. 1201] "Schedule IV Red Mill" "Original copyrights issued to M. Witmark & Sons as trustees for Victor Herbert and Henry Blossom Jr., renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson." which is attached to Mrs. Bartlett's affidavit in the same proceeding.

Mr. Nye: Foundation waived; we object to the offer as immaterial.

(The document just offered in evidence was deemed marked Plaintiffs' Exhibit No. 26, of this date.)

Q. Who is Marjorie Wilson, Mrs. Bartlett?
A. She is the widow of the author.
Q. Who is Henry Blossom, Jr.? He wrote the lyrics, I believe?
A. Yes.
Q. I show you this list, which is entitled "Schedule V. Babes In Toyland. Original copyrights issued to M. Witmark & Sons as trustees for Victor Herbert and Glen McDonough," and ask you whether that truly represents the list of copyrights and renewals of copyrights of the musical compositions in "Babes In Toyland"? (Paper handed to the witness.)
A. I would say yes.

[fol. 1202] Mr. Frohlich: I will offer in evidence this schedule "V" annexed to Mrs. Bartlett's affidavit in the same proceeding.

Mr. Nye: Foundation waived; we object to the offer as immaterial.

(The paper just offered in evidence was deemed marked Plaintiffs' Exhibit No. 27, of this date.)

Q. Was your father in his life time a member of the American Society of Composers, Authors and Publishers?
A. Yes.
Q. When did he join the Society, if you know?
A. I am afraid I don't know the date.
Q. Can you tell us approximately the year?
A. No.
Q. What year did your father die?
A. He died in 1924.
Q. After his death did you and your brother Clifford join the American Society of Composers, Authors and Publishers?
A. Yes.
Q. Have you been members of that Society ever since?
A. Yes.
Q. Have you been in receipt of any compensation for

[fol. 1203] public performance for profit of your father's compositions since his death?

A. Yes.

Q. From whom have you received any such compensation?

A. From the American Society.

Q. What compensation did you receive from the Society in the year 1935? Just give us the approximate figures.

A. $10,000.

Q. Was that money paid to you alone, or to you and your brother?

A. I would say that was about my share; I can't give it exactly.

Q. Your brother also received some compensation from the Society?

A. Yes.

Q. Did you and your brother inherit under the will of your father the various copyrights of the compositions that he had composed in his life time?

A. He left the copyrights to my mother and to me and gave none to my brother.

Q. When did your mother die?

A. In 1927.

Q. Did you inherit from your mother the copyrights that had been left to her?

[fol. 1204] A. No, she left them to my brother.

Q. Did you inherit any of them at all?

A. I had two-thirds. Father left me two-thirds of his copyrights in the will, and to mother one-third. Mother in turn left her share to my brother.

Q. So that Clifford owned one-third and you two-thirds?

A. Yes.

Q. From time to time these copyrights were renewed. In whose name were they renewed?

A. As they were renewed they were all renewed in my brother's and my names.

Q. After they were renewed did you continue to have contractual relations with various publishers to publish the musical compositions of your father?

A. Yes.

Q. Are they now being published under those arrangements?

A. Yes.

Q. Did you within recent years sell any rights in any of your father's plays, for motion pictures?

A. Yes.

Q. Will you please state what works you sold for that purpose?

A. "Babes In Toyland," "M'lle Modiste" and "The Red [fol. 1205] Mill," and "Naughty Marietta."

Q. To whom were the grand rights in "Babes In Toyland" sold?

A. We sold those to R. K. O.

Q. What did you receive as compensation for the sale of those rights?

A. $50,000, for a lease of ten or eleven years; I don't remember exactly.

Q. To whom did you sell the grand rights in "M'lle Modiste"?

A. To Warner Brothers.

Q. What did you receive for them?

A. $50,000, as I remember.

Q. What other plays do you remember that were sold?

A. "The Fortune Teller."

Q. To whom did you sell that?

A. To Warner Brothers.

Q. What did you get for that?

A. $25,000 for the music alone, because they owned the book.

Q. What was the other play?

A. "The Red Mill."

Q. To whom did you sell that?

A. That was sold to Hearst; I think that was Cosmopolitan Productions at that time.

[fol. 1206] Q. What did you get for that?

A. As I remember that, it was $50,000 on a ten-year lease.

Q. Did you sell any other plays?

A. Yes.

Q. Any to Metro-Goldwyn-Mayer?

A. Yes.

Q. What did you sell?

A. "Sweethearts."

Q. What did you get for that?

A. $50,000.

Q. Did you sell any others?

A. "Rose of Algeria."

Q. What did you get for that?
A. The same.
Q. $50,000?
A. Yes. And "The Red Mill."
Q. What did you get for the "Red Mill"?
A. $50,000.
Q. To whom did you sell "Naughty Marietta"?
A. Metro-Goldwyn-Mayer.
Q. What did you get for that?
A. $50,000. They had some sort of claim on the book, so that was the reason it was a little bit less; they had some arrangement with the author.
[fol. 1207] Q. In all of those instances where you sold these rights, were they for a limited period?
A. They all were, with the exception of three.
Q. What was the limitation?
A. They were sold on the basis of ten or eleven years, rights for ten or eleven years.
Q. When you sold these rights, just what rights did you sell?
A. The rights to make a picture, a moving picture.
Q. A moving picture of the particular play?
A. Yes.
Q. In any of those instances where you have rights to make picture versions of the play, you didn't sell the right of publication?
A. No.
Q. That has been reserved to your publisher?
A. Yes. Only the rights to make motion pictures using the book, lyric and music.
Q. From time to time have you been in receipt of royalties from the publication of the musical compositions composed by your father?
A. Yes.
Q. Have these royalties been very substantial in recent years?
[fol. 1208] A. Quite.
Q. How much did you receive by way of royalties from the sales of sheet music on all of the plays in the year 1935? Give us an approximate figure; you don't have to give us the exact amount.
A. This is, just sheet music?
Q. Yes.
A. Like my statement from Witmark?

Q. That is right.

A. I would say six or $7,000 a year on that alone, just sheet music.

Q. Just sheet music from all of the works?

A. Yes; that is approximate.

Q. What did you receive from the same source in 1936?

A. I would say about the same; they didn't change very much.

Q. About the same in 1937?

A. Yes; I think in 1937 they were a little higher.

Q. Did you also receive in 1935 any moneys from your publishers for the mechanical reproduction of your father's works with respect to disk records and piano rolls?

A. Yes.

Q. Can you tell us approximately the aggregate of all of the moneys that you received in the year 1935 from that source?

[fol. 1209] A. I don't believe I can.

Q. Was it more than the sheet music, or less?

A. Less.

Q. Did the same hold true for 1936 and 1937?

A. Yes.

Q. The moneys that you received from sheet music and from mechanicals, was that money that came to you alone?

A. Yes, that is what I had in mind.

Q. Did Clifford Herbert, your brother, also receive moneys from the sale of sheet music and from mechanicals of these compositions in these years?

A. Yes.

Q. You have nothing to do with what he receives?

A. No.

Q. With respect to these motion picture leases which you made on five or six of the works you mentioned, did you retain all of the moneys for yourself?

A. No.

Q. Did Clifford Herbert share in some of these moneys?

A. Yes, he did.

Q. Can you tell us for the record what his share was and what your share was? You have told us he inherited your mother's share.

[fol. 1210] Mr. Hotz: She has told us it was one-third and two-thirds.

A. Up to the time of the renewal; after that time if it has been renewed then he gets one-half.

Q. What did you receive from the Society in 1936 as your own share?

A. Well, about $10,000.

Q. What did you receive in 1937?

A. It has gone up a little.

Q. A little more than $10,000?

A. Yes.

Q. You have a contract; your most recent contract with the Society was made in 1935, wasn't it?

A. Yes.

Q. Do you consider that contract of value to you?

Mr. Nye: I object to that question as calling for a conclusion.

A. Yes.

Q. Would you want that contract declared invalid and unlawful?

Mr. Nye: Objected to as calling for speculation.

A. No.

Q. A great many of your father's compositions will come up for copyright renewal in the next five or six years, [fol. 1211] won't they?

A. Yes.

Q. Are you able to give us an estimate of what you consider the value of these works to you for renewal purposes?

Mr. Nye: I object to the question as calling for pure speculation, no proper foundation having been laid.

A. Taking one operetta as an example, if I sold it for motion pictures and publishing and dramatic rights and everything, I would say at least $100,000 each.

Q. You have had some experience in selling the rights of your published works, haven't you?

A. Yes.

Q. You have some notion of the value of those rights?

A. Yes.

Q. And you are acquainted with the values of the publication rights of these compositions?

A. Yes.

Q. As well as the values for motion picture rights?

A. Yes.

Q. Based upon your experience with respect to these rights, so far as publication and motion pictures are concerned and the royalties that you have received from the [fol. 1212] sale of those rights from time to time, is it your testimony that each of these operettas or musical comedies has a value of $100,000 to you with respect to the renewal rights?

Mr. Nye: I object to the question as extremely leading, calling for speculation.

A. Yes; I would say of course some are more valuable than others.

Q. Striking an average?

A. Striking an average, $100,000.

Q. When you strike an average, do you take into consideration all of these factors, your own experience, the moneys that you have received in the past?

A. Yes.

Q. You testified that from time to time you have received royalties from the sale of mechanical reproductions of your father's musical compositions by reason of phonograph records and piano rolls, is that right?

A. Yes.

Q. After you have received your renewal rights on some of these compositions, has your publisher to your knowledge granted to companies like Victor, Brunswick and other manufacturers of record- and rolls the right to manufacture these compositions in like manner for the renewal [fol. 1213] period?

A. Yes.

Q. Have you been receiving royalties on those rights?

A. Yes.

Q. Have you any control over the sale or disposition of the records and rolls that are sold by the manufacturers of these records and rolls?

Mr. Nye: I object to the question as calling for a conclusion.

A. No.

Q. Are you able to compel any of the manufacturers of these records and rolls to affix to the particular record or roll of your father's composition a price to be charged for the public performance for profit of that record or roll in the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation and conclusion.

A. No.

Q. Would you be willing to permit the manufacturers of the rolls and records of your father's compositions to affix on such record or roll sold in the State of Nebraska any price for the public performance for profit of such composition?

Mr. Nye: Objected to as calling for speculation.

[fol. 1214] A. I wouldn't think so.

Q. Would you be willing to permit the publisher of any of your father's sheet music sold within the State of Nebraska to determine and fix a price to be charged for the use or rendition of the particular copyrighted musical composition within the State of Nebraska?

Mr. Nye: I object to the question as calling for speculation and assuming a state of facts not warranted by the evidence and the law.

A. No, I don't think so.

Q. Assuming that there are upwards of 367 places of amusement and entertainment in the State of Nebraska which use musical compositions, are you in a position to determine and fix a price on each of your father's compositions for the public performance for profit of that composition in the State of Nebraska at the present time?

Mr. Nye: I object to the question as calling for speculation, and as leading.

A. No.

Q. If you were required to determine and fix a price to be charged for the use or rendition of these copyrighted musical compositions within the State of Nebraska, particularly with respect to the public performance for profit of [fol. 1215] these compositions, would you personally be in a position to do that?

Mr. Nye: The question is objected to as calling for speculation.

A. No.

Q. What would you have to do to determine and fix the price for the public performance for profit of these compositions in the State of Nebraska?

Mr. Nye: Objected to as calling for speculation and conclusion, no foundation as to knowledge.

A. I should think I should have to have a lawyer or someone out there looking after that for me.

Mr. Nye: I move to strike out the answer as speculation.

Q. Would you have to employ somebody to look into the different establishments and give you some information in regard to them?

Mr. Nye: I object to the question as leading and calling for speculation.

A. Yes.

Q. Would you be able to determine and fix the price to be charged for all purposes and uses of your father's compositions, without some definite information with respect [fol. 1216] to the nature of these establishments in the State of Nebraska which use music?

Mr. Nye: Objected to as speculative, assuming facts not warranted.

A. No.

Q. Are you financially able to employ an investigator to look into these establishments and to see whether or not they were infringing your father's music in the State of Nebraska?

Mr. Nye: Objected to as leading, calling for speculation.

A. I wouldn't be able to pay an awful lot for it. I don't know what the fees would be.

Q. Are you financially able to pay a lawyer to bring suits for infringement in the State of Nebraska, on your father's compositions?

Mr. Nye: I object to the question as assuming a hypothesis not warranted by the evidence; speculation.

A. It is sort of a hard question to answer.

Q. I mean a good lawyer.

A. A good lawyer? Probably I couldn't afford to pay a good lawyer.

Q. Did your father ever receive any compensation in [fol. 1217] his lifetime from the public performance for profit of his copyrighted musical compositions, for the small

uses, that is to say, for picture theatres, for hotels, for dance halls—if you know?

A. Not until the American Society started to collect them.

Mr. Nye: Note my objection to the question as calling for hearsay.

Q. Did your father in his life time personally attempt to determine and fix a price for the public performance for profit of his compositions, with respect to these so-called small rights, if you know?

Mr. Nye: I object to the question as calling for hearsay and without foundation.

A. I would say no, I don't know.

Q. Are your father's compositions played at this time over the radio stations of the United States?

A. Yes.

Q. Are they played frequently?

A. Yes.

Q. You yourself have heard them?

A. Yes.

Q. Are they played on the hook-up stations of the National Broadcasting Company and the Columbia Broadcasting System?

[fol. 1218] A. Yes.

Q. Have you yourself heard them played time after time on those hook-up stations?

A. Yes.

Mr. Frohlich: I think that is all. You may examine.

Cross-examination.

By Mr. Hotz:

Q. Mrs. Bartlett, where do you live?

A. In New York City.

Q. Where does Clifford live, your brother?

A. No place in particular; he travels around; he has no home.

Q. Where was your father born?

A. In Dublin.

Q. Was he an Irishman by birth?

A. By birth.

Mr. Frohlich: I meant to ask one or two questions on citizenship. May I ask them now?

By Mr. Frohlich:

Q. Was your father a citizen of the United States?
A. Yes.
Q. Are you a citizen of the United States?
A. Yes.
[fol. 1219] Q. And were you born here?
A. Yes.
Q. Is that true of your brother Clifford?
A. Yes. My father became a citizen, I think, within two years after he got here—immediately took out papers.

By Mr. Hotz:

Q. There is a distinction, of course, between music that is written for plays, for example, operettas, musical plays of all sorts such as "The Red Mill" and others, and the individual pieces or songs that have been composed, is there not?
A. Yes.
Q. The American Society of Composers, Authors and Publishers have nothing whatever to do with the public performance rights of those operettas and plays; they don't have anything to do with them, do they?
A. You mean when they are broadcast?
Q. No, for public performance rights.
A. You mean if they were given on the stage, for instance, or something like that?
Q. That is a matter that you handle through your publisher?
A. No, I don't handle that through the publisher; we handle that through the Library, the Witmark Harms Music [fol. 1220] library. I will explain that to you. In St. Louis they have an operetta during the summer, and they do, say, "The Red Mill" for a week; they pay so much to the Library and then it is divided between us. The American Society has nothing to do with a performance like that.
Q. That is what I meant. The American Society of composers, Authors and Publishers have only to collect for public performance rights of the vocal and instrumental compositions where the individual song is sung or played?
A. I believe that is right.

Q. It is over that source that you have delegated and given full and complete authority to the American Society of Composers, Authors and Publishers in reference to those matters, isn't that right?

A. Yes.

Q. You have delegated and given to the American Society of Composers, Authors and Publishers the right to fix and and determine the prices that are to be charged to the users of that style of musical compositions, copyrighted musical compositions, isn't that true?

A. Yes.

Q. You have no control over that?

A. No.

Q. They do that?

[fol. 1221] A. Yes.

Q. You receive as pay and compensation from the American Society of Composers, Authors and Publishers a fixed sum in accordance with the classification that you have been assigned to by the Society?

A. Yes.

Q. You know what your classification is, how it is described or designated?

A. Yes, double A, that is the top.

Q. That is the top?

A. Yes.

Q. From some of the other witnesses, composers and song writers that have testified here, they have told us that the popular music such as they write has a short life, probably four months.

A. Yes.

Q. And that the sales of musical compositions fell ofmaterially and that their income from their publishers has dropped down considerably, that is, based on the royalties they received from the publishers.

A. Yes.

Q. In your case I notice they have not fallen off.

A. We were speaking from 1935 on; but I would say, from father's life time they were down, but I would say [fol. 1222] that the difference is that it is more or less like classical music; it is not like popular songs that last a short time.

Q. It is what you call standard type rather than the popular type?

A. Yes.

Q. In reference to these sums of money that you testified that you received from R. K. O., Warner Brothers, Hearst organization, Metro-Goldwyn-Mayer and various other picture concerns from time to time you have received from twenty-five to $50,000, the American Society of Composers, Authors and Publishers have nothing to do with that, either?

A. No.

Q. Is that all individual contracts and arrangements that you have made between yourself, your publisher and those users?

A. Yes, they are individual contracts; the publisher doesn't share.

Q. Then the publisher does not have anything to do with it?

A. No.

Q. Who fixes that?

A. When Mr. Burkan was alive it was Mr. Burkan's idea to give a ten-year lease instead of selling them outright. [fol. 1223] we have followed that plan.

Q. Your attorney is Mr. Frohlich, now, this firm here?

A. Yes.

Q. And they attend to those matters for you?

A. Yes.

Q. So far as the legal end of it is concerned?

A. Yes.

Q. You have never read this bill out in Nebraska to know what the bill contains, I suppose?

A. No, I have not.

Q. You have not inquired into the problems out there that the users have had with the American Society of Composers, Authors and Publishers?

A. I just heard about it in a general way.

Q. Just in a general way?

A. Yes.

Q. Do you know that one of the features of that bill out there is that there has been a claim made that confusion has arisen in connection with the fixing of public performance rights, that is, the amount that should be paid by the small user, hotel, dance hall, restaurant and so forth, and that the American Society of Composers, Authors and Publishers [fol. 1224] fixed different sums to be paid, and that the bill out there is seeking to remedy that situation?

A. I just knew that was what they wanted to do.

Q. In connection with the mechanical rights, that is, the portions of music that are owned and controlled by you and your brother where there are records and rolls, that is handled, is it not, under a special contract by which a certain number of cents per roll or record is given to you?

A. Yes.

Q. Right at the time?

A. Yes, through the publisher.

Q. Through the publisher?

A. Yes.

Q. You divide that by arrangement between yourself and the publisher?

A. Yes.

Q. And your income, then, is based upon the number of records or rolls that are manufactured?

A. Yes.

Q. And in connection with the radio, the broadcasting, do you have any special contract with the National Broadcasting Company?

A. No.

[fol. 1225] Q. You have none with the Columbia?

A. No.

Q. And none of the net works?

A. No.

Q. The public performance rights in connection with music, copyrighted vocal and instrumental music in which you are interested, that is handled through ASCAP, is it not?

A. Yes.

Q. And after these records and rolls are bought and paid for by having a certain amount paid by the manufacturer that is all the further interest that you have, except the division of the money between yourself and your publisher in accordance with your contract, is that right?

A. Yes.

Q. In connection with the matter of sheet music, where it is used by individuals and firms in Nebraska for public performance rights, have you ever attempted to sit down with your publisher and figure out a sum of money that could be obtained at the time that music was sold that would include the public performance rights, so that would end it right there at the time the music was sold or purchased?

A. No.

Q. You have never done that?

[fol. 1226] A. No.

Q. You know the number of copies that have been sold, do you not?

A. Yes.

Q. And you know that from the fact that you collect royalties on the sale price?

A. Yes.

Q. Just generally, what are some of those; what division do you make?

A. Do you mean to take one number, for instance "Kiss Me Again" from "M'lle Modiste"?

Q. Yes. What would you say was your average royalty from sheet music?

A. On this one number?

Q. The average on sheet music that is sold?

A. I would say five or six thousand dollars.

Q. Translating that into percentage, two, three, four, five cents, what would it average?

A. On the sheet music most of the contracts are alike; I get three cents on each copy that is sold. Is that what you mean?

Q. Yes, that is what I mean.

A. Three cents on each copy.

Q. Have you received $6,000 a year from that source, [fol. 1227] assuming that you get three cents from each copy—I am trying to get at the number of copies in that way.

A. It is only on the sheet music we receive three cents. If it is an arrangement we get different—probably fifteen per cent or ten per cent of the price.

Q. Now, on the arrangements, by that you mean orchestrations?

A. Yes.

Q. Arrangements for bands?

A. Yes.

Q. And the additional fee is charged of fifteen cents instead of three cents, you know that these are for public performance, do you not?

A. Yes.

Q. That the arrangement is made for public performance?

A. Yes.

Q. You have never attempted to work out for your publisher at the time that you fix those sums for the orchestra-

tions and getting up works for public performance, you have never attempted to arrange with your publisher, or discuss the matter of having included therein a fee that would also cover public performance rights?

A. No.

Q. If you did do that and if you were able to obtain an [fol. 1228] agreeable sum that you and your publisher agreed upon, that would compensate you, would it not, for public performance rights, if it was satisfactory and the user paid the price?

A. I don't see how they could agree upon it.

Q. If you and your publisher arranged a certain sum, you would know that based upon the number of copies that were sold you would know what you were going to receive, would you not, in dollars and cents?

A. I don't see how you could figure it ahead like that. To use a word that has been used so often, I would say it was highly speculative.

Q. For instance, in receiving $6,000 for your sheet music at three cents a copy, that would anticipate two hundred thousand copies; am I right on that?

A. I think so.

Q. Suppose you have included in there another three cents for public performance rights, you would know that you were going to receive $6,000 for public performance rights, would you not, from the users, and you would get it right directly from your publisher, the same as you do the royalty for three cents?

A. I don't know; I don't like that.

Q. You are not prepared to answer?

[fol. 1229] A. I don't like that.

Q. You don't like the idea. But nevertheless you don't mean to say that it could not be done if you and your publisher sat down and tried to work it out; you wouldn't want to go on record as saying that it could not be done?

A. I would almost say that.

Q. You have a record, have you not, of all of the numbers of pieces, vocal and instrumental music, upon which your father had obtained copyrights, from your publisher; they are all available?

A. Yes.

Q. He renders you a statement semiannually or thereabouts?

A. Yes.

Q. Showing the number of pieces that have been sold?
A. Yes.
Q. And it is upon that that your royalties are based?
A. Yes.
Q. Do you remember back as far as the case that your father had against Shanley, Victor Herbert against Shanley?
A. No.
Q. Or how it arose, or the circumstances?
A. No, I really do not.
[fol. 1230] Q. Who is your publisher, mostly?
A. Witmark published most of the things, but Schirmer also published a great many?
Q. G. Schirmer?
A. Yes. M. Witmark & Sons.
Q. Aside from Schirmer, those are all part of the Warner organization, are they not?
A. There are also other publishers. Walter Fischer, he published quite a few.
Q. They are all members of the American Society of Composers, Authors and Publishers?
A. Yes.
Q. And of course you are a member?
A. Yes.
Q. Is your brother Clifford?
A. Yes.
Q. I don't believe you are on the board of directors, are you?
A. Am I?
Q. Yes.
A. No, I am not.
Q. You know, do you not, that the American Society of Composers, Authors and Publishers have delegated to them by you and others the public performance rights, that is, the [fol. 1231] handling of the public performance rights?
A. Yes.
Q. You know that?
A. Yes.
Q. And you are also familiar with the fact, I think you told me before, they are authorized to fix and determine the fee or license that was fixed for public performance rights of copyrighted musical compositions in the State of Nebraska?
A. Yes.

Q. Is it your observation as member of the American Society of Composers, Authors and Publishers or do you know where there was any dissatisfaction among the composers and authors in reference to the classifications in which they were placed?

Mr. Frohlich: I object to the question as incompetent, irrelevant and immaterial, hearsay and speculative.

Q. If she knows.
A. I really don't know.
Q. You couldn't answer that?
A. No.
Q. Who owns the copyright on the musical compositions that formerly were your father's?
[fol. 1232] A. My brother and I.
Q. Have you assigned them to your publisher?
A. Assigned the publishing rights.
Q. To the publisher?
A. Yes.
Q. And you are paid for that assignment of those rights and the renewals, a certain royalty on each and every copy that is sold?
A. Yes.
Q. And that is covered by your contracts that are in evidence; I presume they are, are they not?
A. Yes.

Mr. Frohlich: They are all covered by the contracts.

Q. And in turn the publisher, by and with your consent and your brother's consent, has delegated to the American Society of Composers, Authors and Publishers the complete and final authority in connection with the public performance rights of the copyrighted vocal and instrumental musical compositions?
A. The small rights.
Q. And the fixing of the fees and licenses therefor?
A. Yes.
Q. And that is universally the custom with persons who [fol. 1233] are the writers and owners of musical compositions in New York?
A. Yes.
Q. And with the publishing houses?
A. Yes.

Mr. Hotz: I think that is all.

[fol. 1234] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

No. Eq.-562

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Complainants,

vs.

HARRY R. SWANSON, as Secretary of State of Nebraska, et al., Defendants

STATE OF CALIFORNIA,
County of Los Angeles, Southern District of California, Central Division, ss:

Depositions of Jerome Kern and Sigmund Romberg, the witnesses produced and examined at the office of Philip Cohen, Esq., Room 1217, 707 South Hill Street, City of Los Angeles, County of Los Angeles, State of California, before William J. Stahly, a Notary Public in and for the County of Los Angeles, State of California, residing in said County and State, this 15th day of June, 1937, at 10:00 o'clock in the forenoon of that day, the undersigned William J. Stahly, Notary Public, having held the said hearing at said time and place, pursuant to the notice of taking depositions, and [fol. 1235] stipulation dated March 28, 1938, and stipulation dated April 23, 1938 and stipulation dated May 11, 1938 and stipulation dated May 28, 1938, in the above entitled action pending and at issue therein between Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., complainants, versus Harry R. Swanson, as Secretary of State of Nebraska, et al., defendants; complainants appearing and being represented by Louis D. Frohlich, Attorney at Law, and the defendants neither appearing at the said hearing nor being represented by counsel.

The said Jerome Kern and Sigmund Romberg, being first duly sworn by the undersigned, William J. Stahly, Notary Public in and for the said County and State, to testify to the truth, the whole truth and nothing but the truth, being thereupon examined, testified as follows:

Direct Examination by L. D. Frohlich, of Counsel for Plaintiffs.

Examination of JEROME KERN.

By Mr. Frohlich:

Q. What is your full name and address, Mr. Kern?

A. Jerome David Kern.

Q. And you reside where?

A. 917 North Whittier Drive, Beverly Hills, California.

Q. What is your occupation?

[fol. 1236] A. I am a composer of music.

Q. How many years have you been engaged in that occupation?

A. Since 1903. That is 35 years.

Q. Have you specialized in the composition of any particular type of music?

A. Yes.

Q. And what type is that?

A. Musical comedy and light opera.

Q. I show you a list of compositions and ask you to look at this list and tell us whether it fairly sets forth the compositions that have been composed by you during the past 35 years?

A. Well, this is a list arranged alphabetically and as nearly as I can see at a glance it approximates an accurate list of my published works.

Q. I will offer that in evidence as complainants exhibit 1.

(List referred to was received by the Notary Public, marked Complainants Exhibit 1, and the same is attached to and made a part of this deposition.)

Q. Now, Mr. Kern, in composing these compositions did you from time to time have collaborators who wrote the words or lyrics of those compositions?

A. Oh, yes.

Q. And after these compositions were written and com-

[fol. 1237] posed by you and your collaborators did you have these compositions published by music publishers from time to time?

A. Yes. You mean chronologically? I have not immediately after.

Q. At some time?

A. Usually they are copyrighted and published after they were in a play. In other words material on a shelf is rarely published.

Q. In composing your music of these compositions that appear in plaintiff's exhibit 1 did you have in mind that these compositions would first be performed on the stage before they were published?

A. Almost invariably.

Q. And was it the practice with respect to your compositions to have them performed on the stage before they were actually published?

A. Yes.

Q. And until these compositions of yours that appear in complainants Exhibit No. 1 were actually published was there any copyright taken out on these comp-sitions, if you know?

A. Almost without exception no copyright.

Q. And when for the first time was copyright taken out on these compositions of yours?

[fol. 1238] A. Almost immediately after a production, if the importance of the number merited production at all.

Q. Let's take some of these comic opera, light operas or dramatic-musical works to which you wrote the music, did they contain individual compositions?

A. Yes.

Q. And in addition to that individual musical composition did these works also contain various ensembles, opening choruses,——

A. Yes, and dance and incidental music.

Q. What was the important music and the music having the greatest commercial value in these theatrical-musical compositions?

A. The theme songs, the love songs, the comedy songs, and so forth.

Q. And these songs that you have named were they songs that were eventually published by your publishers and sold to the public?

A. Yes. In other words they became sort of a trade mark of the particular operetta and identified with it.

Q. Did many of your compositions so published attain financial success?

A. Yes, many of them.

Q. Did your publisher sell many thousand- of copies [fol. 1239] of your musical compositions over the years?

A. In the early days many thousands of copies.

Q. Which publishing firm for the most part published your musical compositions over the years?

A. T. B. Harms Musical Company.

Q. Is that a large music publishing firm?

A. It is a large and important musical publisher.

Q. And did this publishing firm pay you royalties on the individual compositions which you composed?

A. Every copy that they sold they paid a royalty on.

Q. What was the usual royalty you received per copy of sheet music?

A. Three cents a copy for the music.

Q. And your collaborator who wrote the lyrics would also receive something on that musical composition?

A. The same amount. Always spit fifty-fifty.

Q. Did you have any individual contract with T. B. Harms on the compositions in composing each one?

A. No.

Q. Did you have any contract?

A. No. Very close association with some people who were friends.

Q. Is it your testimony that there was no contract?

[fol. 1240] A. There was, through the years, an all understanding.

Q. Now, under the arrangement or understanding that you had with T. B. Harms, did you give them performing rights in your compositions enumerated in Exhibit 1?

A. No.

Q. Did you ever give to any publisher in the United States or elsewhere the performing rights of any of your compositions?

A. No.

Q. Did you reserve those performing rights to yourself?

A. Entirely to myself and collaborator.

Q. Of course when I speak of you, I speak of you and your collaborator?

A. Yes.

Q. How many types of performing rights are there?

A. Grand right or stage right, as we call it, and the small or non-dramatic performing right.

Q. Now, how do you define the grand or stage right?

A. That is the right leased or sold to a manager, a producing manager, for the right to use the composition in a play performed by human beings on the stage.

Q. And how do you define non-dramatic performing [fol. 1241] right or small right *or small right*?

A. The small right is the right to use in public for profit whether vocally or instrumentally, the musical composition for purposes of entertainment.

Q. Were the performing rights of your musical compositions, both non-dramatic and stage rights of value to you?

A. Yes, they are my first source of livelihood.

Q. Did you receive any royalty from the producers of plays or of dramatical musical works in which your musical composition- were performed on the stage?

A. Yes, either in cash payment or in percentage of the box office intake; and as my importance and standing increased, naturally the terms were better.

Q. And were these sums you received from performing rights on the stage substantial over the years?

A. Yes.

Q. Can you tell us how much you received from the stage rights of all of your musical compositions on an average each year during this period?

A. Well, I would say that a successful musical play with a run in the metropolis and subsequent road runs yielded around $50,000.00.

Q. For the entire run of the production?

A. For the run of the production.

[fol. 1242] Q. Can you mention a few of the more successful plays for which you wrote the music?

A. Yes.

Q. Will you give us that list, Mr. Kern?

A. Sally, Sonny, Showboat, The Cat and the Fiddle, Music in the Air, Sweet Adeline, Stepping Stones, Very good Eddie, Leave it to Jane, Oh Lady Lady, Good Morning, Dearie, and many others.

Q. From time to time as your publisher published the compositions that are set forth in Exhibit No. 1, did your publisher grant to manufacturers of mechanical records the right to manufacture records and piano rolls of your musical compositions?

A. Frequently.

Q. And in granting these rights were you consulted?

A. Yes.

Q. Were you a party to the contract with the manufacturers of records and rolls?

A. No.

Q. Who made the contracts, just the publisher?

A. The publisher and the manufacturer. Well, I had a participating interest.

Q. And when the publisher received any royalties by way of the manufacture of these records and rolls, did he pay you a percentage of the royalties from time to time?

[fol. 1243] A. Yes. I got half of all the publisher received.

Q. Were your compositions played in the state of Nebraska from time to time, if you know?

A. Yes.

Q. On what do you base your knowledge that your compositions were played in that state?

A. Because a great many of my shows toured the country and were routed through almost every large city, including Omaha and other cities in the state of Nebraska, and millions of records were sold in the state of Nebraska, and were of course played in that state. I have composed a great many songs that have been used in motion pictures, and these motion pictures have been played in all the cities or towns in the State of Nebraska where there are motion picture theaters.

Q. Mr. Kern, in looking over complainants exhibit No. 1, I notice under the column "renewed," various compositions with dates and the names of publishers. Would you explain for the record what that column indicates?

A. It indicates that after the life of the copyright, namely 28 years, the copyright is renewed by the staff of the publisher, for convenience only, in the name of the author and the composer.

Q. Have these various compositions that appear on the column "renewed" been renewed for your account and [fol. 1244] benefit?

A. Yes.

Q. And do the renewals belong to you?

A. Yes.

Q. Have these renewals of the compositions a commercial value to you?

A. Yes.

Q. And will all of your compositions be renewed from time to time as the original date of copyright expires?

A. Yes.

Q. And when these compositions are renewed do you continue to receive royalties from the publishers of the compositions?

A. Yes.

Q. And do you and will you continue to receive compensation by way of royalties from musical productions of these compositions?

A. Yes. There have been many instances where songs that have been dormant have been re-issued by the record people. Several are on the market now, remakes of old compositions, and they receive the same treatment. They are renewed and receive the same treatment as new compositions.

Q. How many compositions of yours have been renewed?

A. Approximately 48 to date.

[fol. 1245] Q. What value do you place upon the renewal of these 48 compositions?

A. I consider them worth for the next 28 years, $1,000 a composition.

Q. And would the sum of $1,000 a composition as the value be true with respect to your other compositions which will be renewed from time to time?

A. I would consider that an absolute minimum. I think $1,000.00 is too little. I wouldn't sell a motion picture concern a copyright for $1,000.00. I would ask for renewal rights.

Q. Mr. Kern, are you a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. What is that society?

A. That is a society formed for the protection of copyright owners, of authors, composers and publishers, and the owners or proprietors of copyrights.

Q. And what is the function of that society?

A. It licenses non-dramatic performing rights of the compositions of its members and collects license fees for these licenses, for the license to publicly perform for profit those compositions.

Q. When was that society formed?

A. 1914.

[fol. 1246] Q. Were you one of the founders?

A. I was one of the original members.

Q. You were one of the original members?

A. Yes.

Q. When did you join that society, about?

A. 1914.

Q. And have you been a member continuously since 1914?
A. Yes.
Q. And have you executed contracts from time to time with the American Society of Composers, Authors, and Publishers?
A. Yes.
Q. I show you this contract dated September 18, 1935, and ask you whether you recognize the signatures on the contract?
A. That is my signature.
Q. And do you recognize the signature of the person who signed for the American Society of Composers, Authors and Publishers?
A. Yes.
Q. And whose signature is it?
A. Joseph Young.
Q. And he is an officer of the Society of Composers, Authors and publishers?
[fol. 1247] A. Yes.
Q. I will offer this in evidence.

(Contract referred to, was received by the Notary Public, Marked complainants Exhibit No. 2, and the same returned to Mr. Frohlich.)

Q. I show you, Mr. Kern, what purports to be a photostatic copy of complainants exhibit No. 2, and ask you if that is a true and correct copy of complainants exhibit No. 2?
A. Yes.
Q. I will offer that in evidence and as complainants exhibit 3.

(Photostat copy of complainants exhibit No. 2, was received by the Notary Public, marked complainants Exhibit No. 3, and the same is attached to and made a part of this deposition.)

Q. Were you a member of the Board of Directors of that society?
A. Yes.
Q. When were you such member, approximately?
A. I have been a member of the Board of Directors for about ten years.
Q. Do you receive royalties from the American Society of Composers, Authors, and Publishers from time to time?

[fol. 1248] A. Yes.

Q. What royalties did you receive from the Society for the year 1936?

A. $14,576.16.

Q. What royalties did you receive in 1937?

A. $17,480.65.

Q. Does the American Society of Composers, Authors and Publishers employ local representatives throughout the United States?

A. Yes.

Q. Does it employ counsel?

A. Yes.

Q. Now, if you were acting independently of the American Society of Composers, Authors and Publishers or any other group or combination, would you be able to determine and fix the price to be charged for the use or rendition of your copyrighted musical compositions within the state of Nebraska?

A. No.

Q. Would you be able at the time of the publication and sale of your musical compositions within the state of Nebraska to tell the amount of monies that would be a reasonable charge for the performing rights of your compositions within that state?

A. No.

[fol. 1249] Q. Would you, in order to determine and fix a price to be charged for the performing rights of your compositions in the State of Nebraska, be required to obtain information and data with reference to use of your musical compositions within that State?

A. Certainly.

Q. And in order to acquire such information and data would you be able to do that yourself?

A. No.

Q. Would you be compelled, in order to acquire such information and data, to employ investigators and representatives in the State of Nebraska?

A. In great numbers.

Q. Would it be necessary for you to acquire information and data with respect to the users of musical compositions in the State of Nebraska to determine the nature of various establishments in that State?

A. Certainly.

Q. Would you be required to obtain information and data with reference to the nature of the use of your compositions by these establishments in that state?

A. Yes.

Q. Would the employment of agents and representatives in the State of Nebraska entail expense to you?

[fol. 1250] A. Expense in actual money and more important, in time. I would have time for little else.

Q. What do you estimate it would cost you to employ a man or a number of men to go around in the state of Nebraska to ascertain information with respect to the establishments that use your musical compositions in that state?

A. It would cost me anywhere from five to ten thousand dollars a year. I would have to have a man, skilled in music, and who would want at least fifty or seventy-five dollars a week, and I would have to pay his hotel bills, traveling expenses, and I would have to employ a number of such men, and I would have to have an office in the state of Nebraska. All of that I would estimate would cost me anywhere from five to ten thousand dollars or more a year.

Q. In order for you to protect yourself with respect to infringement in the State of Nebraska would you be compelled to employ investigators to listen to radio establishments in that state?

A. Yes, and dance halls.

Q. Would you be compelled to employ investigators to go around to dance halls, cabaret, motion picture theaters, hotels, and other places of amusement and entertainment in that state?

A. Yes.

[fol. 1251] Q. Would such investigators entail expense to you?

A. Certainly.

Q. What would you estimate that to be?

A. Another five or ten thousand dollars.

Q. Would you have to employ a lawyer in the state of Nebraska in infringement suits for your musical compositions have been infringed in that state?

A. Yes.

Q. What would you estimate a lawyer would cost you for that purpose?

A. Another five thousand dollars a year.

Q. Are you financially able to bear such an expense to protect your musical compositions in the state of Nebraska?

A. No. The cost of such representation would be much more than my receipts.

Q. Is the American Society of Composers, Authors and Publishers doing this service for you?

A. Yes.

Q. And would you be able to continue your present livelihood as a composer without the aid of the American Society of Composers, Authors and Publishers?

A. Certainly not.

Q. Would you be able, acting alone and independently [fol. 1252] today, to fix a price on each and every one of your musical compositions within the state of Nebraska for the purpose of television?

A. Not a fair price.

Q. And why?

A. Because television today is in the experimental stage and we do not know how extensive it may become or how important the use of it will be. It may affect other uses and may destroy the value of other uses, and until television becomes an accepted fact, no one today in my profession is able to judge with any degree of accuracy what a fair price for the public performance for profit would be on my compositions.

Q. Are you willing to permit the manufacture of mechanical records and musical roles of your compositions to fix a price on their records and roles for certain performance-for profit of your compositions?

A. No.

Q. Have these manufacturers of records and roles any contractural right as far as you know to license users in the state of Nebraska to publicly perform -or profit such records and roles and collect fees therefrom?

A. No.

Q. Are you willing to give them such right?

A. No.

[fol. 1253] Q. Are you able in any way to compel such manufacturers of records and role- to collect royalties for the public performance for profit of your compositions and pay you a share thereof?

A. No.

Q. Are your musical compositions frequently performed by radio broadcasters outside the state of Nebraska?

A. Yes, very often.

Q. Are your musical compositions performed by radio outside the state of Nebraska on National hookup-?

A. Frequently.

Q. And in these hookups are there radio stations within the state of Nebraska that re-perform your musical compositions so performed outside the state of Nebraska?

A. Yes.

Q. Are you able to control the re-performance or re-broadcast of your compositions outside the state of Nebraska to be re-performed and re-broadcasted within the state of Nebraska?

A. No.

Q. Are you able to control the performance of your compositions on motion pictures in which your compositions appear within the state of Nebraska?

A. No.

Q. Please state how your musical compositions are [fol. 1254] turned over to producers of motion pictures?

A. I contract with producers of motion pictures to write musical compositions that appear in their pictures. This form of contract is known as synchronization. The compositions are synchronized with the action of the picture and are re-produced when the picture is shown on the screen. The producers of the motion picture distribute their pictures throughout the United States and foreign countries, and these pictures so distributed by them appear upon the screen of the exhibitors within the state of Nebraska. I have no control over the manner of distribution. That is purely within the control of the motion picture producers and distributors.

Q. Is it desirable from your view point as a composer of production music to affix to the sheet music of the compositions sold within the State of Nebraska a price for the public performance for profit of your compositions at the time the compositions are sold within the state of Nebraska?

A. No.

Q. Is it desirable from a commercial point of — your compositions to with-hold the public performance for profit of your compositions from time to time even though the actual sheet music is sold and published?

A. Yes.

[fol. 1255] Q. Has that been the practice throughout the years with your musical compositions?

A. Yes.

Q. Please explain the reason for this?

A. My compositions have been, as I testified before written for stage productions. While production is running both in big cities and on tour, it is desirable to prevent others from performing these compositions, because such performance would be in competition with the particular stage production, and would destroy the commercial value of such production. Therefore, I have invariably restricted the public performance of my compositions until these compositions and the plays in which they appeared have run their course. That is true with all production writers. To permit these compositions to be performed indiscriminately for profit would jeopardize the commercial value of the compositions and the stage productions in which they were performed and for which they were written. For that reason I cannot and will not determine and fix a price to be charged for the public performance for profit of my compositions at the time of the publication of these compositions. Many a composition is published that has no value at all from a view point of sheet music sales. Its chief and most often its only value is for the stage production performance or the grand right. These compositions are always restricted by me and by my publisher.

[fol. 1256] Q. Under the Nebraska statute you lose that valuable right?

A. Absolutely.

Q. Has the broadcasting of your compositions upon the radio affected the sale of the sheet music of your compositions, if you know?

A. Yes.

Q. Are you familiar with the music publishing business generally?

A. Yes.

Q. Do you know whether it was the usual thing for a popular musical composition prior to the advent of radio to sell a million copies?

A. Yes, frequently.

Q. Have there been any sales of musical compositions to the extent of million copies or more since 1922?

A. Not that I know of.

Q. What does radio do to the popularity of a musical composition?

A. Radio performances of a popular composition are over-done. Frequently the same song is played by many stations throughout the country two or three times a night. For that reason a musical composition, no matter how popular or its merit loses its popularity and vogue after a period of five, six or seven weeks. That adversely affects [fol. 1257] the sale of sheet music and other rights with respect to the composition. Radio just simply over-popularizes and kills music today, making it a nuisance rather than an entertainment.

Q. What value do you place on your contract, complainants exhibit- 2 and 3?

A. Considering the income that I have derived from the Society during the years and considering that — have the right to renew my contract with the Society each five years, and considering the protection which the Society gives me, I consider my contract with the Society worth at least $250,000.00.

Q. Are you willing to have your contract with the Society declared invalid and void?

A. No.

Q. Have you any agent or representative within the state of Nebraska at the present time?

A. No.

Q. Do you transact business within the state of Nebraska at the present time?

A. No.

Q. Are you domiciled within the state of Nebraska?

A. No.

Q. Are you a citizen of the United States?

A. Yes.

[fol. 1258] Q. Before you domiciled in the state of California what was your domicile?

A. New York state.

Q. Now, prior to the time that you joined up with the American Society, Composers, Authors and Publishers were your musical compositions performed publicly for profit in the United States?

A. Yes.

Q. Did you receive any revenue from such publication?

A. No.

Q. Did any user anywhere in the United States ever come to you with the request to perform publicly for profit your musical compositions?

A. No.

Examination closed.

——— ———.

Subscribed and sworn to before me this — day of June, 1938. ——— ———, Notary Public in and for the County of Los Angeles, State of California.

———

[fol. 1259] Deposition of Sigmund Romberg

Sigmund Romberg, having been first duly sworn under oath by the Notary Public to testify the truth, the whole truth, and nothing but the truth relative to the above entitled action, testified as follows:

Direct examination by L. D. Frohlich, of Counsel for Complainants.

Examination of Sigmund Romberg.

By Mr. Frohlich:

Q. Mr. Romberg, what is your full name?

A. Sigmund Romberg.

Q. Where do you reside?

A. 1023 North Roxbury Drive, Beverly Hills, California.

Q. Are you a citizen of the United States?

A. Yes.

Q. Where was your domicile prior to coming to California?

A. New York City.

Q. What is your occupation?

A. Musical composer.

Q. And how many years have you been such a composer?

[fol. 1260] A. Since 1910.

Q. Is that your only means of livelihood?

A. Yes.

Q. Have you specialized in the composition of any particular type of music?

A. Yes, stage productions and moving pictures.

Q. Will you give us a list of some of the better known stage productions of which you composed the music?

A. Maytime, Soldier Boy, The Magic Melody, Blossom Time, Student Prince, My Maryland, The Desert Song, New Moon, Forbidden Melody, Mayfair.

Q. Give us the names of some of the motion pictures for which you wrote the music.

A. Viennese Nights, Children of Dreams, The Night is Young, The Girl of the Golden West.

Q. I show you a list of musical compositions purported to have been composed by you and ask you if that is a true and accurate list of your compositions?

A. It is.

Q. I will offer that in evidence as Complainant-s Exhibit 4.

(The list referred to was received by the Notary Public and marked Complainant's Exhibit 4, and the same is attached to and made a part of this deposition.)

Q. How many renewals of your compositions have there been?

[fol. 1261] A. Only one so far.

Q. What is the name of that renewal?

A. Memories.

Q. Was that the renewal of the composition Memories?

A. Yes.

Q. Now, from time to time will your compositions be ripe for renewal?

A. Yes.

Q. And do you intend and propose to renew these compositions?

A. Yes.

Q. Have these compositions value for you with respect to renewal periods?

A. Naturally.

Q. And will you continue to receive royalties and emoluments from the renewal of your compositions?

A. Yes.

Q. What do you value each of your compositions with respect to renewal rights?

A. At least $1000 a renewal.

Q. Were your compositions published from time to time by various publishers?

A. Yes.

Q. And did you in your contracts with these publishers [fol. 1262] ever give any of the publishers the right to publicly perform for profit your composition?

A. The publishers?

Q. Yes.

A. No, I did not.

Q. Did you reserve that right yourself?

A. Yes.

Q. Did you also reserve yourself the stage right for these compositions?

A. Yes,

Q. As a matter of fact a great many of your compositions were played on the stage a long time before they were finally released, isn't that so?

A. That is right.

Q. And was it a customary thing when you wrote the music for a dramatical-musical work to restrict and reserve the public performance for profit of such composition during the run of the particular play?

A. Yes.

Q. And what was that due to?

A. Well, so that the musical material in the show should remain fresh and interesting, and I didn't want any composition between outsiders and the people who spent money, thousands of dollars, in producing these shows. It was a form of protection.

[fol. 1263] Q. Assuming you were compelled to act independently and not in combination with other composers, could you, under the Nebraska statute, reserve this right of public performance for profit and the stage right if you were compelled to determine and fix the price to be charged for the use or rendition of that musical composition in the state of Nebraska?

A. No, I couldn't. I would be utterly helpless.

Q. From time to time have you received royalties from publishers for sheet music?

A. Yes.

Q. What was the usual royalty?

A. Three cents on each copy for sheet music.

Q. What did your collaborator receive?

A. He received about the same.

Q. If there were two collaborators?

A. They split up between them.

Q. Did you also receive from your publishers from time to time royalties from the reproduction of your compositions for records and musical rolls?

A. Yes.

Q. How were these records and music rolls manufactured?

A. They were manufactured under an arrangement with the publisher and he received usually the two cents per roll [fol. 1264] or record which the copyright law fixes as the compulsory price, and I received usually one half of what the publisher received.

Q. Did you at any time make a special contract with any manufacturer of rolls or records for the manufacture of such rolls and records?

A. No. That was always done by my publisher.

Q. Have you the right to go to any manufacturer of music rolls and records and compel him to fix a price for the public performance *of* profit of such rolls or records within the state of Nebraska?

A. No.

Q. Would you want to give any manufacturer of music rolls and records of your compositions the right to collect royalties in the state of Nebraska for the public performance for profit of your compositions?

A. No.

Q. Have you any control over the distribution of the rolls and records manufactured by these manufacturers of your compositions in the past?

A. No.

Q. Have you any control over the method of distribution of any of the motion pictures in which your compositions appear?

A. No.

Q. Have your compositions been played in the state of [fol. 1265] Nebraska over the years?

A. Yes, many times.

Q. Did the plays for which you wrote the music tour the state of Nebraska?

A. Yes.

Q. Have musical rolls and records of your compositions been sold within the state of Nebraska, if you know?

A. Yes.

Q. And have sheet music of your compositions been sold within the state of Nebraska?

A. Yes.

Q. Have you any control at the present time over any of the sheet music that has been sold in the state of Nebraska of your compositions?

A. No.

Q. Are you able to determine and fix a price at the present time for the public performance for profit of your compositions in the state of Nebraska?

A. No.

Q. Have you any information or data with respect to the establishments where music is used in the state of Nebraska at the present time?

A. No.

Q. What would you have to do in order to acquire such [fol. 1266] data and information?

A. I would have to employ an agent or representative within that state, or maybe a number of such agents and representatives. I would have to pay salaries of $50, $75 or $100 a week to such agents. I would have to employ an investigator to go around and see that my compositions are not infringed. I would have to employ a lawyer, and from my past experience of people experienced in music and the salaries they demand I am sure that would involve an expense of over $10,000.

Q. Are you able financially to bear that expense?

A. No.

Q. Is the Society doing this service for you at the present time?

A. Yes.

Q. Would you be able to receive any monies for the public performance for profit for your compositions in the state of Nebraska if it were not for the Society?

A. No.

Q. If you were required to act independently and not in combination with anyone could you at the present time affix to the sheet music of your compositions sold in the state of Nebraska any price for the television rights of your compositions?

[fol. 1267] A. No.

Q. Have you any information presently that would assist you to fix a fair price for such television use in the state of Nebraska?

A. No.

Q. Is there any way in which you could acquire such information?

A. No.

Q. If you were compelled to act alone and independent to fix the price for public performance for profit in the state of Nebraska would that interfere with the production of the stage plays for which you write music?

A. Yes.

Q. Would it jeopardize the commercial value of these stage plays?

A. Yes.

Q. Would it jeopardize the investment of the producers of these stage plays?

A. Yes.

Q. Would it result in competition between the producers of these stage plays and users of the musical compositions within the state of Nebraska?

A. Yes.

Q. Is it desirable, from a commercial standpoint, with [fol. 1268] respect to your musical compositions, to defer the public performance for profit of many of your compositions?

A. Yes.

Q. Is that due to the nature of the business?

A. Yes.

Q. And does the Nebraska statute prevent you from exercising that right?

A. Yes.

Q. Mr. Romberg, are you a member of the American Society of Composers, Authors and Publishers?

A. Yes.

Q. And when did you join that Society?

A. 1917.

Q. And have you been a continuous member since that day?

A. Yes.

Q. Have you presently a contract in force with that Society?

A. Yes.

Q. I show you this document, dated September 16th, 1935, and ask you whether you recognize the signatures on the document?

A. Yes.

Q. Is that your signature?
A. Yes.
Q. Is that the signature of Joseph Young, secretary of [fol. 1269] the Society?
A. Yes. I am familiar with it.
Q. I will offer this in evidence.

(Document entitled Agreement between Sigmund Romberg and American Society of Composers, Authors and Publishers, was received by the Notary Public, marked Complainant's Exhibit No. 5, and returned to Mr. Frohlich.)

Q. I show you what purports to be a photostatic copy of Plaintiff's Exhibit No. 5 and ask you if this is a true and accurate copy of this exhibit?
A. Yes.
Q. I will offer this in evidence as Complainant's Exhibit 6.

(Photostatic copy of Complainant's Exhibit 5, namely Agreement between Sigmund Romberg and American Society of Composers, Authors and Publishers, was received by the Notary Public, marked Complainant's Exhibit No. 6, and the same is attached to and made a part of this deposition.)

Q. Were you at one time a member of the board of directors of the American Society of Composers, Authors and Publishers?
A. Yes.
Q. Can you tell us what revenue you received from the Society in the year 1936?
[fol. 1270] A. $14,576.16.
Q. What royalties did you receive from the Society in 1937?
A. $17,480.65.
Q. You consider the contract, Plaintiff's Exhibit 5 and 6 of value to you?
A. Yes.
Q. And what do you value this contract at?
A. At least $250,000.
Q. Are you willing to have this contract declared invalid?
A. No.
Q. Prior to 1917 did you receive any compensation for the public performance for profit of any of your compositions?
A. No.

Q. Did ever any user of music in the United States ever come to you prior to 1914 and request you to license him to publicly present for profit any of your compositions?

A. No.

Q. Is the Society doing something for you which you are unable to do for yourself?

A. Yes.

Q. And do you want the Society to continue to function in [fol. 1271] that manner for you?

A. Yes.

Q. You have spent practically the greater part of your life in the musical profession, haven't you?

A. Yes.

Q. And you are familiar with the profession?

A. Yes.

Q. And the problems of the members of the profession?

A. Yes.

Q. Do you know if any composer in the United States ever received any compensation for the public performance for profit of his compositions prior to the time the Society was formed?

A. As far as I know, and with my familiarity with the profession I do not know of a single composer in the United States who ever received any monies for public performance for profit of his compositions before the Society began to function.

Q. Are your musical compositions performed on radio broadcasts outside the state of Nebraska?

A. Yes.

Q. And are your musical compositions frequently re-broadcast by radio broadcasting stations within the state of Nebraska?

[fol. 1272] A. Yes.

Q. Is that done by means of the hook-up?

A. Yes.

Q. Are you able to control the re-broadcast of these compositions within the state of Nebraska that have originally been broadcast outside the state of Nebraska?

A. No.

Q. What is the usual price charged by your publisher for the sheet music of your compositions?

A. 22 cents per copy.

Q. Has that been the average charge over the period of years over which you have been composing music?

A. Yes.

Q. These copies of sheet music are purchased by members of the public from time to time, isn't that right?

A. Yes.

Q. Now, what class of the public is the greatest purchaser of sheet music of your compositions?

A. Singers, public schools, private performers, amateur performers.

Q. If you were compelled to affix to the copy of sheet music the sales price for all purposes including public performance for profit would that adversely or otherwise effect the sale of sheet music of your compositions?

[fol. 1273] A. Yes.

Q. How would it effect it?

A. If I were compelled to follow this Nebraska statute and place on the copy of sheet music a price for all users so that the purchaser would have to pay all of that price when he purchased the sheet music, there isn't a single purchaser in the state of Nebraska who would buy a copy of my music, because he couldn't afford it, and the result is that the sale of my music would so fall off and diminish at once practically to the vanishing point within the state of Nebraska.

Q. Are you domiciled in Nebraska?

A. No.

Q. Were you ever domiciled there?

A. No.

Q. Have you any agent or representative in that state?

A. No.

Q. Do you transact business in that state?

A. No.

Examination Closed.

——— ———.

Subscribed and sworn to before me this — day of June, 1938. ——— ———, Notary Public in and for the County of Los Angeles, State of California.

———

[fol. 1274] State of California,
County of Los Angeles,
Southern District of California,
Central Division, ss:

I, William J. Stahly, a Notary Public in and for the County of Los Angeles, State of California, residing in the

city of Los Angeles, County of Los Angeles, State of California, do hereby swear:

That Jerome Kern and Sigmund Romberg, the witnesses produced pursuant to the notice of taking depositions and the stipulations dated March 28th, 1938, April 23rd, 1938, May 11th, 1938 and May 28th, 1938, personally appeared before me on the 15th day of June, 1938, at 10:00 o'clock in the forenoon of that day, the undersigned Notary Public being neither of counsel nor kin to either party, having held the said hearing at the said time and place, at the office of Phillip Cohen, Esq., Room 1217, 707 South Hill Street, City of Los Angeles, County of Los Angeles, State of California, and being by me duly sworn to tell the truth, the whole truth, and nothing but the truth, and being by me duly cautioned to testify to the whole truth and nothing but the truth, the said witnesses thereupon answered to the several questions propounded to them by Louis D. Prohlich, of counsel for the Complainants, as shown in the foregoing [fol. 1275] depositions, and there being no appearances on behalf of the defendants, and a telegram having been received dated June 13th, 1938, which is hereunto annexed, which telegram stated, "Nebraska Attorney General Will Not Appear For Depositions June Fifteenth," and which was signed by Barlow Nye Administrative Assistant Attorney General, of the State of Nebraska, and the said witnesses having deposed to all the matters contained therein as shown thereby; and the Complainants' Exhibit No. 3 having been examined and compared by me with Complainants' Exhibit No. 2, and having been found to be a true and accurate copy of Exhibit No. 2; Exhibit No. 6 having been examined and compared by me with Complainants' Exhibit No. 5, and having been found to be a true and accurate copy of Exhibit No. 5;

I Further swear that when said depositions were completed and transcribed they were carefully read by the said Jerome Kern and Sigmund Romberg, the witnesses aforesaid, and were corrected by them in each and every particular they desired, and they were then subscribed by the said witnesses;

I Further swear that I am a shorthand reporter, and that said depositions were taken down by me in shorthand at the time and place hereinabove named, and were thereafter [fol. 1276] transcribed into typewriting under my supervision.

I Hereby swear that the foregoing —, comprise a full, true, correct and impartial transcript of my shorthand notes of said depositions.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office this — day of June, 1938.

——— ———, Notary Public in and for the County of Los Angeles, State of California.

[fol. 1277] Gene Buck called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. What is your full name?

A. Gene Buck.

Q. Where do you reside?

A. Great Neck, New York.

Q. Are you a citizen and resident of the State of New York?

A. Yes, sir.

Q. How long have you lived in that state?

A. Thirty-three years.

Q. Where did you originally come from?

A. From Detroit, Michigan.

Q. How old were you when you came to New York?

A. Twenty-one.

Q. And what profession or business did you pursue?

A. I was originally an artist for three years, and then started to write songs.

Q. The words or the music?

A. Mostly the lyrics—the words, and also some music; and from that, the writing of songs, which I am primarily interested in, into the writing of musical plays and the production of musical plays.

Q. Were your musical compositions published from time to time?

A. Over five hundred of them.

[fol. 1278] Q. I hand you this list of musical compositions, Mr. Buck, and ask you whether this list accurately and truly represents musical compositions composed and published by you?

A. Yes, those are the numbers. I wrote forty productions for the late Florenz Ziegfeld and his Follies.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 1.

Q. You say you were associated with the late Florenz Ziegfeld for many years?

A. Yes, sir.

Q. Did he produce plays known as the Ziegfeld Follies?

A. Yes, sir.

Q. Were they highly successful plays?

A. I believe the most successful reviews ever produced in America.

Q. Did you have anything to do with the writing of any part of those plays?

A. Yes.

Q. For how many years were you connected with him?

A. Twenty-three years.

Q. Did you become a member of the American Society of Composers, Authors and Publishers at one time?

A. I was one of its original founding members in 1914.

Q. Can you give us the names of the other gentlemen who helped found that organization?

A. The real founder, the instigator of this society, was the late Victor Herbert, who called us together. It also consisted of Louis Hirsch, composer, Raymond Hubbel, [fol. 1279] Glenn McDonough, Silvio Hein, and Henry Blossom. This was part of a small group of composers and authors.

Q. Are you familiar with the conferences and talks between these various persons you have just named with reference to the incorporation or organization of the Society?

A. I was with them when it was brought into being.

Q. Do you know what brought about the organization of the Society?

A. Yes, sir.

Q. Will you please tell us briefly?

A. There was in this country at this time authors and composers who were confronted with a situation that had never happened before. That is, large companies, corporations and users of music were taking their works without asking the men who created it or their publishers, and started to build industries in this country on the productions of their brains. At first it started with the phono-

graph companies, who without paying George M. Cohan or Victor Herbert or Phillip Sousa or the man who created the songs in this country, a nickel, took their works and put them on phonograph records and built one of the great businesses of the world, and up to that time the man who created that song—the words and music—and his publisher never received a nickel in royalty. In 1909 Mr. Nathan Burkan, since dead, the attorney for Victor Herbert, marched to Washington and said that something should be done about this situation. Theodore Roosevelt was President of the United States at that time, and he also had a gift for writing. When this situation was brought before [fol. 1280] him he said that the law should be changed and that the composers and authors should receive some recognition for their compositions and writings being violated. These records were made and sent all over the world and this terrific injustice existed. He made a recommendation to Congress, and the Act of 1909, or revision of the Copyright Act, was put into the Copyright Act. It was the first fundamental protection, which is going to flow through this case, this recognition of the rights of creative workers. I merely highlight this so that you get some of the atmosphere that's in this case, which is good for the record and good for your minds in addressing yourself to it.

The author and composer prior to 1909, such as Cohan, Sousa or Herbert, contributors of musical works in this country, never received a cent from the phonograph companies, and they were springing up throughout this nation, taking their works, engaging orchestras and stars, and putting them on wax, and sending them throughout the world. The phonograph companies were very powerful in Washington, to such an extent that there came into this fight Charles K. Harris, who, I believe, wrote "After the Ball", since gone; Harry Von Tilzer, and also into the fight came Augustus Thomas, Robert Underwood Johnson, all creators banded together, men who had a gift for writing songs, a book or play or novel or article. What was involved in this question? It was the first intrusion of the mechanization into taking and holding creative works without asking the man who created it if they could go [fol. 1281] ahead and use it, and they built up gigantic interests. There were a handful of writers, and the opponents were very, very powerful. Out of it came one of the most insidious things in American law—the price fixing

provision which was set out in the Act of 1909—a provision that the author and composer and his publisher by law could only get two cents for the creation of his brain on a phonograph record, but a phonograph company could pay Enrico Caruso $150,000 a year, and the leading bands and orchestras of the United States had a free right to bargain. The phonograph companies put it in there that two cents was all an author and composer and his publisher could derive from the sale of the record. At that time, and it is very important here, the phonograph record was confined to the home. This magic instrumentality called radio was not conceived at that time, and in the deliberations of Congress, inasmuch as this was a record, that phonograph record at that time was part of an instrument to mechanically reproduce. No person living could read a phonograph record. These indentions would only speak when a needle was put on, and it was part of a machine. That was the start of the mechanization and of the utilizing of the works of creators of songs. Naturally those who wrote the songs of the country felt terribly. They were perfectly willing in those days, and they were the first to step forward to take this two cents, and that was the only compulsory license provision, I believe, up until a year or so ago, when it was put into some agricultural act. It was the first time in the history of this [fol. 1282] nation that price fixing was recognized in any part of our government, and it was an amazing commentary that it should be tacked on men and women who created the songs of the country.

Q. What happened, Mr. Buck, in 1914?

A. And from 1909 on——

Mr. Hotz: Go ahead with what you were saying.

A. In 1912 there started in this country the so-called cabaret. In 1913 it increased in volume and it broke out like a prairie fire throughout this country. You would go into a restaurant to eat and out in front of you would step a gal or a man or a quartet or a band in competition to the legitimate shows and enterprises in theatres built for such a purpose. Into this restaurant to lure patrons would come artists singing songs, and they would take the songs of mine from the Ziegfeld Follies, take the Victor Herbert songs out of his repertoire, take the popular songs created

by Irving Berlin and George Cohan, take Sousa's marches without ever asking anyone, just like the phonograph boys did. This new enterprise started in the restaurant business to lure customers into their establishments. There wasn't an author or composer in the United States, and the same condition exists today, who could engage an attornoy, nor did he have the funds.

Q. Did you have a fund and were you able to do anything about it in 1914?

A. I could do nothing. I am going to answer the question you asked me. Victor Herbert had a sensational suc-
[fol. 1283] cess on Broadway. This great, open-hearted, generous man called us together and said something should be done about this. They are taking the greatest songs of the country now, and it was a very insidious technique. They didn't charge admission at the door, but this was their creation, and one of the toughest things in this country, the so-called couvert charge. Performers appeared on the floor and sang songs that they had pirated and which were created for musical play, and some of them cost $200,000.

Mr. Hotz: We desire to object to the immateriality of the statements that have been made by the witness, and make this objection in this form, and request counsel to kindly put your questions to the witness and let him answer them as nearly as he can by questions and answers. We feel that much that has been said is immaterial, and that we could go on here and show the trials and tribulations many, many years ago, without getting down to what we are confronted with today.

Mr. Frohlich: I have tried to save time by not asking a lot of questions.

The Court: I think the witness is inclined to indulge in argument. Confine yourselves to the facts.

Q. Well, now, with reference to the American Society of Composers, Authors and Publishers, that was formed, you say, in 1914?

[fol. 1284] A. I was just reaching that point.

Q. That was an unincorporated society under the laws of the State of New York?

A. I think the Court is entitled to know why it came into existence.

Mr. Frohlich: We will get to that in a minute.

I offer in evidence plaintiffs' Exhibit Number 2, Chapter 609 of the General Associations Law of the State of New York.

Mr. Hotz: No objection.

Q. Mr. Buck, I show you this document and ask you what it is?

A. That is Articles of Association of the American Society of Composers, Authors and Publishers.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 3.

Mr. Hotz: No objection.

Q. I show you two documents, Mr. Buck, and ask you what these represent?

A. They represent the membership list of the American Society of Composers, Authors and Publishers, affiliated societies, and the Board of Directors and Officers and all representatives in the States of the Union.

Q. Is this a blue document?

A. The blue one is for the year 1937, and the last issue is 1939, August 1st. That is most pertinent in this case.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibits Numbers 4 and 5.

[fol. 1285] Q. Mr. Buck, prior to 1914 did any of the users of American Music, to your knowledge, pay any author or composer for the public performance for profit with respect to those compositions?

A. No, sir.

Q. And was that one of the motivating reasons for organizing the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. After the organization of that Society in 1914 was the Society able to get money from the users for the public performance for profit of these compositions?

A. The history is we didn't get the person in court. When we went in with the violation we met the restaurant owners of the United States.

Q. Were the restaurant owners organized into a trade association?

A. They were.

Q. What was the name of it?

A. I think it was—I would have to get a book; I can't recall. The record is there. The court records show it, with the opponents that confronted us.

Q. In other words, you say a test suit was brought of some kind?

A. Yes, sir.

Q. Were the restaurant owners represented by one counsel?

A. Yes.

Q. And who represented the group?

A. Yes.

Q. Was this case carried to the United States Supreme Court?

A. We lost the case in the lower court and it took three [fol. 1286] years and eventually it went to the United States Supreme Court, and the late Justice Oliver Wendell Holmes rendered a decision construing the Shanley case. That was the performance for purposes of profit, although there was an admission charged at the door by the indirect charge of the couvert charge, and they put this charge on your check.

Q. That was the case of Herbert against Shanley?

A. Yes.

Q. After that decision came down in 1917 did you meet any other further opposition on the part of the users with respect to payment for these performing rights?

A. In the interim during these three years the picture houses throughout the United States utilized the same way of taking the music works of authors.

Q. Were these picture houses organizing trades and associations?

A. They were.

Q. Do you recall the names of some of the associations?

A. The Motion Picture Exhibitors of America and the Motion Picture Exhibitors of New York—they were organized in every state, and now they have a national organization and a state organization.

Q. A national and a state organization?

A. Yes, sir. Whom were we confronted with? We never met Mr. Shanley and never met the individual infringers. We were always confronted with an attorney like today, by the representatives of an association.

Mr. Riddell: Just a minute. I move to strike out the [fol. 1287] answer as not responsive to the question, and wholly argumentative.

The Court: Overruled. Part of the answer is clearly responsive.

Q. In the years 1917 on was the litigation between the American Society and users with respect to the attempt by the American Society to enforce the rights of its members?

A. It is continual right up to this moment; it never ceased.

Q. Did the motion picture theatre owners pay anything to the American Society for the use of the compositions in the theatres?

A. Not until forced to by the court action.

Q. How long did that take?

A. That took two years, I think.

Q. Did the motion picture owners pay anything to any of the individual authors, composers and publishers, members of the Society, during that period?

A. Never in their history.

Q. Did they pay anything to any author for performing rights, do you know?

A. Never in their history.

Q. Well, did the time come when the American Society on behalf of its members entered into license agreements with the owners of motion picture theatres in the United States?

A. Yes. When our rights were upheld by the court, then we negotiated with them.

Q. Now, in 1923 was radio the coming actor?

A. It started in 1921, yes.

Q. By 1923 had it reached any proportion?

A. Yes, very much of a proportion.

[fol. 1288] Q. There were a number of radio stations in existence in 1923?

A. Yes.

Q. Were these radio stations operating throughout the United States?

A. They were.

Q. Were they utilizing musical compositions for the purpose of public performance at profit?

A. They were.

Q. Were they utilizing the compositions of the members of the American Society?

A. They were.

Q. Did they offer to pay to the American Society, or to any individual members of the Society, any compensation for the public performance for profit?

A. No, they did not. The picture owners resisted.

Q. Did the Society demand of them that they pay compensation for these performing rights?

A. They did.

Q. Was that demand acquiesced in?

A. No.

Q. Was there litigation on the subject?

A. The first case brought by the American Society of Composers, Authors and Publishers was in the State of New Jersey and tried before Federal Judge Lynch, who upheld the Society. That was constituted a public performance for profit. The broadcasters said, like everybody else, "We are not infringing here."

Mr. Riddell: I move to strike out that portion of the [fol. 1289] answer beginning, "The broadcasters, just like everybody else", from there on, as not responsive.

The Court: It may be stricken out.

Q. Were the broadcasters organized in any groups in 1923 and subsequent years?

A. Yes.

Q. Can you give us the names of the groups?

A. The original association was the National Association of Broadcasters which is in existence today, and the first president was Gene McDonald of Chicago, and then there was Paul Klugh, executive chairman, who now works in Chicago. I happen to know the gentlemen met in Washington, where they went down to change the law, to have the two cents compulsory apply to broadcasters.

Mr. Hotz: Objection to as hearsay, and as not responsive. I suggest that counsel confine Mr. Buck to his specific questions.

The Court: The volunteer part may be stricken out. Overruled as to the rest.

Q. Now, Mr. Buck, you said there was litigation between the Society and the broadcasters after 1923?

A. That is right.

Q. Was the National Association of Broadcasters represented by its own counsel?

A. Yes.

Q. What form of opposition did the Broadcasters take with respect to the Society, in addition to litigating their rights in others?

[fol. 1290] A. Well, some of them first didn't use the American Society works on their broadcasting stations, namely, the R. C. A., headed by Mr. David Sarnoff, for some time. He operated WJZ and some of his stations, without utilizing the works of the American Society.

Q. But now did a time come when the activities of the Broadcasters took other shape?

A. I didn't hear the last.

Q. Did the time come when the activities of the Broadcasters were extended and took other shape? Did they do anything else?

A. We took the Broadcasters to court and were upheld by the courts, and they did the next thing to change the law.

Q. You mean with respect to the copyright law?

A. To change the basic copyright law by a bill introduced by Senator Dill of Washington.

Q. What year was that?

A. In 1924.

Q. Were hearings held before committees in Washington?

A. Yes; numerous committees in the Senate and House, and one joint hearing.

Q. Did you attend those hearings?

A. I did.

Q. Who appeared in favor of the bill which would affect the copyright law?

Mr. Hotz: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The National Association of Broadcasters.

[fol. 1291] Q. Are you able to tell us without looking at any document from your own memory, what particular bills were introduced and who appeared in favor of those bills against the interest of the American Society?

A. The first bill was the so-called Dill bill introduced by the Broadcasters in 1923. There was the introduction in

Congress of a revision of the Copyright Act known as the Vestal bill, and there were long extensive hearings that lasted a year and a half. Vestal of Indiana happened to be chairman of the committee. The Broadcasters appeared then as the National Association of Broadcasters. And if it is so desired, I will put the counsels' names in the record.

Q. I want you to tell us. Are you able to do it from memory?

A. The next important bill that the users of music presented was the Duffy bill, introduced in the United States Senate by Senator Duffy of Wisconsin, for revision of the Copyright Act. It was known in Washington as the users bill.

Q. Mr. Buck, who prepared this document here, do you know?

A. This was prepared by our legal staff, and is a record from 1924 on of appearances at all hearings in Washington, on every bill pertaining to the change of the Copyright Act.

Q. Will you refresh your memory from that document and tell us who appeared in 1924?

A. The first bill down there to change the Act from 1909 was brought down there by the original president, Gene McDonald of Chicago, and Paul Klugh, executive chairman. The bill was introduced by Senator Dill on the 9th day of [fol. 1292] April before the United States Committee on Patents, and the appearance there was Mr. McDonald, Mr. Klugh, and Mr. Charles Tuttle.

Q. He is a well known lawyer in New York City?

A. He is a very distinguished attorney, and at one time Federal District Attorney.

Q. Will you look at the other sections of this document, which refer to hotels and motion picture people with reference to these communication bills, and tell us who appeared on behalf of any other organization?

A. On the same Dill bill introduced, which would eliminate from the Act the all-important line, "public performance for profit," which the Society operates under for the protection of its members. Mr. Frank Boland for the Hotel Men's Association appeared at the same time.

Q. Did anyone else appear at that hearing?

A. At that hearing for the motion picture industry there appeared Mr. Sidney Cohen, who was at that time the head of the Motion Picture Theatre Owners Association, and Mr.

Samuel Handy of the Motion Picture Exhibitors of America, in the 68th Congress, in the first session.

Q. By the way, that bill didn't pass, did it?

A. It didn't; it was defeated.

Q. Did that bill affect the minimum damage clause of the act?

A. Yes; it attempted to strike it out.

Q. What was the clause?

A. Provision of $250.00 as a damage clause which is in the act.

[fol. 1293] Q. After 1924 were any other bills introduced in Congress?

Mr. Hotz: Just a minute. We object to that as incompetent, irrelevant and immaterial. We have no objection to the present Copyright Act being referred to or introduced in evidence. I can't see the necessity nor the materiality for the various attempts they have made in Washington, D. C. to change the Copyright Act, and take it up year by year. It stands today on the statute books. The courts have universally held what the rights of the various authors and composers are under that act. There is no doubt about it, and there is no controversy here. This is not an infringement suit. There is nothing about infringement in this action. This is an action for a plain, ordinary, simple injunction to restrain the enforcement of a certain bill for unlawful monopoly in the State of Nebraska. I think, therefore, I will have to insist that they do not encumber the record, and permit this immaterial testimony to go in.

The Court: Overruled.

A. Yes.

Q. After 1924 were any other bills proposed to Congress which affected the Copyright Act?

A. Yes, sir.

Q. Will you be able to refresh your recollection, Mr. Buck, from looking at this document and tell us when the next bill was introduced?

[fol. 1294] A. The next important bill was introduced by Senator Duffy in the United States Senate. Numerous bills were dropped into the basket in 1924, but they didn't arrive at a crystallization to the extent that a committee gave a hearing to either side. The basket was filled with bills, but the patent committees of the House or Senate did not

hold extensive hearings until the Duffy bill was introduced by Senator Duffy—the extensive hearings were held then.

Q. Did you attend the hearings?

A. Every one of them.

Q. Who appeared in favor of that Duffy bill?

A. The same gentlemen; the National Broadcasters, the Hotel Owners of America, and the Motion Picture Exhibitors of America.

Q. Did the Duffy bill affect the provisions of the Copyright Act with respect to minimum damage?

A. It did; it moved to strike out the $250.00 clause, it moved to strike out the extension, more or less. An admission was charged at the door of a cabaret or restaurant. It was an entire user bill. I trust the Court will understand when I say "user," I mean our opponents again, who created it.

Q. Did the time come when legislation was introduced in the various states throughout the country which affected the rights of the composers, authors and publishers of musical compositions?

A. Yes, sir.

Q. Can you tell us the first bill that was proposed or passed with respect to such legislation?

[fol. 1295] A. The first bill introduced was in the State of Washington three years ago.

Q. Prior to the introduction of a bill which affected the copyright, did the State of Washington or the officials of that state take any action with respect to copyright owners who were members of the American Society of Composers, Authors and Publishers?

Mr. Hotz: Just a minute. Object to that as incompetent, irrelevant and immaterial, and not within the issues of this case. I am not prepared to go into what happened in Washington.

Mr. Frohlich: I have a decree of the State Court of Washington, and the American Society was affected by this decree. I have a certified copy of it, by Judge Wright, in which he adjudicated the rights of the Society. Its nature and character had been attacked within that state.

I want to show by this witness what was the nature of this attack culminated in this decree. I want to show here

that when this bill was passed, the bill now seeking to be enacted in the Statutes of the State of Nebraska, it wasn't the first bill of its kind and there was reason for having had that bill proposed in the State of Nebraska. There were some people who were interested in that bill. It was the culmination along the line of attack, first in the courts in the east and then in the halls of Congress, and when there was failure in the halls of Congress there was an attempt [fol. 1296] to introduce bills in the forty-eight States of the Union to emasculate the rights of these composers, authors and publishers, and this is one of the bills. I think the history of this bill or the reason for its passage is of some interest to the Court. The Court is not expected to sit in the dark and view things in a vacnum. They say this is affected with public interest, and I say it is a private interest of users. I think it is revealing, your Honors, on that point.

Mr. Hotz: If counsel has a decision of the court he wants to cite, it seems to me it is a matter for argument as to what other course might have held under similar bills and similar circumstances. That isn't a matter for the witness to testify to. Of course, the American Society has had litigation. In fact, the name Gene Buck appeared before the court more than any other individual. They have got records here to show eighty-eight suits pending in Nebraska in the two jurisdictions we have here. I can't see the materiality of that. I don't see why we have to go into the fights they had in Washington and Florida and Montana, and different things. Our Nebraska bill, we can show it is materially different.

The Court: Sustained for the present.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Num- [fol. 1297] ber 6, being the decree of Judge Wright, a certified copy of it.

Mr. Hotz: We object to it as incompetent, irrelevant and immaterial, and not within the issues of this case. It merely purports, your Honors please, to be a decree in a case.

The Court: Sustained.

Mr. Frolich: I offer in evidence at this time, your Honors, two laws of the State of Montana, one passed in 1937 and one in 1939, very much similar to the statute in suit here. I merely want to offer certified copies of these laws in evidence.

Mr. Hotz: We object to those as incompetent, irrelevant and immaterial, having no bearing on the issues in this case, and encumbering this record. The laws of Montana are in their statute books.

The Court: This Court will take judicial notice of all these laws. Objection sustained.

Mr. Frolich: They will be marked plaintiffs' Exhibits Numbers 7 and 8.

I also offer in evidence similar laws in the State of Washington, the State of Tennessee and the State of Florida, being Exhibits Numbers 9, 10, 11 and 12.

Mr. Hotz: Let the record show the same objection.

The Court: Objection sustained.

[fol. 1298] Q. Are you an officer of the American Society of Composers, Authors and Publishers?

A. I am the president.

Q. And how long have you been president?

A. Sixteen years.

Q. I show you this document and ask you whether you recognize the signatures?

A. I do. That is a contract for agreement between myself and the American Society as a member.

Q. What is the date of that contract?

A. The date of that is June 25, 1935. That is a renewal agreement.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 14.

Mr. Hotz: No objection.

Mr. Frohlich: May I substitute a photostatic copy of that?

The Court: Yes, and the original may be withdrawn.

Q. Roughly, about how many publisher members are there in this Society?

A. About one hundred and twenty-three or one hundred and twenty-four.

Q. How many writer and composer members?

A. About one thousand and sixty or seventy.

Q. For each and every one of those publisher members, author and composer members, have executed similar contracts to Exhibit Number 14?

A. Exact contracts.

[fol. 1299] Q. Now in force and effect?

A. The same contract between the publisher member and composer, and they all sign the same kind of a contract.

Q. When in point of time do they expire?

A. That contract expires December 31, 1940.

The Court: The other contracts also expire at the same time?

The Witness: They all do. They have been renewed for five-year periods all through the Society's history.

The Court: And the same period? They date from the same day and renewed at the same time?

The Witness: Yes.

The Court: Not each one has a five-year period, has it?

The Witness: All of them up to the year 1921. From 1914 we just had one contract. We had one contract at that time, and it had a continuity from 1914 to 1921. Then starting at the year 1921, from then on, it was for every five years. At the end of that five years all members in the Society signed a renewal agreement for a period of five years.

Q. Mr. Buck, has the American Society of Composers, Authors and Publishers any contractual relations with other societies elsewhere in other countries?

A. It has some thirty-six nations.

Q. Among them is there one society in France?

[fol. 1300] A. The French Society and British perform the rights of the Society. Every country in Europe, with the exception of Russia.

Q. Now, I show you photostats of contracts between the American Society and European societies, and ask you whether these photostats are true and correct copies of the originals, and whether these contracts are presently in existence?

Mr. Frohlich: For the information of the Court, I have the originals in court, but I would like very much to take them back.

A. These are the photostat copies.

Q. Are the contracts all in force at this time?

A. Yes. I signed them.

Mr. Frolich: I will offer in evidence plaintiffs' Exhibit Number 15 as a group and as one exhibit.

Mr. Hotz: You have them in once in your depositions.
Mr. Frohlich: I believe so, somewhere in the depositions.
Mr. Hotz: Let us not get them in here twice. We have no objection to them.

Q. Now, Mr. Buck, does the Society deal in any sheet music?
A. No, sir.
Q. Does it have any interests whatever with reference to the publication of musical compositions?
A. No, sir.
Q. Does it purchase or sell any sheet music?
A. No, sir.
[fol. 1301] Q. Does it print or publish any musical composition?
A. No, sir.
Q. Does the Society own any copyright?
A. No, sir.
Q. Has it ever owned any?
A. Never in its history.
Q. Has it ever traded in any shape, manner or form in sheet music?
A. It has not.
Q. In what is the Society interested?
A. The author, composer and publisher vests in the Society the so-called "small performing right"—the right to publicly perform for profit.
Q. Is that the only right in which the Society is interested?
A. That is the only right they have.

The Court: Why have somebody testify about this if it is already in? It will probably speak more accurately than the witness' recollection.

Q. How does the Society license the compositions of its members to users of these composition for the purpose of public performance for profit? Tell us the procedure.
A. It issues a blanket license. If a theatre license is predicated on the seating capacity of the house, it is so much per seat per year. The broadcasting station license is predicated, first, on the wave length of the station, the location of the station, the sum area of its listening public, and the power granted to them by the United States Government.

[fol. 1302] Q. As to a dance hall, what is done?

A. If a dance hall, it depends on its location and the size of it; if a restaurant, also its location and the size of it.

Q. Now, on September 1, 1937 did the Society have in force various contracts in the State of Nebraska with users of music in that state?

A. They did.

Q. I show you this group of contracts—photostats of these contracts, and ask you whether those are the contracts that were in force with the users of musical compositions in the State of Nebraska, May 17, 1937?

A. Without going into detail with every one of them, yes, they are the photostatic copies.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 16.

Mr. Hotz: While we have no objection as to the materiality and relevancy of this bunch of photostatic copies of the contracts in the State of Nebraska, it encumbers the record unduly. They have set out their complaint the users they have in their respective counties, and then attached to the bill of complaint a typical contract, and that so far as we are concerned, even though we have denied it, would be sufficient, except one contract we have called for, and that is with the radio station coupled up with the newspaper at Norfolk.

[fol. 1303] Mr. Frohlich: My reason for offering them is primarily that these contracts are very vitally affected by the statute. This statute abrogates each and every one of those contracts.

The Court: The question is whether they are already in the record.

Mr. Frohlich: They are not, your Honors. We simply attached one typical contract, a radio contract, a hotel contract. I think all the records ought to be in evidence.

Q. Mr. Buck, did you at my request have your office tabulate the revenue that was taken in by the American Society of Composers, Authors and Publishers from the users of music for the purpose of public performance for profit within the State of Nebraska from the year 1928 down to June 30, 1939?

A. I did.

Q. I show you this document and ask you whether that is the tabulation that was made?

A. It is.

Q. Is that a true and correct tabulation from the books of the American Society?

A. It is.

Q. And accurately and truly represents the money that came in for the years indicated, in the manner indicated, is that right?

A. That is right.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 17.

[fol. 1304] Mr. Hotz: No objection.

Q. Did you also prepare at my request a schedule of the actual cost of operation and commissions paid by the Society within the State of Nebraska from the year 1932 to 1937?

A. I did.

Q. I show you this tabulation and ask you whether that is a true and correct tabulation taken from the books of the American Society?

A. Yes, sir, that is accurate.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 18.

Mr. Hotz: No objection.

Q. Mr. Buck, could you furnish the figures for 1938 and the first half of 1939?

A. I would be very glad to do it.

Mr. Frohlich: We will furnish it and bring it up to date.

Mr. Hotz: Would you just as a matter of simplification add that onto Exhibit Number 18? You could do it by pencil. And you will state, Mr. Frohlich, that will be the accurate records of your Society?

Mr. Frohlich: That is correct.

Q. Now, Mr. Buck, were you in 1914 able to protect your rights with respect to public performance for profit of your compositions throughout the United States?

A. No, sir.

Q. Were you financially in a position to hire investigators [fol. 1305] and lawyers to seek out infringement and so on?

A. No, sir.

Q. Have you ever been able yourself personally to protect yourself with respect to public performance for profit of your rights?

A. Not without an association.

Q. Does that same situation hold true with the other members of the Society?

A. All of the members.

Q. Now, if you attempted to protect your own rights without the help of any organization or association with the State of Nebraska, what would you have to do as a practical matter, and with your knowledge of the entertainment profession, to safeguard and protect your rights for public performance for profit?

Mr. Hotz: We object to that as not within the issues of this case. This bill has nothing in it nor has the complaint raised any issue, nor is there anything in our answer or the state law to cover the object of any organization for the purpose of policing their rights covering infringement. They can institute any sort of procedure they wish in connection with that. It is not within the bill and not within the issues. The Society operates in this state without any handicap on the matters which the attorney has directed to the attention of the witness.

The Court: I think the witness may state briefly.

[fol. 1306] Q. You may state, Mr. Buck, what you would have to do to go about it?

A. The first thing you would have to do is to hire an investigator in the State of Nebraska to investigate all establishments.

Q. Would one investigator be sufficient for 391 establishments?

A. It couldn't be done.

Q. How many investigators would you have to have for 391 establishments?

A. Conservatively three or four.

Q. And what salary would you have to pay a man to go around and investigate these establishments?

Mr. Hotz: I object to that as immaterial.

The Court. Sustained.

Q. You would have to pay his salary?

A. Yes, sir.

Q. If any infringement was found, would you have to engage a lawyer?

A. Yes; engage a lawyer to bring suit in a court of law.

Mr. Hotz: Object to that as immaterial and calling for a conclusion of the witness, and a self-evident fact that lawyers have to be paid.

The Court: It has been stipulated the amount in controversy exceeds $3,000.

Mr. Frohlich: I want to show the helplessness of an individual under this act.

Q. Would other writers and composers have to do the same as you, if they were to proceed individually to protect their rights within the State of Nebraska?

[fol. 1307] A. Every author and composer in this country would have to do the same thing individually.

Q. And every publisher would have to do the same thing?

A. And every publisher would have to do the same thing.

Q. If an author and composer resides many miles from the State of Nebraska, it would impose a greater hardship on them, would it not?

A. It is an impossible task; it is dealing with an impossibility that any single individual could cover the violations of his works in a state.

Q. When you write a musical composition and have it published, is it frequently the case that your compositions have been manufactured by radio and phonograph companies or piano roll companies into mechanically reproduced compositions?

A. Yes.

Q. In other words, disc records and musical rolls have been made from your compositions from time to time?

A. That is right, because different rights flow from the Copyright Act.

Q. And one of the rights is to make a mechanical reproduction of your composition?

A. Yes, sir.

Q. Now, when these mechanical reproductions were made you were paid under the compulsory provision of the Copyright Act at the rate of two cents a disc record or piano roll, were you not?

Mr. Hotz: Objected to as not within the issues of this case, and having been answered by the witness, and this act applies to vocal and instrumental musical composi-

[fol. 1308] tions.

Mr. Frohlich: Now, in the first place it is very important to the issues in this case, your Honors, because one of the

rights we claim is completely destroyed by this statute, is the right of public performance for profit that would flow from the public performance for profit of a mechanical disc or piano roll, because the act expressly applies not only to played music but every copy of the composition manufactured. It has been carefully drawn to bring in every form of reproduction of that musical composition. It is our contention that when disc records are made they are made by others whom we don't control, and are forced to put on a price schedule as called for by the act, and these people can take the records and bring them into the State of Nebraska and have them perform, and the copyrighter doesn't get a penny for it, and he can't collect anywheres within the state for that performance. That is very vital here, the construction of this part of the act.

Mr. Hotz: Your Honors, that statement isn't altogether correct. In fact, no part of it is correct. This act doesn't militate against anything of the sort, nothing of the kind. Any composer or author or publisher, any of the 123 publishers, that have rights, certainly this act doesn't exempt [fol. 1309] them from infringement. The only thing it does prevent is a monopolistic organization from coming into this state and fixing a price, if it can. That is all there is to this act, and unless they can show by this witness in this question that this disc and musical records are in some way connected up with the act, it is absolutely immaterial. I can't find it in the act.

The Court: Read the question.

(Question read).

The Court: Overruled.

A. Yes, sir.

Q. And under the compulsory provision of the copyright all other writers and composers and publishers throughout the country of musical compositions receive compensation under this compulsory license provision of the Copyright Act?

A. Equal.

Q. You, of course, know that the act provides that where the copyright licenses one record maker to make a record, then any other record maker in this country has a right, on paying two cents a record, to make as many as he pleases?

A. One phonograph company, that is right.

The Court: That is putting into the mouth of the witness what you say the law is.

Q. Isn't that the procedure in the musical profession?

A. It is the practice that the minute the author and composer and publisher gives to one phonograph company in [fol. 1310] the United States the right to reproduce that song on a record, every other company in the United States can also make them at the same price.

Q. If you, Mr. Buck, were to grant somebody the right to reproduce a record of one of your compositions and other disc or piano roll manufacturers under this compulsory license provision of the act, made, manufactured discs and piano rolls of your compositions, could you in any shape, manner or form compel those manufacturers to put on the price of their records or rolls any schedule with regard to the use of public performance for profit within the State of Nebraska?

Mr. Hotz: Object to that as calling for a conclusion of the witness, and leading.

The Court: Sustained.

Q. Were many of your compositions recorded on the disc records?

A. Numerous ones.

Q. Can you give us the names of some of your compositions?

A. "Hello Frisco", "Tulip Time", "Sally Come Back In The Alley", "Garden Of My Dreams", and "No Foolin".

Q. And were many disc records made from the compositions you have just mentioned?

A. Many.

Q. Were disc records made by many manufacturers?

A. Many.

Q. Were many disc records sold throughout the United States?

A. They were.

Q. And some of them are now being sold throughout the United States?

A. Yes, sir.

[fol. 1311] Q. Have you any control over any of these records?

A. I have not.

Q. Are they in your possession?

A. No.

Q. Is there any way in which you can compel anyone to affix any price on them?

A. No, sir.

Q. Would you be willing to have any manufacturer of rolls or records fix a price on the rolls or records with respect to public performance for profit?

Mr. Hotz: I object to that as calling for a conclusion of the witness, and immaterial.

The Court: You may answer yes or no.

A. Yes.

Q. Read the question.

(Question read).

A. Well, in a sense I naturally would recapture the control. That is what I meant when I said yes; that is what I am addressing myself to.

Q. Assuming you now have to operate under the Nebraska Statute, and records are made from your songs, would you be willing to have some manufacturer put on the face of the record any schedule of prices for the public performance for profit?

Mr. Hotz: Object to that as not within the issues of this case, and not within the Nebraska Act, there is nothing of that sort in there.

The Court: Overruled.

[fol. 1312] A. No.

Q. Mr. Buck, do you know something about the show business?

A. I do.

Q. Not only did you have experience with Ziegfeld, but did you have experience of your own as a producer of plays?

A. I produced plays myself.

Q. And have you kept in touch with the general profession of producing plays throughout the country?

A. Yes.

Q. Has there been any marked decline in the production of plays since the advent of radio?

A. Yes, a great decline in the actual production of plays in the theatre. Theatres are closed from Maine to California outside of a few major towns.

Q. I show you a schedule prepared from a trade paper called "Motion Picture Herald", dated November 17, 1934,

and ask you whether you have ever seen that schedule before?

A. Yes, I have seen that before.

Q. Does that schedule purport to set forth the decline in the production of musical plays?

A. Yes.

Q. For a period of years?

A. Yes; dramatic and musical.

Q. Would you say you agree with it, and that it is accurate and correct from your experience in the show business?

A. Yes.

Mr. Frohlich: Offer in evidence Plaintiffs' Exhibit Number 19.

[fol. 1313] Mr. Hotz: We object to this exhibit Number 19 because it has no bearing upon the issues in this case. There is nothing in the complaint and nothing in the answer or bill about it. It is a page taken from the "Motion Picture Herald" and purports to give the Broadway stage from 1920 to 1934, showing the relative declines and increases and so forth in connection with performances. The bill does not attempt to reach public performances of that type; that is, dramatic performances.

The Court: In any event it is hearsay and there is no foundation laid. Sustained.

Q. You know something of the music business, too, don't you?

A. I do.

Q. In your sixteen years as president of the American Society you have personally come in contact with every phase of the music business?

A. Yes, sir.

Q. And you know the history of a great many of the famous songs of the country?

A. Yes, sir.

Q. And what they did financially?

A. Yes, sir.

Q. How many copies were sold?

A. Yes, sir.

Q. Did you cause a compilation to be made of songs that sold in excess of a million copies?

A. I did.

[fol. 1314] Q. Before I show you that compilation, let me ask you whether from your knowledge and experience since

1927, 1928 or 1929, or about that period, there was any fall ing off in the sale of sheet music in the United States?

A. Tremendous.

Q. And at the time that sheet music was falling off wa radio becoming more prevalent and popular?

A. Yes.

Q. And did the time come when radio reception was possi ble in many millions of homes in the United States?

A. There are thirty million sets operating tonight in th United States.

Q. In your opinion, based upon your knowledge and ex perience did the operation of these radio sets affect th sale of sheet music?

A. It did.

Q. In what way did it affect it?

A. Well, it affected it primarily in the way of pianos an the desire of people to buy sheet music. The writer of song first wrote the songs, and besides expressing himself it wa his desire to make a living primarily. To make that living his living was derived first from the sale of sheet musi and secondly from phonograph records. Since the inve tion and tremendous vogue and popularity of radio, shee music has fallen off and piano stores have been closed fro Maine to California. There is a little economics involve in there too. People are not going down on the corner an buy four or five sheets of music when they can turn on th [fol. 1315] radio for nothing and hear the greatest artists i the world. The same thing happened to the phonograp records, although at the moment they are coming back, an owing to this recent craze of so-called "swing music".

Q. Now, Mr. Buck, did you at my request prepare a com piliation of musical compositions that have grossed in sal a million or over?

A. I did.

Q. I show you this compilation and ask you whether th is true and correct?

A. Yes, that is true.

Q. Made upon your own personal knowledge?

A. Yes.

Q. And from information received by you from t various publishers?

A. From the publishers who publish the music, and al the composers—a royalty statement.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 20.

Mr. Hotz: It is interesting, but has no materiality.

Q. Mr. Buck, do you know of any musical composition that sold a million copies within the past five years?

A. No, sir; there isn't any.

Q. In the musical profession they endeavor to write songs that are very popular hit songs, don't they?

A. That is right.

Q. And there have been numerous hits in the last ten years, haven't there?

[fol. 1316] A. Many of them.

Q. Have any of those hits grossed a million copies of sheet music, to your knowledge?

A. No, sir.

Q. How many copies a day, as a rule, are sold of a hit song?

A. You means copies a day, or today?

Q. I mean at the present time.

A. At the present time a hit is considered one hundred thousand copies.

Q. In your opinion and from your knowledge of the business, what is that decrease due to in that sale of sheet music?

A. We naturally believe it is owing to the use of radio—we believe that.

Q. Is radio used a great deal in music?

A. Yes.

Q. When it is pleasing and entertaining is it played frequently over the radio?

A. There are nearly seven hundred broadcasting stations in the United States, and with the magic of its expression on a hook-up you can have a song hit tonight, and where ordinarily prior to the great popularity of the radio, a song would live ten or twelve years—it would take two years at least to go across the country—tonight Bing Crosby or John Boles will sing a song, and instantaneously, conservatively, thirty million people will hear him sing it. Consequently the song for a short time is a sure hit, but today it does not last six weeks. There is not a song hit in America that can last six weeks.

[fol. 1317] Q. Does this situation affect the author's royalty from the sheet music?

A. It naturally does.

Q. Are the authors' royalties today as high as they were in the days before the advent of the radio?

A. They have dropped seventy per cent.

Q. So that today the writer of a musical composition cannot look to more than thirty per cent on the hit number of what he could get fifteen years ago?

A. Not sheet music.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

Mr. Te Poel: The complainants move that the case be dismissed as to Grace Ballard, formerly County Attorney of Washington County, Nebraska, owning to the fact that she has recently departed from this life.

(Thereupon Mr. Gene Buck resumed the stand for further direct examination).

By Mr. Frohlich:

Q. Now, Mr. Buck, prior to 1914 what were the main sources of revenue that an author and composer derived when he wrote a composed musical composition?

A. The average song writer, so-called popular song writer's revenue was derived primarily from sheet music and phonograph records, but Victor Herbert, Jerome Kern, Berlin and myself, we were the men who wrote musical plays. Like I draw royalties on the Follies, and Herbert on Irene and numerous musical works.

[fol. 1318] Q. In other words, the writer or composer who wrote or composed musical compositions which appeared in musical plays, he was known as a production writer?

A. Yes, sir.

Q. And a writer who wrote and composed musical compositions to be sold to the public was known as a popular writer?

A. Most of the members of the American Society today are popular writers.

Q. Does the Society also have in its membership production writers?

A. Yes, sir.

Q. Now, prior to 1914 the popular composer had two sources of revenue, the sale of sheet music and the compensation from the mechanical records, is that right?

A. That is right.

Q. A production writer had the same revenue, in addition to which he also received revenue from the production of his plays, and royalties based upon the office receipts?

A. That is right.

Q. After 1914 and down the years has that picture changed any way?

A. Yes, tremendously.

Q. Very briefly, what change has there been?

A. Well, the change has been with the popular song writer. As I stated here this morning, his income from the sale of sheet music has dropped eighty per cent, and dropped as far as phonograph records, ninety per cent. Now it is on the rebound a little bit on account of Goodman and [fol. 1319] like swing orchestras. Take the production writer and just look at the picture of the United States today. There aren't ten musical comedies playing in the United States today, and there are not three playing in New York City. When I was in the Follies, at this time of the year thirty-five musical plays would be produced.

Q. Has the reduction in the production and the amount of musical plays affected the production writer today?

A. Yes.

Q. What is the cause of this reduction in musical comedy production?

A. Owing to the invention of the radio. Along comes the radio, this magic instrument, as I say, and it brings into the home great singers, and the theatre can't compete with that. If I produce a show tomorrow night and engage Bing Crosby to sing, I can't pay his wages that the sponsors of a radio program will pay Crosby to sing before a vast audience, whereas if he were playing in my theatre I would have only twelve hundred or two thousand seats.

Q. Now, Mr. Buck, in 1914 the revenue derived by the writer, both popular and production writer, from performing rights, was, as you testified, practically nothing, is that right?

A. True.

Q. Since 1914 has the revenue from the public performance for profit of these writers, increased?

A. Yes, it has.

Q. And where does that revenue come from today?

A. From the public performance for profit. In fact, to be candid with you, the only outcome and the only outlook a

[fol. 1320] composer and author has today for his initiative in creating public performance for profit is in the licensed establishment. If sheet music is gone, if the phonograph record is gone, what is the incentive for a man gifted to sit down and write?

Q. And in what manner is this revenue from the public performance for profit now derived by the writers of popular and production music in the United States; where does it come from?

A. It comes from the American Society; that is the chief source of revenue for any composer and author in the United States.

Q. So that if the revenue from the public performance for profit derived from the American Society is lost, then is it your testimony that the authors and composers of music today would be without any substantial revenue whatever from any source?

A. With thirty-five years in the business as a writer and composer, and with my vast knowledge as president of this Society for sixteen years, yes, sir. That is all he has to look for.

Q. I show you a tabulation made up by your office at my request and ask you if this tabulation truly and accurately represents the number of licenses issued by the American Society to establishments throughout the country since 1922, in each and every state?

A. It does.

Q. Will you please look at that tabulation and give us the [fol. 1321] total establishments now licensed by the Society in the year 1939?

A. In the year 1939, as of June 30th this year, the total licensed establishments of every radio station, motion picture theatre, dance hall and restaurant in the United States totaled 30,824 as of this day.

Mr. Frohlich: I offer in evidence plaintiffs' Exhibit Number 21.

Q. I call your attention, Mr. Buck, to the fact that this tabulation commences with 1922. Did the Society issue any licenses to users prior to 1922?

A. Yes, sir.

Q. Many licenses?

A. Yes.

Q. Between 1914 and 1921 did the American Society issue many licenses?

A. Not many.

Q. As a matter of fact, it didn't obtain any substantial revenue until about 1922, isn't that right?

A. That is true.

Mr. Frolich: I would like to offer in evidence plaintiffs' Exhibit Number 22, being a schedule which shows the diminution in the sale of sheet music and the diminution in the sale of phonograph records in the United States from 1927 down to 1933, taken from the records of the Department of Commerce and incorporated in the 1936 hearings on the copyright bill. Is there any objection to its competency?

[fol. 1322] Mr. Hotz: No, we wouldn't make any objection to the competency of it, but my objection to it is that it is not down to date.

Mr. Frohlich: I couldn't obtain anything later.

Mr. Hotz: Therefore it has no probative force, as being too old and immaterial.

The Court: Have it marked as Exhibit Number 22.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. Now, when the courts in their various holdings discussed the distinction between public performance rights and ordinary sale rights for sheet music and so forth, your organization then became active in the protection of the public performance rights, is that true?

A. That is right, sir.

Q. And at the present time your organization confines itself almost exclusively to the collection of money from the users of vocal and instrumental music performed for public rights; that is what you call public performance rights?

A. Primarily the protection of its members.

Q. I understand that, but that is something else. The protection from the infringement is another thing.

A. Yes, sir, but that is what brought the Society into existence.

[fol. 1323] Q. That is one of the purposes of your Society, to protect your members from infringement?

A. To stop this wholesale piracy.

Q. The way you do that is to have an agent and organization in each state in the Union who looks after and detects infringements of public performance?

A. That is right.

Q. Just explain to the Court what you mean by public performance rights and what people in the State of Nebraska generally are subjected to the payment of fees for public performance rights.

Mr. Frohlich: I really object to that, your Honors, on the ground that it calls for a legal conclusion on the part of the witness.

The Court: Let him answer.

A. I would be very happy to answer that. There are ten broadcasting stations operating in the State of Nebraska tonight. If the broadcasting station operates in this state tonight that is not operating for purposes of profit, this Society gives them a free license. Out of 700 broadcasting stations in the United States there — about seventy universities and churches, and as long as they are not opening their stations for the purposes of selling time for a five minute spread or spot announcement, or for a shorter period, or a half hour, the Society is perfectly willing to give its entire catalog to any municipal school or university or any broadcasting station that is not operating for purposes of profit. If that station sends out salesmen and they go to [fol. 1324] furniture stores and insurance companies and to national advertisers to dispose of its time, that is when the Society asks that station to take out a license.

Q. Now, then in addition to the radio, what else is there?

A. The next phase of activity in this state would be the motion picture theatres in the state who publicly perform music for profit.

Q. And the hotels?

A. Yes. We also license the picture houses, and it is predicated on the number of seats in that picture house. The next group in that would be the dance halls in the State of Nebraska. After all, a dance hall has nothing but the floor and music.

Q. They pay licenses?

A. They take out a license predicated on the size of the dance hall and how much usage of music there is. The next

is the hotels. If a hotel doesn't use music, we do not ask for any license, but if the hotel takes a name band orchestra and goes into the show business and uses our music for purposes of getting the public into the cocktail rooms and to dance, then we ask them to have a license.

Q. Then in addition to the hotels and dance halls, what about the amusement parks and that sort of thing?

A. If that amusement park is operating for purposes of profit rather than space and luring customers in there, they take out a blanket license with the Society. May I say to you, it is very cheap.

Q. Do you mean then for your interpretation of the public [fol. 1325] performance for profit is any user of music that performs for the public where he might derive benefit from the playing of the music?

A. Where he wants to get the public into his place and do business and utilize music.

Q. Then in the hotel room, where they have music come into the room through broadcasting, how is that handled?

A. We won a decision in the Supreme Court of the United States on that question, and have never charged.

Q. That I am trying to get at is that the hotel rooms also pay that?

A. At the moment we are not collecting from them.

Q. What do you do in connection with the telephone company or branch of the telephone company that has that service?

A. We have nothing to do with the telephone company, sir.

Q. But I mean they have the connection?

A. The remote control by the telephone company from the Broadcasting station into hotel rooms?

Q. Yes.

A. We took the question into the United States Supreme Court and they upheld our rights, but we haven't exercised our right at this time.

Q. Now, how about such things as volunteer fire departments, the American Legion halls and things of that sort?

A. If the American Legion hall is running for purposes of profit, we don't charge the American Legion. I would like to answer that further. If someone hires the American Legion hall, and if the American Legion rent a user their hall, to a group of people who want to stage a dance for [fol. 1326] purposes of profit——

Q. (Interrupting) Now, volunteer fire departments, where they conduct dances in municipal auditoriums, how is that handled?

A. No, we do not collect from volunteer fire departments. We are only collecting from people in the usage of music for purposes of profit. We don't collect from granges, American Legions, and we don't collect from municipalities. I can refute it to this record.

Q. Now, Mr. Buck, when this money is collected in for the public performance rights, the composer whose music has been played for public performance rights, he doesn't get the particular money that comes in; it goes into the coffers of the American Society, and there, through its Board of Directors, it is divided up into classifications to which the Board of Directors assign the various membership, is that right?

A. That is right.

Q. In other words, if a composer who has——

A. (Interrupting) Let me correct you, sir. The Board of Directors, they distribute it with every publisher and writer member in the American Society.

Q. There isn't any doubt about that. Now, how is that classification of the membership arrived at; who arrives at it and determines that?

A. The classification committee—there is this committee in the American Society. For the record here, all the money taken in by the American Society is distributed fifty per cent to the publisher members of the Society and fifty per cent to the writer members of the Society. The twelve [fol. 1327] publishers who are members of the Board of Directors sit down and analyze the activity of the numbers, and the number of works in the catalog of that man; the catalog and quality of his works and the years of service that the Society has had accessibility to that catalog, and that Board is representative, sir, of the production publisher, the so-called standard publisher who publish what we call standard works, I mean like Mrs. Nevin's husband who wrote "The Rosary," and she is in this court room, the widow of him. They have representation on the Board. The popular song writer who writes a number of songs, they have representation on the Board.

Q. You say there are about one thousand composer members?

A. That is right.

Q. I think that the exhibit you introduced here showed somewhat less than that; I think about 889 to 900.

A. Well, I am telling you as of today. We have taken in members; we have every month a membership committee that meets and reports at our Board of Directors, and we elect new members. I can give it with a degree of accuracy as of today.

Q. Now, among those one thousand members, the composer members, that get fifty per cent of the net receipts, there are classifications of those members that are made by the classification committee?

A. That is right.

Q. Now, you have been a member of that classification committee since its foundation?

A. And chairman of it.

[fol. 1328] Q. And you are president of the Society?

A. Yes, sir.

Q. And you are familiar with the subject matter of classification, I suppose?

A. Yes, sir.

Q. Now, please tell the Court as briefly as you can the various classifications.

A. I will be happy to do so.

Q. Go ahead.

A. First, I must prepare the Court so there will be no false intimation in the background in the atmosphere of what is going on here. Ordinarily we would like to have a system of each time a number is performed that that person was paid for that individual performance.

Q. That is a physical impossibility.

A. You know that, sir. You know there were sixty-five million performances publicly performed in the United States last year, and it would take a city as big as Lincoln, Nebraska and all its clerks to analyze those programs and extract them.

Q. Get back to the question.

A. I am going back to the question. In the absence of that, we formed what we call a classification system, wherein representatives from the Board of Directors of every quality and nature of work would meet every three months, going over that member's work, his contributions, how many years he had been in the Society, the number of works contributed, the nature and quality of his works, the vogue

[fol. 1329] and popularity of his works. That is the way we classify these members.

Q. How many are there? Give us the classifications; what I want are their classifications.

A. Of the exact classification?

Q. Yes.

A. First class is Double "A", the next is "A".

Q. How many members are there of the Double "A" class?

A. About fifty.

Q. How much do they get per year?

A. About $15,000.

Q. Are you in that class yourself?

A. No, sir, I am not, unfortunately.

Q. There are about fifty in that class, and they get about $15,000 per year?

A. Yes, sir.

Q. What is the next lower class?

A "A".

Q. How many are there of that number?

A. There must be about fifty.

Q. And what do they get per year?

A. About $12,000 a year.

Q. Are you a member of that class?

A. No, sir, I am not. And if it is any information to you, owing to my activities in the Society as its president, such as at this moment——

Q. (Interrupting) You are a member of one of the classifications, are you not?

A. I took myself out of Class "A", where I was since the foundation of the Society, and moved myself down.

[fol. 1330] Q. How long were you in Number "1" classification?

A. I was in classification "A"—first it was "AA" from 1914 up to six years ago, and I personally took myself out of that class owing to my inactivity.

Q. You haven't written any music or composed lyrics for many years?

A. The last thing I did was the late Florenz Ziegfeld's last Follies he produced before he died in 1932.

Q. Go on with the rest of the classifications.

A. The next classification is class "Double B", then "B", then "Double C" and then "C".

Q. "B" is what? How many members are there and what do they get?

A. At the moment I can't tell you. I would be very happy to furnish this information.

Q. Couldn't you give us about what they are?

A. Yes.

Q. What are they?

A. I will answer you and I trust this Court and you will accept this as approximate.

Q. All right.

A. I am not such a genius that I can tell you for sure. I imagine in Class "B" there would be——

Q. (Interrupting) "Double B".

A. "Double A" fifty—between forty and fifty in "A". I imagine in "Double B", about forty in "B".

Q. Take it right down.

A. I have to wait a moment. In "B", about thirty or forty. In "Double C"——

[fol. 1331] Q. (Interrupting) Give us the amount of the various ones.

A. Well, the top class gets about $15,000.

The Court: What do you mean by "top class"?

The Witness: "Double A".

A. (Continuing) "Double B" gets about $9,000, or $8,000. "Single B" gets about $6,000 or $7,000. The next class, "Double C", gets about $2,000.

Q. How many members in that?

A. In "Double CC"?

Q. Yes.

A. I imagine about seventy-five or one hundred, and the same in "C".

Q. Then what is there?

A. The next class is called "C-1".

Q. What do they get?

A. They get about $1600.

Q. How many are there in that?

A. Well, in "C-1", I imagine there are about fifty or sixty.

Q. And then what?

A. The next class is the class called "Double D"; that gets about $1200 a year, I imagine.

Mr. Frohlich: You mean each member of each class gets that much each year?

The Witness: Each member of each class gets that much each year.

Q. What is the next class?

A. Interspersed in between the classes—I want to straighten the record out while going down the road. In between I have skipped a couple, where I want to put it in. [fol. 1332] There is such a thing as a permanent "A", such as a set classification, that a person derives, and there is a permanent "B", and there is a permanent "C"—as long as they live they get a set amount of money.

Q. What are those amounts and how many members are there in those permanent classes?

A. I imagine in the permanent "A" they get $4,000 or $5,000 a year; about ten. I imagine in permanent "B" they get about $3500 a year; there are about ten or twelve in that class. In permanent "C" there is about eighteen or twenty. You realize, sir, I am guessing, without the accurate figures in front of me, but they are approximate.

Q. What is the lowest class after the last one you mentioned?

A. The lowest class is Number 4.

Q. How many are there in that?

A. Oh, I imagine in "4" there are about seventy or eighty.

Q. And they receive about how much per year each?

A. About $40.00 a year—$10.00 a quarter. They are people who have at some time or another written a song or two, but who haven't written anything that has attained any eminence in the Society, and they want to be members of the Society.

Q. Then you have a non-participating membership, do you?

A. Yes.

Q. How many in that?

A. I imagine the non-participating membership would have about—may I correct this for the Court here, about this non-participating membership so that this won't be misconstrued? In the policy of this Society, if a man [fol. 1333] makes application for membership, and he is first put in a non-participating class for reasons of wanting to know his stability, whether he is going to remain a song writer, whether the quality of his work is such that he should be put into an active class, which is an active mem-

bership where we divide money, there is a very definite reason for that. If you are a music publisher and make application to the American Society, we take you in and we first put you in the non-participating class.

Q. How long does he remain in that non-participating class?

A. Until such time until some public performance is made in these United States of his work. A lot of those men in those classes don't have public performance. The minute they publicly perform, we make them active.

Q. Is there any fixed time they must remain in there, such as five years?

A. No, sir; they can stay in five minutes if they show activity or have publicly performed in the United States.

Q. When they first come in, they come into the non-participating class?

A. That is right.

Q. That is the way the members come in?

A. Every member comes in the American Society that way.

Q. And then he stays in there until the Board of Directors through their classifying committee takes him out?

A. No, the classification committee has nothing to do with it. The Board of Directors elects him to membership, like the Bar Association or the Medical Association.

[fol. 1334]. Q. After he is elected to membership, then how does he get into the various classifications?

A. You mean how he gets to his classification?

Q. Yes.

A. These classifications are used in the absence of the program system which would take a million dollars.

Q. I understand that.

A. You mean how does he become classified?

Q. Yes. Through the classification committee; you have already answered that.

A. Yes.

Q. And how many members are there from this list that you handed in of some one thousand members—as I say, nine hundred to one thousand members—that are in the non-participating class probably would be the difference of the sum total of those you have already mentioned, and one thousand, isn't it?

A. I don't think there are over one hundred non-participating members in the Society. He is a person with a desire

and inclination to write, and he has written a song that is not publicly performed. That is why he is in the non-participating class. The minute a publisher or writer shows in any licensed establishment in this country that there is performance of his work he is immediately made active, so I don't want any misinterpretation of a non-participant.

Q. The Society then is operated through a Board of Directors of twenty-four men, isn't that right?

A. That is right.

[fol. 1335] Q. Of twenty-four members?

A. That is right.

Q. And your articles of the association show how the members are elected?

A. That is right.

Q. And elsewhere here we have the members who make up that Board?

A. Yes.

Q. You are president of this Society?

A. Yes, sir.

The Court: He has testified to that.

Q. You receive compensation for acting as president, do you not?

A. Yes, sir.

Q. And that is paid by the American Society?

A. Yes, sir. But I would also like to put in the record in answer to that question, I served from 1914 to 1931 without a dime in salary.

Q. You get a salary now?

A. Yes, sir.

Q. What do you get?

A. $50,000.

Q. Per annum?

A. Yes, sir. I would like to straighten this out, too. Up to three years ago—let's put all the cards on the table, so that it won't inflame the imagination of the record—I got $20,000 up to three years ago, then I got $35,000, and as of January 1st, unrequested, I get $50,000.

Q. What classification are you in?

[fol. 1336] A. I am in Class "BB". I put myself there.

Q. How much per annum?

A. That gives me about $8,000, I think.

Q. Now, is Mr. Mills secretary-treasurer of the organization?

A. No, he is not. Mr. Mills is employed as chairman of the administrative committee of the Society.

Q. He receives a salary, too, in the administration of this Society?

A. Yes, sir.

Q. What salary does he get?

A. $50,000 a year.

Q. That is the Mr. Mills who is in the court room?

A. He is here, and is going to testify and tell you about certain things.

Q. Mr. Paine also?

A. He is also here, and he is general manager at $25,000 a year.

Q. Are either Mr. Mills or Mr. Paine composer members?

A. They are employees of the American Society and run the operation of its business.

Q. You maintain an office in New York City?

A. We certainly do.

Q. What is the address?

A. 30 Rockefeller Plaza.

Q. You have employees?

A. We have.

Q. And run and operate the American Society of Composers, Authors and Publishers at that place?

[fol. 1337] A. We do. We have no magic to do this without employees.

Q. You have payrolls and pay your stenographers and clerks the same as anyone else in business?

A. Yes.

Q. Now, you also have in your organization a group that are called the publisher members?

A. That is right.

Q. And they consist of some one hundred and twenty-three or one hundred and twenty-five of the music publishers in the United States, is that right?

A. That is right.

Q. When a person composes a piece of music they have it copyrighted or they assign the rights of having it copyrighted to their publisher, is that right?

A. That is right,

Q. The publisher sets it up in salable or usable form?

A. That is right.

Q. The publisher sells that music to the public that want it, the users that want the records?

A. You have forgotten a very important thing in painting that picture. The publisher, when he takes that copy of music I created, he must then create a demand for that music. That is a very important thing, a function besides printing sheet music.

Q. That is a matter of salesmanship?

A. That is right. That is a very important thing.

Q. And each one of those publisher members are members of the American Society of Composers, Authors and Publishers, is that right?

[fol. 1338] A. Yes, sir. We have no jurisdiction over any publisher who isn't a member.

Q. Of this one hundred and twenty-three, they are the largest and best music publishing houses in the United States?

A. I believe that is true.

Q. Each one of those publisher members receive money from the Society each year?

A. That is right—fifty per cent of the entire.

Q. How is that fifty per cent of the entire divided?

A. That is divided on the same system that the writers have. A group of twelve men representing the so-called standard publishers who publish higher class music such as sacred music and the like, such as Carrie Jacobs Bond's music. The group of publishers who produce works of like musical comedies and the popular works——

Q. (Interrupting) Are put in different classifications?

A. Yes.

Q. How many classifications are there of the publishers?

A. Well, that I couldn't answer. I will be glad to furnish it to the Court. I imagine the publishers have similar classifications to the writers—maybe not as many classes.

Q. About what do the publishers receive from the first class in dollars and cents per year?

A. You mean the top ranking musical publishers?

Q. Yes.

A. Oh, I imagine $100,000.

Q. How many in that classification?

A. I think two; it may be only one. May I say this to you, [fol. 1339] sir, I am not pleading any ignorance of this question, but I have never had anything to do with the publisher classification. The publishers settle their own classification affairs. While I sit as president of the Society, my presi-

dency comes by virtue of being a member of the Board, and I have always maintained the position that no publisher member sitting at that side of the table has any right to tell a writer member of the Society how he should be classified, or where classified, and from the same viewpoint the writer members never entered in the publishers' activities where they shouldn't. For the sake of the record, as the president of the American Society, I have attended every classification committee of the writers since its foundation, and never attended a meeting of publishers' classification in my life.

Q. Is there anybody here in your organization that can tell us about that?

A. Yes, sir. We have the general manager here, we have Mr. Paine and Mr. Mills who will enlighten you thoroughly on that question.

Q. In the distribution of this money, what amount or how much does the American Society get?

A. The American Society took in last year nearly six million dollars, and it cost eighteen per cent to operate, and the rest of it was distributed to its members and to fulfill a foreign obligation of about three hundred thousand dollars.

Q. The prices charged for the public performance rights in the State of Nebraska are fixed by your Board of Directors?

[fol. 1340] A. No, no. Let us get that straight. The prices as charged in the State of Nebraska—we sat down and negotiated, sir, so that we get the whole picture.

Q. Please answer my question.

A. I want to answer the question. You say we fixed it—we did not fix it. We negotiated with the National Association of Broadcasters who fixed it, and we sat down with the Hotel Owners Association and fixed it, and sat down with the Motion Picture Operators of the State of Nebraska and fixed it. I want that record clear. There was a period of negotiations. It was not fixed by any individual writer or board of directors of the American Society. It was fixed by negotiation.

Q. But the price ultimately arrived at and accepted and made satisfactory to the National Association of Broadcasters and the American Society, that price was fixed and finally determined whether acceptable or not by your organization in New York, isn't that right?

A. That is true, with the other negotiators on the other side of the table. May I say about being satisfactory? I don't think it is satisfactory on either side.

Q. Were any bonuses paid in addition to the regular salaries and things of that sort?

A. The only bonuses ever in the history of the association, and Mr. Mills or Mr. Paine and myself—the highest bonus ever was a $5,000 Christmas present.

Q. When was that?

A. Last year.

[fol. 1341] Q. To each one?

A. Yes.

The Court: Each one?

The Witness: Yes, sir; I as president, and Mr. Paine as general manager, and Mr. Mills as chairman of the executive board.

Q. There is no agency here in the State of Nebraska that fixes the prices that users here in this state conform to?

A. What we do, our representative in the State of Nebraska knows about it.

Q. From information you send to him into the State of Nebraska?

A. Let me straighten you out now. He knows what the agreement was made in New York by the Broadcasters in the State of Nebraska who are members of N. A. B. on the deal also. He didn't negotiate it personally—it was negotiated by the N. A. B. and Board of Directors of the American Society.

Q. In other words, his information as to what to charge comes from New York, and then he follows out your instructions and puts that into force and effect in the State of Nebraska?

A. That is right.

Q. And that representative of yours here in this state, what is his name?

A. Mr. Eugene Blazer.

Q. He has been your representative for a number of years?

A. Yes, sir; and very efficient.

Mr. Hotz: I will ask the reporter at this time in connection with Exhibit Number 16, whether or not you have had

an opportunity to count the number of contracts in that [fol. 1342] exhibit?

The Reporter: I have not finished it as yet.

The Witness: About 390 in the State of Nebraska, I will tell you now.

Q. Are there any users of vocal and instrumental music in the State of Nebraska that do not have contracts, where they just temporarily go in and furnish music like dances or something of that sort?

A. We never issue licenses to any singer. We only license the establishment, either the owner or dance hall or the man who controls the lease of the motion picture theatre. Never in our life have we issued a license to a human being.

Q. Whoever it is you deal with, in individual instances, there are no special contracts that are made up for them; you do have instructions of that sort, where they collect money from the various users?

A. Never from an individual performer in the history of this country—from the establishment or hotel or dance hall or broadcasting station or picture theatre.

Q. We will say it is a dance hall or something of that sort, where they occasionally have a dance.

A. That is right.

Q. Where your inspectors would go around and negotiate and make a deal right on the spot?

A. That is right.

Q. I presume there are quite a few of those in the State of Nebraska, are there not?

A. Yes.

[fol. 1343] Q. Will you give us such instances?

A. Yes. There are some of them that pay $30.00 a year to the American Society, and it gives them accessibility to forty-six thousand works from all over the world, without which they couldn't open the doors of their dance hall.

Q. You say there are forty-six thousand copyrighted works that the American Society has?

A. Forty-six thousand members, I wanted to say. I will correct myself. One thousand members of the American Society, and forty-four thousand members throughout the world who also go with the license we issue to these establishments.

Q. About how many pieces of copyrighted music would you say that the Society deals in the public performance?

A. How many, you mean, we have in your catalog?

Q. Yes.

A. For a user to use?

Q. Yes.

A. That is very difficult to say. I imagine he would have accessibility to three or four hundred thousand musical works or arrangements and also musical works. You must understand, sir, when I say that, I state that after a certain number of years according to the Copyright Act, the numbers fall into the public domain, but from then on such arrangements are made of classics which is copyrightable.

Q. They are copyrighted then again after that?

A. That arrangement is copyrighted, that specific arrangement.

[fol. 1344] Q. Let us get this straight about publisher members. There are one hundred and twenty-five members that are designated as publisher members; they are the part of your organization that actually own the copyrights?

A. They do, yes, in the majority of cases, because the custom has been in the musical business when a composer and author writes a song, they turn it over to the publisher who secures a contract from them at so much royalty, probably one or two cents, and for a production, six cents. That copyright is taken out by the publisher and that is why the publisher must be in the American Society.

Q. These publisher members each publish a catalog or have a catalog of the musical copyrighted compositions owned by their house, do they not?

A. Yes.

Q. But the public performance rights on each one of those catalogs by each publishing house is assigned to the American Society?

A. That is right; everything in their catalog is assigned.

Q. That applies to the State of Nebraska as well as elsewhere?

A. That is right.

Q. Those catalogs are available from those respective publishers?

A. They are.

Q. So that the public knows what each publisher has, the style, the kind and class of music, is that right?

A. Yes.

Q. In dealing with the public performance rights it must come through the American Society?

[fol. 1345] A. That is right, because there are thirty thousand licenses and no individual publishing house or writer is capable of looking after his interests with the infringements from Maine to California.

Q. Of course, you don't know, and have no way of knowing, the number of individuals and composers that have made up that vast amount of music, do you?

A. Yes.

Q. How many would you say there were in the United States?

A. I have given you the accurate figures of the number under our control—one thousand writers. In that, so that the record will be straight, there are about two hundred estates in there; they are dead, such as Victor Herbert and Sousa. Their widows and their children get money just as if Sousa and Herbert were living.

Q. Through whatever classif ation they happen to be in?

A. And they happen to be in the best, although Herbert has been dead for fifteen years; also Sousa.

Q. These composer members, in addition to what they receive from the American Society for public performance rights, they also receive, do they not, through an arrangement with their publisher, a royalty on the music sold?

A. Absolutely; that is why he went to the publisher with the song, to get it published, because it is not under the jurisdiction of the American Society until published.

Q. And they have got to come through the publishers in order to get any place with the American Society?

A. No, not necessarily.

[fol. 1346] Q. Then their music couldn't be published; they have to have a publisher?

A. When he starts.

Q. Do you know generally, and I think it appears in these depositions on file, what percentage or royalty they get for each piece of music sold, vocal and instrumental?

A. In the so-called popular song, such as any modern hit, what we in the trade practice call a popular song?

Q. It is three cents, isn't it?

A. Two in some instances.

Q. Between two cents and three cents?

A. It depends. A writer that is more distinguished, the more he can get.

Q. On that end of it, that is a matter of negotiation between the composer and the publisher?

A. Yes. The American Society has nothing to do with that.

Q. The composer gets his check for that royalty directly from his publisher for any amount he wishes to charge or whatever the deal is?

A. Whatever his standing is as a representative writer. He may have six cents if he is big enough and has written magic hits, and there is a demand for his work. Irving Berlin publishes his own music.

Q. Irving Berlin is an important composer and a member of your Society, is he not?

A. One of the original members of the American Society in 1914.

Q. And a publisher member?

[fol. 1347] A. Yes; he owns his own publishing house and writes. He has a tinge of genius.

Q. The matter of the collection of the public performance rights, if the user in the State of Nebraska refuses to pay or refuses to accept the terms and conditions, how is that handled? Supposing the user of vocal and instrumental music in the State of Nebraska in dealing with the representative of your Society in the State of Nebraska, couldn't get together with him, and they refused to pay or said it was too much and wouldn't pay that amount, and they couldn't make a deal or a transaction satisfactory to your Society in accordance with the instructions from your office in New York.

A. That same goes with any business in the world. If there is no deal you don't want that, and then you don't use it.

Q. Then you furnish him with a typewritten or copy list of the copyrighted music you own?

A. No. We furnish any licensee with the American Society. We have no printed list.

Q. There is no printed list furnished?

A. May I say this so that the Court will have a clear conception of it.

Q. I want them to have a clear conception.

A. We have put in this record a list of the members of the American Society, every composer and author and every publisher, and it is very easy for a user of music who desires to use music for public profit, all he has got to do is look at that sheet music—there is the publisher and there is the

writer, and if that fellow belongs to the American Society [fol. 1348] and he wants to use it, all he has got to do is find out whether the Society has control of it or not.

Q. By going to the copyright office?

A. No.

Q. By going to the music itself?

A. No.

Q. Now, Mr. Buck, isn't it true that the average operator of a hotel or broadcasting station who buys his music under contract, and is liable under the law for these public performance rights, has no way of telling what his musicians are going to play?

A. It is not true, and he is not running a good broadcasting station if he is operating that way. Even when there is remote control into the hotel, he should see the quality and nature of the works if he running a good station, and that is the only kind he will run if he is smart.

The Court: Just a minute. Limit your answers to the questions.

The Witness. I beg your pardon; I apologize to the Court.

Q. You think it is necessary under your viewpoint that a hotel proprietor or dance hall proprietor or any other user of music such as broadcasting stations, they must know and determine if they can't deal with you or won't deal with you, and they must then determine from each piece of music played, from the marks placed on it, whether it is copyrighted or not, and by whom?

A. There is not a copy of sheet music played unless the [fol. 1349] publisher's name and the author's name is on it.

Q. In the event the music comes into Nebraska from the National Broadcasting Station in New York, or the Columbia or Mutual, and it is sent in to WOW or the Central States Broadcasting Station in this state, and there rebroadcast, and assuming they haven't had any opportunity to deal with you, or have not dealt with you, what means or method would they have of knowing whether or not it was copyrighted?

A. I am quite sure with all the rights involved in getting a license from the United States Government that no broadcasting station in the State of Nebraska would indulge in any such activity even if they bought and paid for a sustaining program from New York. They certainly want to know the nature and quality of it, and that it was cleared,

and if they bought a nationally known program like Charlie McCarthy or Toscanini's orchestra, they would certainly know that stuff was cleared. The broadcasters are smart.

Q. Mr. Buck, the fact remains if they cannot deal with your Society with the amount of copyrighted music there is, speaking now of broadcasting stations, hotels and so forth, or don't deal with your Society, and assuming that they are acting in good faith and do not want to infringe on the copyrights, they have no alternative excepting to go to the sheet music and look on it and see in whose name it is copyrighted?

A. I beg to differ, sir. In operating a broadcasting station he pays the employees for a musical knowledge and to put on a program. A good broadcaster knows where to get [fol. 1350] a product from, and I hope he knows the nature and quality of his works. I am leading to this point, that the public domain has millions of works that are acceptable and that he can use.

Q. Who would know in your organization, would it be Mr. Blazer or otherwise, the amount of money paid to your Society in the State of Nebraska that is not covered by the contracts in Exhibit Number 16?

A. That is rather a complex question. If you will simplify it, please.

Q. I mean not covered by contract, but isolated.

A. What is Exhibit Number 16?

Mr. Frohlich: It is based on something not in evidence.

Mr. Hotz. I only asked him who would know it.

Mr. Frohlich: You asked him who would know something, which, I say, is not in the evidence.

A. If you will specify, I will be glad to answer, if you will tell me what contracts.

The Court: I don't think there is any place in the evidence for that question.

Mr. Hotz: I will withdraw the question.

Q. Now, what percentage of the publishers of the United States are members of the Society? I mean that are really in the business; I don't mean isolated publishers.

A. How many musical publishers in the United States?

Q. I mean what percentage of publishers of vocal and instrumental music used in the State of Nebraska, published [fol. 1351] by members of your Society?

A. I imagine about fifty per cent.

Q. What amount of the vocal and instrumental copyrighted music is vested in your Society in public performance rights?

A. You mean created in the United States?

Q. Yes.

A. As created in the United States and as written?

Q. Copyrighted in the United States.

A. That is a very difficult question to answer. I would imagine about seventy per cent of it, conservatively. That is all of it the people want to hear.

Q. I think you stated clearly you did not publish a complete list of your copyrighted music?

A. We do publish a complete list of every publisher member and we do publish a complete list of every author and composer under contractual arrangements with the American Society, and all you have to do is get from the American Society that book as put in evidence. If you are running a broadcasting station or dance hall, and if you are using any of those, you are doing it without their permission. It is very simple.

Q. That is the way you have of notifying the public of the copyright?

A. That is right.

The Court: There is a continual flow of music. While I am talking to you now, men are creating and writing music—it couldn't be up to date.

[fol. 1352] Q. What if somebody uses one of those that is just published or copyrighted?

A. If he is a member of the Society there is no danger of that at all. It can't reach the user until it reaches that state of composition.

Q. Through the publisher?

A. Through the publisher, unless the man is so famous, as Mr. Berlin or Mr. Kern, who let bands introduce it before publishing. Mr. Victor Herbert used to do that, and Mr. Sousa used to do that with his famous marches. He would write a march for a university or state or band and he would let them go ahead and use it before it was even published.

Q. Do you know the amount of music that was sold, vocal and instrumental, by the publisher members last year?

A. All I know, sir, is the sales of sheet music dropped from about seventeen million to two million in ten years.

That will give you an idea. There is a cross section of the picture. It has dropped from seventeen million income to be distributed to the writers, from seventeen million to two million. That gives you some idea of what has happened.

Mr. Frohlich: Are you talking about 1933 for that two million, or down to the present time?

The Witness: 1933.

Q. You say you could not estimate the number of copyrights your Society now owns, you as president of it, that is, in the United States?

A. No, I could not.

Q. Or the public performance rights your American Society own?

[fol. 1353] A. Frankly, I couldn't give you an accurate picture.

Q. Can't you come within one hundred thousand of it?

A. No. May I say I can't?

Q. Who in your organization can?

A. I am going to answer that, sir. It is entirely possible Mr. Mills or Mr. Paine can give you with some degree of accuracy the number, as they are the actual technical runners of the American Society, just what it has in it. They can be more capable of answering that particular question than I can. You will have that answered in the record here.

Mr. Hotz: With the permission of the Court and counsel, Mr. Bennett would like to ask the witness a few questions Is there any objection to that?

Mr. Frohlich: Well, I have no objection, if Mr. Bennett will state his relationship to the National Association of Broadcasters and state for the record whom he represents.

Mr. Bennett: Your Honors please, I am representing one of the defendants in this case, and happen to be a practicing lawyer in Washington, D. C., and one of my clients is the National Association of Broadcasters.

Mr. Frohlich: No objection.

Mr. Hotz: Mr. Bennett is also with the Department of Justice.

Cross-examination.

By Mr. Bennett:

The Court: Is there some special line on which you [fol. 1354] would like to examine?

The Witness: I will be glad to answer them.

Mr. Bennett: I would like to qualify some of the things that were overlooked.

The Court: All right; proceed.

Q. Mr. Buck, you stated on your direct examination that you were present in Washington and appeared before the copyright committee of Congress on all of the statutes or bills which you testified were introduced in Washington?

A. Yes, sir.

Q. Do you recall appearing in Washington before the copyright committee of the House, or rather the committee on patents of the House of Representatives of the 71st Congress, second session, March 4th and 5th and April 2nd, 1930?

A. I do, yes. May I ask, is that the House? Will you specify who was the chairman at that particular time of that sub-committee? Was it Mr. Sirovich?

Q. I imagine so, but I can't state that. I would like to read the statement you made as appears in the official publication of the testimony, and ask you whether that statement was true at the time it was made; is it from Page 250.

The Court: You better first ask him whether he made it.

Q. This appears in the transcript of that record as part of your testimony and statement to the committee.

The Court: Just a minute. That is not pertinent at all.

Mr. Bennett: I think, your Honors, it is quite pertinent [fol. 1355] in line with Mr. Buck's testimony put in here.

The Court: If you want to ask him whether he made such a statement, you may do so.

Mr. Bennett: I did ask him.

The Witness: I haven't heard him.

The Court: You didn't ask him whether he made any such statement.

The Witness: You haven't asked me yet.

Q. Did you testify before that committee?

A. Yes, I did.

Q. Will you read this statement and state whether you made it?

A. Why not ask the Court what it is? Let's have it out in the open here.

Q. I would be happy to read it.

A. Go ahead.

Q. "In former times they had told you about the American Society—a terrific monopolistic chemira that was just going to take the Victor Company and the motion picture industry right out of business. Let us put the cards on the table and see what the American Society is. The American Society is an organization which consists of all the authors and composers and their publishers in America."

A. It is entirely possible I said that as a salesman, like your pride of telling the people the N. A. B. is the greatest broadcasting organization in the United States, and as Mr. Ford said, he has the best car. It is entirely possible as head man selling the music of this nation to users of this [fol. 1356] country, I am entirely capable of saying I have the best product. It is very human, and I am entirely capable of saying that.

The Court: Just a minute. Just answer the question whether you made that statement or not.

A. (Continuing) I may have said that. I would like to read what the question was leading to that.

The Court: The question is, did you make that answer or not.

The Witness: I would like to read it.

The Court: He read it to you.

The Witness: It says there I said it. It must be true.

Q. Now, Mr. Buck, do you recall testifying at the hearing held March 21-24-25, 1932 by the committee on patents of the House of Representatives, 72nd Congress, in which you testified; do you recall that?

A. I testified, as I said, at every hearing before the Congress on anything pertaining to the copyright act. I don't know what I said. I did testify. What is the substance of that testimony, I can't recall at the moment. Tell me what I said.

Q. The record published of the committee hearings shows the following testimony: "Mr. Boland:"

A. He was the attorney for the Hotel Men's Association of the United States.

Q. (Continuing) "The American Society of Composers, Authors and Publishers, I believe—I may be wrong—does [fol. 1357] not control much more than one-half of the popular music." The Chairman: Why, Mr. Buck told me they control ninety-five per cent." "Mr. Buck: The copy-

righted works." "The Chairman: Can you prove that to me?" "Mr. Buck: Yes." Did you make that statement, Mr. Buck?

A. It says it there. I don't recall it at the time. I am entirely capable of saying that. It depended on that question which was before the House at that time.

Q. Did you believe that statement to be true at the time you said it?

A. That we controlled ninety-five per cent of the music at that time?

Q. Yes, in 1932; March, 1932.

A. I am incapable of saying anything unless I really believe it, Mr. Bennett.

Q. Mr. Buck, in your direct testimony you stated that if it wasn't for the Society you would have to have personally three or four checkers or investigators in the State of Nebraska in order to check up on possible infringements of your copyrights?

A. As the law now stands, but if this law is passed, I would need one hundred.

Q. In the bill of complaint filed in this cause, on Page 14—you signed the bill of complaint, I believe?

A. I did.

Q. (Continuing) This statement is made: "Complainant Gene Buck wrote the lyrics of many musical compositions for over twenty years last past, and from time to time he [fol. 1358] entered into contracts with various musical publishers, pursuant to which such publishers duly secured copyright in such respective compositions by publication, deposit and registration of the works as required by the Copyright Act." Do you own the copyrights of those works, Mr. Buck, or the publisher with whom you contracted?

A. The publisher owns them.

Q. Then am I right in believing that it would be the publisher who would have to check to determine infringements in the State of Nebraska?

A. May I correct you, Mr. Bennett, and say to you it so happens in the construction of the American Society that when a member signs an agreement, from the time he signs that agreement, an author and composer vests in that Society that performing right before it is ever published. It comes under the jurisdiction of the Society on its creation. I want to make that clear with this Court. The minute he

writes that comes under the jurisdiction of the Society through a contractual arrangement.

Mr. Bennett: May I suggest for the record there is a copy in the record, and it shows as to whether it transfers any rights prior to publication.

That is all.

Mr. Hotz: Would the Court consider it of any value right now if I read one of those typical contracts?

The Court: I presume it is in evidence.

[fol. 1359] Mr. Hotz: It is in evidence.

The Court: It speaks for itself, unless you want to make an argument, and have an argument with this witness. One of the troubles here is that the witness has construed a good many things that are in writing.

Further cross-examination.

By Mr. Hotz:

Q. Now, the point I want to get at is this: In the agreement you have with the——

Mr. Frohlich: Do I understand you are interrogating the witness?

Mr. Hotz: Yes.

Mr. Frohlich: I thought you had completed.

Mr. Hotz: Just one question.

The Witness: It is all right.

Q. When a member becomes associated with the American Society and signs one of these contracts such as Exhibit No. 14, which you have signed, you say every other member must sign?

A. Publishers and writers have the same form of contract. There is no difference.

Q. They have the exclusive right of public performance in every musical work, and it shall be deemed assigned to the Society by this instrument, whether they have made any other assignment?

A. That is right.

Q. And that goes for future works and everything else?

[fol. 1360] A. If I go home tonight and write a song, the minute I get through it comes under the jurisdiction of the Society. Here is the distinction I want to make clear for the Court.

Q. Just a minute. I will let your counsel examine. That is all our cross examination.

A. All right.

Mr. Frohlich: No further questions.

Witness excused.

[fol. 1361] Ernest Priesman, was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.

A. Ernest Priesman.

Q. What is your occupation?

A. I am in the orchestra business.

Q. You conduct an orchestra?

A. I have an orchestra.

Q. Do you reside in the State of Nebraska?

A. Yes, sir.

Q. Where?

A. Omaha, Nebraska.

Q. Now, how many years have you conducted an orchestra?

A. I have been connected with orchestras for the past ten years.

Q. Have you played at any of the hotels in Omaha?

A. Yes, sir.

Q. Have you played recently?

A. Yes, sir.

Q. How many men do you employ in your orchestra now?

A. Well, in the present orchestra, nine people.

Q. Including yourself?

A. Yes, sir, including myself.

Q. Do you purchase music for distribution to your orchestra?

A. Yes, sir, I have occasion to.

[fol. 1362] Q. Do you also receive professional copies?

A. Indirectly I receive some professional copies.

Q. About how large a library of music do you maintain?

A. Well, the dance library we use usually consists of one hundred tunes.

Q. In addition to a dance library do you have a vocal library?

A. There are some standard things we carry, but the vocal library is included with the regular music.

Q. So that you have to have one hundred orchestrations, I take it?

A. We usually carry that along on each job, yes, sir.

Q. Do you get a good deal of that for nothing?

A. In our particular case, we don't get a lot of it for nothing. We get part of it for nothing.

Q. What proportion of the library you carry do you obtain gratis?

A. I would say in our particular case maybe ten to fifteen per cent is sent in through hotels as professional copies.

Q. Where do you purchase your music?

A. At various music stores, mostly right in Omaha, and sometimes we send out for it.

Q. Do you purchase any from jobbers?

A. At present we purchase right from the Lyon & Healy retail store in Omaha.

Q. Have you ever purchased any music from any jobbers by mail?

A. I have had occasions to.

Q. How many musical compositions do you perform of an evening?

Q. It would depend if it was a dance engagement or what [fol. 1363] type of engagement you are referring to. On a three-hour dance I would say we play dances in sets of ten at a dance, and if ten at a dance, approximately three tunes to a set.

Q. You also play encores and request numbers?

A. Of course.

Q. When you come into an establishment like the Hotel Paxton, does the proprietor have anything to do with the selection of the musical compositions, or do you do it yourself?

A. We do that out of the pieces we have there, and the requests given to us.

Q. The proprietor doesn't have to do anything about that?

A. Seldom.

Q. You, yourself, as an orchestra leader have never received a license from the American Society of Composers, Authors and Publishers, have you?

A. No, sir.

Q. And no other orchestra leader, so far as you know, has applied for or obtained such a license?

A. None I know of.

Q. You rely on the fact that the place in which you play is a licensed establishment?

A. Yes, sir.

Q. When you purchase a composition for your orchestra, you can't use an ordinary piano copy, can you?

A. Not for your orchestra.

Q. You have got to have an orchestrated edition which contains music for each particular instrument in that orchestra?

A. Yes.

[fol. 1364] Q. What do you usually pay for an entire set of orchestrations?

A. From fifty to seventy-five cents.

Q. That covers the entire band, doesn't it?

A. Yes, sir.

Q. If you were compelled to purchase this music for your orchestra, and you were compelled to pay a performance price in addition to the price of the sheet music, could you profitably conduct your business?

Mr. Hotz: Just a minute. I object to that as calling for a conclusion of the witness. There is nothing in here about his earnings or anything of the sort. It is immaterial.

The Court: Overruled.

A. I would say in answer to that, at the present wage scales and prices it wouldn't be profitable. The cost has to be passed on to the customer.

Q. In other words, the additional cost of performing rights would have to be paid by yourself in the first instance?

A. Yes, sir.

Q. And then you would have to get it by extra salary from the hotel?

A. It would have to be paid by the direct employer.

Q. Who employs your orchestra?

Mr. Hotz: Objected to as calling for a conclusion of the witness, and highly speculative who it would be paid by. It would depend on the negotiations.

The Court: Sustained.

[fol. 1365] Q. Do you keep any log or record of your performance?

A. As to which numbers we play?

Q. Yes.

A. No, sir, not in general.

Q. Are you familiar with the method or manner of conducting a business with other orchestras in the State of Nebraska?

A. I would say in general I do, yes, sir.

Q. Do they keep logs of the composition or records of the particular numbers they play?

A. I don't believe they do as to what they play during each evening, unless it would be radio time or something of that kind.

Q. You say you play encores or request numbers. Is that customary in the modern dance entertainment?

A. It absolutely is—it is part of good business.

Q. In other words, after you have played a number, somebody in the audience may come along and say, "We would like to have you play such a number," and you play it for them, if possible?

A. Yes, sir.

Q. You don't have to worry or make any attempt to find out who owns the copyright of such a request number, do you?

Mr. Frohlich: Withdraw the question.

Mr. Hotz: Let him answer the question.

A. We don't usually; we never have.

Q. If you had to play an evening's entertainment from music on which you had paid a performance right within the State of Nebraska, would you be able to play encores or request numbers?

[fol. 1366] A. It would be very, very difficult if we had to check everything.

Q. You first would have to check up and see if you had the music and had paid the price on it, is that right?

A. Yes, sir.

Q. When you purchase a sheet of music are you able to tell at that time in what kind of establishment you are going to perform in in the future?

A. I wouldn't say we would necessarily think of that or know definitely.

Q. What I mean is this, Mr. Priesman, you play in hotels occasionally, don't you?

A. Yes, sir.

Q. And dance halls?

A. Yes, sir.

Q. And other places of entertainment and amusement for the public?

A. Yes, sir.

Q. You don't know at this time where you are going to play six months or a year from now, do you?

A. No, sir.

Q. And if you purchase a sheet of music which had on it a list of various prices for various forms and method of entertainment, and various kinds of public performance for profit, could you, as a practical matter and practical use, in advance, say that you are going to purchase music for this and this kind of entertainment, could you do that?

A. I wouldn't say, as a practical matter, you could do that.

[fol. 1367] Q. Would a statute which compelled you to purchase music under those conditions enable you to continue in business?

Mr. Hotz: Just a minute. I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. About how much is your orchestra paid by week by an establishment which employs you and your eight or nine assistants?

A. On a weekly engagement, by the week?

Q. Yes.

A. That price scale varies.

Q. At the Fontenelle Hotel, for example, have you ever played there?

A. Yes, sir.

Q. How much did you get?

A. I have never played steady engagements at the hotel. I have played at other hotels, and incidental engagements.

Q. What other hotels have you played at?

A. Paxton Hotel.

Q. How much did you receive for a week's engagement there?

A. Well, at the present time the price scale for side men run about a dollar and a quarter an hour on a thirty-hour week.

Q. How many men do you have?

A. Nine people; eight musicians and a vocalist.

[fol. 1368] Q. How much would that figure up for the week?

A. About three hundred and fifty dollars in round figures, I believe—that is what we are required to get.

Q. That is, the men?

A. Yes, sir.

Q. Now, the hotel makes a contract with you as the leader of the orchestra, does it not?

A. The contract at present is made with us acting as their agent to secure the services of musicians associations. We are their agent to secure music. In other words, they are the employer, and we as contractors are not considered the employer, the way the contract is stated. It is very technical.

Q. And, of course, that includes the music that is played on the program, that three hundred and fifty dollars a week, that covers, naturally, the sheet music and orchestrations you use or your singers sing on that program, isn't that right?

A. It does at present, yes, sir.

Q. How many different hotels have you played in, in the past year, in the State of Nebraska?

A. As a steady engagement?

Q. I am not concerned about that.

A. In Omaha, I have played at the Blackstone, Fontenelle, Paxton and Rome, and all the first class hotels.

Q. Have you played any in Lincoln?

A. Yes, sir.

Q. Where?

[fol. 1369] A. The Cornhusker Hotel and the Lincoln Hotel, I believe—those were party dates, single engagements.

Q. Any out in the state?

A. Yes, sir.

Q. Where?

A. Played at Fremont, Nebraska, at Lincoln, Nebraska—I couldn't tell you over the exact last year. Since I have been in the business the last couple of years, it has included Beatrice and Hastings, and all of the danceable towns.

Q. In the hotels?

A. If there are hotels, and sometimes in dance halls, and business in general.

Q. Mr. Friesman, do you know of any place where there is a record kept of number of orchestras, such as yours, or like yours, in the State of Nebraska, in operation in the state for playing music?

A. I don't know of any records where the list or organized bands are listed.

Q. Do you know of your own personal knowledge about how many there are in the State of Nebraska?

A. I am sorry, I couldn't say.

Q. In the City of Omaha, do you know?

A. I could approximate the professional or union orchestras.

Q. How many?

A. I would say there were probably ten to a dozen in various organizations in Omaha. However, that doesn't include the number of bands that play in Omaha. There are hundreds of bands playing in Omaha.

[fol. 1370] Q. They run up into large figures, don't they?

A. Yes, sir.

Q. They come there from elsewhere?

A. Yes, sir.

Q. Sent in by booking agencies, are they?

A. Sometimes they are, and sometimes they book themselves.

Q. In the last two or three years there has been quite a springing up in the demand for dance music on account of the number of dance halls and places where dancing and that sort of entertainment takes place, has there not been?

A. I wouldn't say any greater in the last two or three years. I would say in the past. You might say business has gone down—it depends.

Q. I am talking about Omaha and Nebraska.

A. I wouldn't say there was any increase.

Q. It is greater than it was five or six years ago?

A. I wouldn't say so considerably.

Q. How old are you?
A. Twenty-four.

Mr. Hotz: That is all.

Redirect examination.

By Mr. Frohlich:

Q. Do these traveling bands come from outside the State of Nebraska?
A. Oh, yes, many of them.
Q. Various bands drift into Nebraska and play for a night, or two or three, and go out again?
[fol. 1371] A. Sometimes they are territorial bands and play from night to night.
Q. You said you did purchase some of your music through mail order jobbers or houses, or somehow through the mail?
A. Yes, sir.
Q. Did you purchase that by mail outside of the State of Nebraska?
A. Yes, sir.

Mr. Frohlich: That is all.
Mr. Hotz: That is all.

Witness excused.

[fol. 1372] HARRY ELMER TAYLOR, was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name.
A. Harry Elmer Taylor.
Q. Where do you reside, Mr. Taylor?
A. Omaha, Nebraska.
Q. What is your occupation?
A. Theatre manager.
Q. You manage a theatre in Omaha?
A. Yes, sir.
Q. What is that theatre?
A. The Ritz.
Q. How many years have you managed it?
A. Ten.

Q. And in that theatre do you exhibit motion pictures to the public?

A. Yes, sir.

Q. And do you also as a part of your motion picture entertainment furnish musical entertainment in the theatre?

A. No.

Q. Well, the pictures that come into your theatre have music on them?

A. Yes, sir.

Q. And the music is heard by the audience when the picture is seen?

[fol. 1373] A. Yes, sir.

The Court: A sound track, you mean?

The Witness: Yes, sir.

Q. Do you also own any other place of entertainment?

A. We own the Music Box.

Q. A dance hall?

A. Yes, sir.

Q. In the City of Omaha?

A. Yes, sir.

Q. A large dance hall?

A. Comparatively.

Q. About how large would the dance floor be?

A. I imagine about seventy-five by one hundred.

Q. Do you operate that dance hall?

A. Every night in the week, except Monday.

Q. In the operation of the dance hall do you avail yourself of the services of an orchestra?

A. Yes, sir.

Q. Do you do that every night?

A. Every night except Monday.

Q. How large an orchestra do you employ there?

A. Ten men plus a leader and girl singer.

Q. What do you pay your orchestra weekly?

A. It varies from four hundred and sixty dollars a week to seven hundred dollars.

Q. Would you say that it would be safe to say six hundred dollars is an average price you pay for your orchestra each week?

A. Yes, sir.

[fol. 1374] Q. That would be at the rate of approximately twenty-four hundred dollars a month?

A. Yes, sir.

Q. Do you also have a license from the American Society of Composers, Authors and Publishers?

A. Yes, sir.

Q. How long have you had such a license?

A. Since we started three years ago.

Q. What do you pay the Society per month under the license?

A. Twenty dollars a month.

Q. Have you a license with the Society for your theatre?

A. Yes, sir.

Q. What do you pay the Society for your theatre?

A. Sixty dollars a year.

Q. In giving your entertainment in your Music Box do you keep a record or log of the particular compositions played there nightly?

A. No, sir.

Q. You rely solely upon your license with the Society?

A. Yes, sir.

Q. And when the orchestra leader comes in with his orchestra, you don't determine what pieces he is to play?

A. No, sir.

Q. You feel he can satisfy the public demands?

A. Yes, sir.

Q. Do you know whether or not there are request numbers and encores every night in the establishment?

A. Yes, sir.

[fol. 1375] Q. Do you also employ an orchestra from time to time that comes in from out of the State of Nebraska?

A. Mostly we do.

Q. Mostly your orchestras are traveling bands?

A. Yes, sir.

Q. Now, in your motion picture theatre you do not play music by means of any orchestra?

A. No, sir.

Q. It is simply that the film and sound track on the film carries with it whatever music happens to be on the film?

A. Yes, sir.

Q. And, of course, that film is leased or rented by you from distributors of motion picture films, isn't that right?

A. Yes, sir.

Q. This film comes into your place from outside of the State of Nebraska?

A. Yes, sir.

Q. Of course, we all know and you know most of the films are manufactured in Hollywood?
A. Yes, sir.
Q. And find their way into your theatre and other theatres in the State of Nebraska from time to time?
A. Yes, sir.
Q. Have you any control whatever over the music played on those film tracks?
A. No, sir.
Q. And in order for you to save yourself from infringement, do you rely solely on your license with the American Society?
A. Yes, sir.

Mr. Frohlich: You may cross-examine.

[fol. 1376] Cross-examination.

By Mr. Hotz:

Q. Where is the Ritz Theatre?
A. 24th and Patrick, in the City of Omaha.
Q. What is your seating capacity of it.
A. Five hundred and eighty seats, or six hundred—along in there.
Q. Do you own the Music Box?
A. Yes, sir.
Q. Yourself?
A. Yes, sir.
Q. Where is that located?
A. 19th and Capitol Avenue.

Mr. Hotz: That is all.
Mr. Frohlich: That is all.
Witness excused.

(Short recess.)

[fol. 1377] Mrs. Anne Paul Nevin was called as a witness on behalf of the complainants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Frohlich:

Q. State your full name, please.
A. Anne Paul Nevin.

Q. Where do you reside, Mrs. Nevin?

A. I reside in New York in the winter, and Blue Hill, Maine in the summer. I don't go abroad as I used to.

Q. You are the widow of Ethelbert Nevin?

A. I am.

Q. Can you tell us what year you were married to Mr. Nevin?

A. 1889, I think it was.

Q. Was your husband a composer?

A. Yes, sir.

Q. I show you, Mrs. Nevin, a list of compositions, and ask you whether these truly represent the compositions that were composed by your husband from 1874 down to 1901?

A. He died in 1901.

Mr. Hotz: We will admit, Mr. Frohlich, that the list of publications, of musical compositions, contained in the affidavit attached to her affidavit were publications of her husband, without further identification, and composed by him.

Q. Among those compositions was there a song called the "Rosary"?

A. Yes, sir.

Q. Was there a song called "Mighty Laka Rose"?

A. Yes, sir.

[fol. 1378] Q. Did those songs become famous?

A. I think so, if you judge by the number of copies that were sold.

Q. Now, Mrs. Nevin, are you presently a member of the American Society of Composers, Authors and Publishers?

A. I am.

Q. Was your husband in his lifetime ever in receipt of any moneys for the public performance for profit of any of his compositions?

Mr. Hotz: I object to that as incompetent, irrelevant and immaterial.

The Court: I think she may answer.

Q. Did your husband ever receive any moneys for the public performance for profit of his compositions?

A. I think not.

Q. Did he receive moneys?

A. You see, he has been gone many years.

Q. Did he receive moneys from the sale of sheet music of his compositions?

A. I think so.

Q. Did he receive money from the sale and exploitation of mechanical royalties?

A. I am not sure about that; I think not.

Q. So that the only substantial revenues, so far as you know, he ever received for any of his works was from the sale of sheet music?

A. Yes, sir, absolutely.

Q. He died, you said, in 1901?

A. Yes, sir.

[fol. 1379] Q. When did you become a member of the American Society?

A. I think it was—would it be 1925?

Q. Was it 1926?

A. I can't quite remember.

Mr. Frohlich: Will you stipulate it was 1926?

Mr. Hotz: Certainly.

Q. Ever since you have been a member of the American Society, Mrs. Nevin, have you been in receipt of income from the Society?

A. Always.

Q. Has that been the main source of income you have been in receipt of for your husband's work as a composer?

A. Absolutely.

Q. Do you receive any money today from the sale of sheet music from your husband's compositions?

A. I think I do. Wouldn't that be in the American Society?

Q. Do you receive any money from any publisher for the sale of sheet music today?

A. I don't quite understand—I think I don't. You don't mean the publishers?

Q. I mean the publishers.

A. Well, I get some from them.

Q. Does it amount to very much each year?

A. I think so.

Q. From the publishers?

A. A good deal.

Q. Do you also receive money from the American Society?

[fol. 1380] A. Yes, indeed I do.

Q. Does the money you receive from the American Society help support you?

A. It is practically my whole living.

Q. Are you willing to give up your contract with the American Society?

Mr. Hotz: Now, just a minute. Objected to as calling for a conclusion.

The Court: Objection sustained.

Mr. Frohlich: I want to point out to the Court in order for this lady to be able to receive any money for the sale of the public performance for profit in Nebraska she must give up that contract because the statute declares this is an illegal combination.

The Court: That is a conclusion, and argument.

Mr. Hotz: That is, as far as the American Society is concerned, but not as far as she is concerned.

Mr. Frohlich: The question was whether she would be willing to give it up.

Mr. Hotz: It wouldn't make any difference.

Q. Mrs. Nevin, have you ever had any experience in marketing, selling or exploiting any of your husband's musical combinations?

A. I have had very little—some.

Q. Are you able to look after the business end of the exploitation of any of this music?

[fol. 1381] A. I have done it so many years, and he has many foreign royalties.

Q. If you were compelled to act for yourself, without the assistance of the American Society, could you go into the State of Nebraska and protect yourself against the infringement of your husband's compositions within that state?

Mr. Hotz: We object to that as calling for a conclusion of the witness, and not proper evidence.

The Court: Objection sustained.

Q. Have you the financial means at this time, Mrs. Nevin, to employ investigators to come into the State of Nebraska and to investigate establishments to see whether or not your husband's music is played?

Mr. Hotz: We object to that as incompetent, and the witness showing herself not qualified to answer that question. It is a legal question, and calling for a conclusion.

Mr. Frohlich: She knows whether she has financial means.
Mr. Hotz: That would be immaterial.
The Court: I think it is immaterial; objection sustained.

Q. Mrs. Nevin, do you know anything about the various places of amusement and entertainment where music is played?
A. Yes, I think I do.
Q. Have you any sufficient experience to place upon any of the musical compositions of your husband a price for the [fol. 1382] use of the compositions in any of these places of entertainment?
A. You mean for me to pick them over and do that? I couldn't.

Mr. Frohlich: That is all.

Cross-examination.

By Mr. Hotz:

Q. Mrs. Nevin, who is your publisher?
A. I have two publishers.
Q. Who are they?
A. The Presser people of Philadelphia and the Boston Music Company of Boston, which is Schirmer of New York —of Boston; Schirmer of Boston.
Q. Now, those publishers are members of the American Society, that is, they are publisher members?
A. So far as I know, they all are.
Q. Now, in your dealings with your publisher, what man do you rely upon in the organization mostly as your agent and representative of your publishers?
A. You mean in the publishers?
Q. Yes.
A. I, of course, depend upon Gus Schirmer.
Q. You have known him for many, many years?
A. Very many years. And his father, of course, knew my husband, and he trusted him implicitly.
Q. They are one of the biggest publishers in the United States?
A. They are one of the biggest publishers in the United States, and a member of ASCAP.
[fol. 1383] Q. You receive, do you not, Mrs. Nevin, a royalty for the sale of the music?
A. Every three months.

Q. And you recall what that amounts to, about, do you?

A. I am afraid I don't. Well, you mean—you don't mean the American Society, do you?

Q. I am talking about what you get from your publisher.

A. I know I get a very good royalty, but I can't tell you the exact amount. For instance, the Boston Music Company pays me, and I don't have any contract with them; they pay me one hundred dollars a month.

Q. And then what else do you get?

A. Then, of course, the Presser people—I think most of their people they pay every six months, but I have mine every three months.

Q. How much is that?

A. It amounts to sometimes six hundred dollars and sometimes less.

Q. And then do you have other publishers too?

A. I think that is about all.

Q. Isn't there one more of Gustave Schirmer's house?

A. That is the same thing—it is the same.

Q. Now then, do you know enough about that to tell us if that is based upon so much per piece of music sold, three cents a copy?

A. I think so, it must be. I know it comes very regularly, and I am always glad to get it, and I get it, of course, through the American Society.

[fol. 1384] Q. We recognize the fact, Mrs. Nevin, that your husband's list of music is probably the greatest there is.

A. It is very great, I think. He began very early.

Q. It is used very extensively, is it now, over the radio?

A. I think so. At my husband's death, the "Rosary" sold at four hundred thousand, and now I think, according to the New York Herald Tribune, and a man in Washington, it is selling in the millions. The truth is I don't know, and I don't know whether it is true or not.

Q. Who owns the rights on that, the "Rosary"?

A. Who gets it? I do.

Q. Who owns the publication rights?

A. Schirmer and the Boston Music Company and Presser, but it is all with the American Society.

Q. The public performance rights are with ASCAP? You understand, I guess, what public performance rights are?

A. Yes. I think I have signed something for it.

Q. You signed one of their contracts?

A. Yes, sir.

Q. In what classification have they placed you?

A. I think it is one of the high ones.

Q. Do you know if it is fifteen thousand dollars a year, or less?

A. I think it is fifteen thousand dollars per year.

Q. Your husband died in 1901, you say?

A. Yes, sir.

Q. Who handled your affairs in reference to all of your rights prior to 1926, including your public performance rights?

[fol. 1385] I think it was just in the hands of my publishers—Schirmer and the Presser Company, and at one time the John Page Company, and Presser has bought the Page Company now.

Q. You would sit down occasionally and discuss prices and terms, I presume, with your publisher?

A. I am one person I think who is very close with everyone I deal with, with the publishers, all my publishers, and they even come and see me, which I think should be done by many, many people who are sometimes complaining they don't get the right royalty.

Q. Who is that?

A. It is the John Page Company, or Schirmer—I go down to see them, and the Boston Music Company, but, of course, that is Schirmer. But, of course, until the American Society came, my royalties were much lower.

Q. Your public performance rights came into an increasing amount after you became a member?

A. I think so. The truth is I know very little about the performance. The other part, I have.

Q. How long have you been in this higher class, this fifteen thousand dollar class?

A. Well, at first, of course, I didn't get so much, but some years ago they raised it. I never liked to speak of what I do get, because so many are in it, and I really never speak of it at all. It might cause a feeling on the part of those that don't get so much.

Q. You leave that entirely to the Board of Directors of ASCAP?

A. Absolutely.

[fol. 1386] Q. That is left to Mr. Buck and Mr. Mills and Mr. Paine?

A. And all the others, Mr. Mills and all of them. They have been of the greatest help to me.

Q. You of your own knowledge, Mrs. Nevin, have no recollection you can give us here of the number of pieces of music that are sold for vocal and instrumental purposes by your publisher; you couldn't give us that?

A. No. I think I could get it for you, if you want it, but I couldn't just right now say offhand, because I have such confidence in the American Society that I don't have to think one minute.

Q. That wouldn't be a part of their business; that would be Schirmer's business, the number of pieces that are sold by your publisher would be a matter between yourself and the publisher?

A. Yes, but that is all in the American Society.

Q. That part of it isn't, the royalties you get from Mr. Schirmer?

A. That is the ASCAP.

Q. You think that is the ASCAP?

A. We deal entirely with the ASCAP.

Q. That is your impression?

A. Yes; it is quite an impression.

Q. By the way, who represents you in your copyright matters in New York, what firm of lawyers?

A. I don't know any but the ASCAP.

Q. They handle that for you?

A. I think they handle everything.

Mr. Hotz: That is all.

Witness excused.

[fol. 1387] Mr. Frohlich: No further witnesses, your Honors. All I have now are the depositions that were taken.

May it please your Honors, two depositions were taken pursuant to the notice, one for depositions in New York City in the summer of 1938, and after the depositions were duly certified they came back to the Clerk of the Court, and we have them here. The other two depositions were two witnesses, Jerome Kern and Sigmund Romburg taken in California last summer, 1938, and I have a copy of them here. The originals were certified and sent back to the Clerk of the Court and the Clerk has an entry on his docket showing they were received here in 1938, but he can't find them. I was wondering if I wouldn't be permitted to use my copy, subject to correction; it is a carbon copy. I suggest this

in order to save time, because I realize these depositions are quite voluminous. I would like to offer them all to the Court in evidence as if the witnesses were testifying, subject to the objections that were made by opposing counsel, and your Honors may rule on that when you come to the depositions. I think it would serve no useful purpose for me to stand up for a day and read them.

The Court: Wouldn't it be better if you offered in evi-
[fol. 1388] dence the depositions of stated witnesses taken under this notice or commission, together with the cross examination, subject to all objections?

Mr. Hotz: I call your Honors' attention to the fact that the cross examination of these various publishers is a material part of our case, we figure. There are objections made in connection with some of that testimony, and I am trying to figure out in my mind how to facilitate matters, but at the same time we want that cross examination.

The Court: Why not have the depositions offered and received subject to objections?

Mr. Frohlich: Both as to direct and cross examination.

Mr. Hotz: What I am getting at is, suppose some parts of this cross examination the Court would say was not proper, and if that is the case, in connection with some of these depositions, some of this cross examination, I want to supply other proof of the same thing.

The Court: Could you not offer it on testimony, if not proper cross examination?

Mr. Hotz: But I wouldn't know it if you are going to take these away.

The Court: You can cover it in the statement to the rec-
ord if you desire, in the event the Court holds that any of
[fol. 1389] these objections are not cross examination. In that event, you desire and now offer that part of the cross-examination as your own testimony. I am suggesting that.

Mr. Hotz: That will do it; that is satisfactory, I think.

Mr. Frohlich: I am willing to waive any objection. The whole record can be in as far as I am concerned, everything they elicited can come into this record, and all exhibits. The exhibits are mostly mine. These are my depositions. I am willing to withdraw any objection to any part.

The Court: The record may show that any and all objections interposed on cross examination on the ground that it is not proper cross examination, is waived by counsel.

Mr. Frohlich: Yes, your Honors.

I offer in evidence the depositions taken pursuant to no tice in the City of New York of the witness Sigmund Spaeth with all of the exhibits that were submitted, identified and offered by both sides, and with all of the cross examination subject to the stipulation already made, in which I have withdrawn any objection to the cross examination on the ground it is not proper cross examination.

Mr. Hotz: What about the other objections?

[fol. 1390] Mr. Frohlich: The Court can pass on the im materiality.

I make a similar offer of proof as to the direct testimony and the cross examination and all the exhibits, and the same waiver of objection on my part, of the witness Abraham Schwartz who was business manager of Irving Berlin, Inc.

I also make the same offer with respect to the testimony of Walter S. Fischer, president of Carl Fischer, with respect to the direct testimony and to the cross examination and the exhibits, and the same waiver of objection.

I also make the same offer with respect to the witness Irving Caeser, with respect to the direct examination and cross examination and all the exhibits, and the same withdrawal of objection and waiver.

I also make the same offer with respect to the deposition of Edwin H. Morris, with respect to the direct testimony, the cross examination, the exhibits, and the waiver of objection.

I make the same offer with respect to the testimony of George W. Meyer, with respect to the direct testimony, the cross examination, the exhibits, and the waiver.

I make the same offer with respect to the witness Ella Herbert Bartlett, with respect to the direct testimony, cross [fol. 1391] examination, the exhibits, and withdraw all objections.

I make the same offer of proof with respect to the witness Will Von Tilzer, with respect to the direct testimony, the cross examination, all of the exhibits, and the same waiver of objections.

I make the same offer of proof with respect to the deposition of Edgar Leslie, with respect to the direct testimony, the cross examination, the exhibits, and the waiver of objections.

With respect to these witnesses I now state they are not within the State of Nebraska.

I make the same offer of proof with respect to the witness Jerome Kern, and Sigmund Romberg, taken in the State of California in 1938, and I make the same offer with respect to the direct testimony—there was no cross examination and no one representing the Attorney General's office in that deposition—and also ask that the exhibits be marked in evidence.

Mr. Hotz: My attention, may your Honors please, has been called to the form of this stipulation on the depositions that were first suggested, and that is that the withdrawal of the objections was limited.

Mr. Frohlich: No; as I understand it, the only limitation was as to whether or not it was proper cross examination. [fol. 1392] I think the Court has a right to pass the materiality and irrelevancy of a matter, which it is cross examination or direct.

Mr. Hotz: The only objections you have raised in your cross examination is the fact that it is not proper examination. Is that the only thing you waive, or not?

Mr. Frohlich: What else do you want us to waive?

Mr. Hotz: The rest of your objections.

The Court: The question as to materiality?

Mr. Hotz: Aside from the question of materiality there are other things here.

Mr. Frohlich: I waive every form of objection except the competency, materiality and relevancy.

Mr. Hotz: That won't do.

Mr. Frohlich: I will give you competency; I don't care about that. But I think materiality and relevancy should be in there. I can't burden the Court with a lot of stuff that doesn't belong here. There were very few objections taken by us. That matter of objections, do you want everything to go in on both sides; have the objections withdrawn on both sides?

Mr. Hotz: No. These were your witnesses.

Mr. Frohlich: Certainly. I am willing to have a clean slate, everything to go in on both sides.

[fol. 1393] Mr. Hotz: Not at all. I am not going to waive the reading of these depositions at all.

Mr. Frohlich: I am trying to save time, that is all.

The Court: Have you made your offer?

Mr. Frohlich: Yes.

The Court: Is there any objection?

Mr. Hotz: Yes.

The Court: What is it?

Mr. Hotz: We object to the offer in reference to the cross examination that has been offered because the stipulation in connection with waiving of the objections is not broad enough to cover the situation, and it postpones the ruling of the Court, your Honors, on the cross examination until after the close of the case.

The Court: Do you wish to offer your cross examination yourself?

Mr. Hotz: Yes, we would like to offer our cross examination.

The Court: Offer it.

Mr. Frohlich: I will consent to have it come in.

Mr. Hotz: Offer the cross examination of each of the witnesses in which the direct examination has been offered by Mr. Frohlich.

Mr. Frohlich: We consent to it.

The Court: The direct and cross examination of the wit-
[fol. 1394] nesses as shown by these depositions is received.

What else?

Mr. Frohlich: I just want to make the statement, your Honors, that all of the witnesses mentioned in these depositions reside out of the state, more than one hundred miles from this state, and they are not available for trial at this time, and not within one hundred miles of this court.

The Court: I guess there is no objection.

Mr. Frohlich: With that, your Honors, the plaintiffs rest.

Mr. Hotz: In connection with the status of the record on these depositions, let the record show that these witnesses were, of course, the complainants' witnesses; in our offer of the cross examination it isn't our intention in the manner in which these offers have been made, that the defendant should be bound by the statements made of those witnesses, excepting in reference to the matters on cross examination.

The Court: You offer that as cross examination and not otherwise?

Mr. Hotz: As cross examination and not otherwise.

Mr. Frohlich: The plaintiffs rest.

(Whereupon, at the conclusion of the complainants' evidence, the defendants, in order to maintain the issues on [fol. 1395] their behalf to be maintained, presented the following evidence).

Mr. Hotz: Might I read these cross examinations?

The Court: I don't want you to take the time to read them if we can avoid that.

Mr. Frohlich: I thought, your Honors, we had settled that.

The Court: Probably either side will state substantially what it contained and what their claim is with reference to the proof of these depositions. We wouldn't like to have you offer the cross examination and read it without the other, because you announce your offer as only the cross examination.

Mr. Hotz: We will pass it for the time being.

The Court: All right.

Mr. Hotz: The record shows there were a number of interrogatories propounded in accordance with the terms of the statute to the others, and they answered a large number of those interrogatories and supplied the information that was wanted. On balance of them the various witnesses stated that they would have it present here in the Court room the day called for, if the Court ruled that it was material. There are sixty-three of those interrogatories. [fol. 1396] At this time I would like to read those interrogatories. I don't see how we can avoid that.

The Court: Very well.

Mr. Frohlich: We can avoid it if I consent to them. I will consent that we could dispense with the reading of these interrogatories. There are four sets of them, and I will consent to have everything in there go in that is in. I objected to some of the interrogatories because I felt they were improper and asked a thing they were not entitled to. As to those, we can have a ruling of the Court. I have given them a tremendous amount of material in there.

The Court: Is some of it in the nature of repetition of testimony you already have?

Mr. Hotz: Some. For example, we asked for the list of the publisher members of their organization. We have got that in.

Mr. Frohlich: Whose have you got there; Buck's?

Mr. Hotz: Yes. These others are not very long; they are very short.

The Court: I assume you refer only to those you think now are material?

Mr. Hotz: Yes.

(Interrogatory Number 1 read by Mr. Hotz).

[fol. 1397] The Court: I am wondering if it hasn't been covered pretty well by the testimony?

Mr. Hotz: Yes.

The Court: Why not waive it now in view of the testimony already in?

Mr. Hotz: The purpose of that question, your Honors please, is, of course, to show the development of the Society.

The Court: That is already shown.

Mr. Hotz: No, it is not, we don't have it in there. It shows only from these exhibits here.

The Court: That is largely the testimony of Mr. Buck, isn't it?

Mr. Frohlich: They can develop that from Mr. Buck. Even Mr. Buck couldn't give them those jobs; it would be an enormous job, and would have to go back to 1914 and give them a list of the members.

The Court: Did I understand you to say you agreed they could introduce all of these and there was no objection to them?

Mr. Frohlich: I said I would agree to the present interrogatories, to all the exhibits and answers that are in there, with the exception as to those I objected to I want the Court to make a ruling. The Court will realize what my friend has asked for is a period of twenty-five years and [fol. 1398] would show nothing of a useful purpose. Mr. Buck took the stand and that showed a great deal of the twenty-five years, and he was subject to cross examination.

The Court: In view of the testimony already introduced and the present state of the record, the objection is sustained.

(Interrogatory Number 2 read by Mr. Hotz).

The Court: That will be sustained.

(Interrogatory Number 3 read by Mr. Hotz).

Mr. Frohlich: That has been answered.

Mr. Hotz: They have complied with that.

(Interrogatory Number 4 read by Mr. Hotz).

Now, that they object to, they say.

Mr. Frohlich: Read the objection.

(Objection read).

Mr. Hotz: Now, that asks for the list of the copyrighted musical compositions or arrangements owned or controlled by their author members.

Mr. Frohlich: That is Number 4, isn't it? Read the question again.

(Interrogatory Number 4 re-read).

The man says he can't give it to you and doesn't know it.

The Court: Is that the answer?

Mr. Frohlich: That is the answer.

(Interrogatory Number 5 read by Mr. Hotz).

Mr. Frohlich: That is in evidence, also.

[fol. 1399] The Court: There is no objection to this?

Mr. Hotz: No.

The Court: Why not read right on?

(Interrogatory Number 6 read by Mr. Hotz).

(Interrogatory Number 7 read by Mr. Hotz).

(Interrogatory Number 8 read by Mr. Hotz).

Mr. Frohlich: That Exhibit Number 5, your Honors, is merely a part of this great big box which was not received in evidence. This is bringing that down to date. I have no objection to putting it in evidence, but we couldn't give them any more, your Honors.

Mr. Hotz: I call attention to the Court to the fact that this is what we have been given as a substantial compilation of their compositions. I call the attention of the Court to the fact that it is here.

(Interrogatory Number 9 read by Mr. Hotz).

(Interrogatory Number 10 read by Mr. Hotz).

Mr. Frohlich: It doesn't say exactly that. Exhibit Number 11 has been confused with Exhibit Number 5.

(Interrogatories Numbers 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 read by Mr. Hotz).

The Court: Do you think there is anything disclosed by these answers not fully covered by the testimony either on direct examination or cross examination of this same witness?

[fol. 1400] Mr. Hotz: Probably not; there are one or two things. The evident purpose we had in connection with those interrogatories was to show the enormity of the thing, they are so vast, and the very fact that they could

not furnish them. We thought it might have some probative force, I suppose.

What I would like to do, if the Court will permit it, is to take these with me tonight. It is 5:00 o'clock and I am supposed to go ahead and get some witnesses down here tonight from Omaha. I believe that if I could take these and sit down——

The Court: As a matter of fact you want to continue until tomorrow morning?

Mr. Hotz: No. More than that, I will spend the time, your Honors, if you will believe me, in really going through these interrogatories and seeing if I can't simplify this thing. The interrogatories were the result of a lot of lawyers wanting to ask questions and get their ideas in. A large number of persons are interested in it, and I must confess some of those I can't answer as well as I would like to, and I think if I take the time this evening I will simplify this thing by morning and come in with two or three more, and maybe none, and present them to the Court.

[fol. 1401] The Court: You have nothing else to present this evening?

Mr. Hotz: No.

May I take these out of the court room?

Mr. Frohlich: There is no objection.

The Court: The Clerk will check them with you.

(Whereupon an adjournment was taken until 9:30 o'clock A. M., Wednesday, September 20, 1939.)

[fol. 1402] (At 9:30 o'clock A. M., Wednesday, September 20, 1939, Court convened pursuant to adjournment, all parties present as heretofore, and the following proceedings were had, done and entered of record, to-wit:)

Mr. Te Poel: If the Court please, the Clerk called our attention this morning to the fact that the State Treasurer has died within the last few weeks, who was a defendant in this case, and has been succeeded by John Havekost, the duly appointed and qualified and acting Treasurer. The complainants now move that because of the death of the defendant Bass that John Havekost be made party defendant in this action in lieu of the defendant Bass.

Mr. Frohlich: Plaintiffs consent.

[fol. 1403] JOSEPH MALEC, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.
A. Joseph Malec.
Q. Where do you reside?
A. Omaha, Nebraska.
Q. What is your business?
A. Amusement.
Q. Do you have an amusement park in the City of Omaha or near the City of Omaha, and if so, what is its name?
A. I have a park under the name Peony Park.
Q. Where is that located?
A. It is located west of Omaha.
Q. What street number?
A. 78th and Dodge Streets.
Q. What is its business?
A. Dancing and swimming and picnicking.
Q. About how many persons attended your dance pavilion, indoor and outdoor, last year?
A. About one hundred thousand.
Q. Is there an association in the State of Nebraska of persons engaged in similar lines of business as yourself, and if so, what connection do you have with it?
[fol. 1404] A. I am the president of the association of Nebraska Amusement Men's Protective Association.
Q. When was that organization formed?
A. The organization was formed in 1936.
Q. What was the purpose of its organization.
A. The purpose of the forming of the organization was to get relief from the ASCAP association.
Q. In what manner?
A. To seek relief from the power that the ASCAP exercised over all the people interested in playing music for public performance.
Q. In the State of Nebraska?
A. In the State of Nebraska.
Q. How long have you been in the amusement business?
A. Eighteen years.

Q. In your experience have you had occasion to get statistics and estimate the number of persons interested in dancing and that do dance in the State of Nebraska?

A. I would say about one-third of the population in the State of Nebraska dances.

Q. Did you organize or yourself individually have anything to do with the introduction of the bill that is before this Court, Legislative Bill No. 478?

Q. Yes, I had.

Q. Just state what part you had in connection with it.

A. I organized the amusement people in the State of Nebraska to form this bill. This bill was presented by Mr. Frank Brady.

[fol. 1405] Q. In the preparation and introduction of that bill through Mr. Brady did the broadcasters of Nebraska or the National Association of Broadcasters have anything to do with it; were they consulted at the outset?

A. No.

Q. Was it taken up with them at all in any way?

A. Later we asked them to join us in forwarding the bill that Mr. Brady introduced.

Q. Mr. Malec, are you an employer of music in your establishment for dancing purposes?

A. Yes.

Q. To what extent? Just about the number of orchestras and the amount of time your organization puts in in the employment of music.

A. Well, our establishment uses music during the summer time, six days a week, for a period of three months, and the rest of the year we use music twice a week.

Q. To what extent do you pay out money for orchestras and bands per annum at the present time?

A. Well, yearly we pay about fifteen thousand dollars—approximately around that figure for music.

Q. You have, do you not, an outside dance pavilion and an indoor dance pavilion?

A. We have an outdoor dance pavilion and an indoor dance pavilion.

Q. Were there any other organizations at the time this bill was introduced that were interested besides yourself and your organization, and if so, who?

[fol. 1406] A. In introducing this bill we had the support of the Czech societies and of the German, and various in-

dividuals that had something to do with the use of music directly and indirectly in the past years.

Q. Why were the Czech societies called in, if you know?

A. The Czechs have a great number of dance places throughout the state and they were interested.

Q. The same with the German society?

A. Yes.

Q. Did the theatre or motion picture operators have anything to do with it, and if so, state what?

A. I approached their association on it but they were afraid to come out openly and assist us in presenting the bill.

Mr. Frohlich: I move to strike out "they were afraid".

The Court: It may stand.

Q. Did you have any conversation with any member officially of that organization, that is, the motion picture theatre men's association, and if so, with whom and where with reference to this bill?

A. I talked twice with Mr. Williams.

Mr. Frohlich: I object to any such conversation on the ground it is hearsay.

The Court: He is not giving any conversation.

Mr. Frohlich: He was just about to give a conversation.

Q. Was Mr. Williams their president?

A. Yes.

[fol. 1407] Q. Where was the first meeting held, and generally who was present at the time you undertook to sponsor a bill in the Nebraska Legislature?

A. The first meeting was held in Omaha.

Q. You were present at that meeting?

A. Yes.

Q. Were there any of the broadcasting people present at that time?

A. I called in just the dance people of the state at the time.

Q. Now, have you had any dealings with ASCAP, that is Peony Park, Inc., and yourself personally, in the past years, and are you having any dealings with them at the present time?

A. Yes, I had dealings with the ASCAP for about eighteen years.

Q. Are you operating now under one of their licenses?

A. Yes.

Q. What amount of money are you paying annually to ASCAP?

A. Two hundred and fifty dollars, I believe.

Q. Per year?

A. Per year.

Q. Who were your dealings with as far as ASCAP was concerned, what member of its organization?

A. Mr. Eugene Blazer.

Q. Now, did you operate for a time prior to your present contract without a license? Was there a time that you didn't have a license and paid them money?

A. Yes.

[fol. 1408] Q. How long a time was that, and how much did you pay them?

A. We started out years ago with the fee of sixty dollars. Then this fee was raised from time to time. Years ago there was no contract signed by us with Mr. Blazer.

Q. Did you ever have any controversy with ASCAP in connection with this amount of money that was paid by you for the public performance rights?

A. Yes, at various times I protested to Mr. Blazer about the fee asked by him for playing the music.

Q. And what did he say?

A. Well, just a statement for the yearly dues, and they said they were raised from sixty dollars to the present charge, and whenever I took it up with him as to why the added charge, well, several times he told me that I should be glad he doesn't charge me one thousand dollars; that he was in charge of how much I am to pay.

Q. Did you or Peony Park or the members of your association ever take up with ASCAP in New York, or any of its Board of Directors through yourself or any national organization the matter of the terms or conditions of the contract that you now have with ASCAP?

A. No.

Q. At any time within the past few years have you refused to pay ASCAP?

A. Yes, I refused to pay them several times.

Q. And what happened?

A. I was always threatened with a suit, and I was sued on two accounts.

[fol. 1409] Q. In the United States District Court at Omaha?

A. Yes, sir.

Q. For infringements?

A. Yes, sir.

Q. And those suits were dismissed, were they?

A. Yes.

Q. And you signed the contract?

A. Yes.

Q. Now, why did you sign the contract with ASCAP? Why do you deal with them at all?

Mr. Frohlich: I object to that as calling for a conclusion, and speculative.

The Court: I think he may answer. You brought out proof that it wasn't necessary that they had public domain to draw from.

A. Just couldn't get along without the music, so there was nothing else for me to do but sign.

Q. Do you know about what percentage or amount of the kind of music that your organization uses is controlled by ASCAP through the public performance rights?

A. Well, I have been told by Mr. Blazer that practically all the music is controlled by the ASCAP.

Q. Speaking now of popular dance music?

A. Yes.

Q. And of your own personal knowledge, what are the facts as you have found them?

A. I think he speaks the truth.

Q. At the time this bill came on for hearing in the [fol. 1410] Legislature do you know whether or not there were public hearings held before various legislative committees in connection with it, and before its final passage, or not?

A. Yes.

Q. Did you attend any of those meetings?

A. Yes, I did.

Q. Did you have an opportunity to observe whether or not other persons attended it, and if so, generally who, without going into too much detail?

A. Going over the bill before the committee, the assembly hall was filled to capacity, and I know that there was great interest among many people that traveled a long distance to be there at that meeting, from various points.

Q. That lived in Nebraska?
A. That lived in Nebraska?
Q. Was ASCAP represented at those hearings?
A. Yes.
Q. And did they present their side of the matter?
A. Yes, they did.
Q. Do you know whether the matter was debated on the floor of the Legislature before the bill was passed?
A. Yes.
Q. Did you hear it?
A. Yes.
Q. You were present?
A. Yes.
Q. You heard the various sides presented by various legislators?
A. I did.
[fol. 1411] Q. Do you know what the final vote on the bill was?

Mr. Frohlich: I object to that.
The Court: Sustained.
Mr. Hotz: Did I understand that counsel objected on the ground of incompetency, and if so, I will concede that?
The Court: As I understood it, there was no objection at all. The bill was passed and I don't think it makes much difference how much majority it had.

Q. When you employ music, Mr. Malec, what control do you exercise as a proprietor over the musicians in regard to the style and kind of music they play?
A. I exercise no power over the music that the orchestra brings along when they play their engagement.
Q. How do you negotiate with your musicians?
A. Well, some bands are booked directly, and some bands we get through their bookers.
Q. Booking agencies?
A. Booking agencies, yes.
Q. The point I want to bring out, Mr. Malec, is whether or not if these musicians are individual musicians or employees of yours, and do you pay each one separate or do you just give a check to the booking agency or to the band leader for the contract price for the term that they play?
A. The men are never individually paid. The pay goes

Q. You do not control the amount of money each individual musician gets?

[fol. 1412] A. No, I don't.

Q. Would you be able to run and operate your establishment in the State of Nebraska without music?

A. I couldn't do that—I would have to have music.

Q. Would you be able to run and operate your establishment without ASCAP?

Mr. Frohlich: I object to that as not qualified, and highly speculative. The witness is not qualified to testify to that.

The Court: Overruled.

A. I could not run without the music of ASCAP.

Q. What is the principal objection you have, Mr. Malec, in your dealings with ASCAP? What are you complaining about, what is the chief difficulty and why did you organize and have this bill introduced in the State Legislature; what is the trouble?

A. I felt that the unlimited power exercised by the representative was detrimental and unjust to the business, and dangerous.

Q. In what manner?

A. The attitude and position Mr. Blazer took in telling me that he would have the right and power to ask one thousand dollars as a fee for a park to pay.

Mr. Frohlich: Can you fix the time and place of that conversation?

The Court: About the time and place.

The Witness: Oh, Mr. Blazer made statements of that type several times in the past years.

[fol. 1413] Q. When did he make them?

A. He would always make them at a time when we would get into—about the time when he was sending us a statement and I would refuse or argue this fee with him, telling him we had difficulties these days to carry on our business, and he would take the attitude that we were very fortunate that he wasn't charging us more.

Q. Do you have an opportunity at the present time to deal openly for music with any other persons that you know about, any publisher or catalog or anything of that sort?

A. Well, at the present time I don't know if I could deal

with anybody else as long as we are paying this fee to ASCAP.

Q. I didn't have that so much in mind, Mr. Malec; I said do you desire to select your music from the catalogs of different publishers and chose your own style and class of music? Would you like to do that?

A. Yes, I would prefer that.

Q. And are you able to do that now under your arrangements with ASCAP?

A. I don't think so.

The Court: Mr. Malec, do you know of any competitors of this ASCAP organization who are in the market with music for musical selections.

The Witness: I don't.

The Court: Have you been solicited by representatives through the mail or in person or music concerns offering to sell music?

[fol. 1414] The Witness: About three years ago I received a letter from Warner Bros. They were telling me in the letter that they wanted a fee of a hundred and fifty dollars from the Park for playing music—their music, but at that time we just ignored the letter, and there was nothing more heard by us from Warner Bros.

Q. When was that?

A. I would say about three years ago.

Q. What was the result of that, if you know? Did you get any notification in connection with that matter from ASCAP?

A. No. I received a letter from Warner Bros.

Q. What did they say?

A. They were telling me they were divorcing themselves from ASCAP, and they wanted us to pay them a hundred and fifty dollars for playing their music.

Q. I mean after that did they go back in ASCAP?

A. I understand they did.

Q. You never received any more letters from them, anyhow?

A. No.

Q. How many members of your organization are there in the State of Nebraska?

A. About two hundred and forty.

Q. You are speaking now of the Amusement Men's Protective Association?

A. Yes.
Q. Of which you are president?
A. Yes, sir.

[fol. 1415] Mr. Hotz: I think that is all.

Cross-examination.

By Mr. Frohlich:

Q. Mr. Malec, when did you go into business in Peony Park?
A. Oh, I had Peony Park for about twenty-four years.
Q. You were there in 1921?
A. Yes.
Q. Did I understand you to testify you paid ASCAP moneys, but never had a contract in the early days?
A. There were some days we did not have a contract.
Q. Did you have a contract in 1921?
A. I could not say.
Q. I show you this document and ask you whether you recognize the signature?
A. Yes.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 42.

Q. It is your signature?
A. It is "Malec Bros." on there.
Q. In your handwriting?
A. Yes, sir.

Mr. Hotz: Objected to as immaterial.
The Court: Overruled.

Q. You had a similar contract in 1922, did you? Look at this document and look at the signature and see if it is yours?
A. Yes, sir.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Num-
[fol. 1416] ber 43.
The Court: Is there any reason for encumbering the record with that? It is similar to others.

Q. Mr. Malec, under this first contract, plaintiffs' Exhibit Number 42, you paid thirty dollars a year, is that right? Look at it.

A. I thought it was sixty dollars—I had forgotten.

Q. And under your second contract in 1922 you paid fifty dollars a year, didn't you?

A. Yes.

Q. Your business was growing, wasn't it?

A. Yes.

Q. You don't want this Court to believe that you were as large an establishment in 1921 and 1922 as you are today?

A. No.

Q. You were a small dance hall in those days, weren't you?

A. Well, we have done a lot of business during the summer time.

Q. Did you employ orchestras in those days at substantial salaries?

A. No.

Q. How did you furnish music to your patrons?

A. We had to pay for the music.

Q. How did you operate the music, by what means; with an orchestra?

A. With an orchestra.

Q. A small orchestra?

A. Well, nine to ten pieces.

[fol. 1417] Q. In those days?

A. Yes, sir.

Q. What did you pay the orchestra, on the average?

A. Well, in those days five to six dollars a man a night.

Q. How much would that run into a week or month?

A. Ten men would be fifty-five dollars, something like that, a night.

Q. It would be about three hundred dollars a week?

A. Yes, sir.

Q. Fifteen thousand dollars a year?

A. Well, around those figures.

Q. You increased your business as you went along, didn't you?

A. Some years we did, yes.

Q. What admission did you charge in 1921?

A. One dollar a couple.

Q. And on the average how many people came into your establishment a week?

A. Well, in those days we danced four nights a week.

Q. You only operated four nights?

A. Four nights.

Q. And how many people came in of an evening?

A. Well, anywhere from, say, sixty couples up to two hundred and fifty or three hundred couples on Saturday night.

Q. Do you now operate on four days a week?

A. We now operate two nights a week.

Q. In the summer time, how do you operate?

A. Operate six nights a week then.

[fol. 1418] Q. In winter time?

A. Two nights a week.

Q. What do you charge admission now?

A. Forty cents a person.

Q. Eighty cents a couple?

A. Some nights thirty cents; some nights forty cents; Saturdays, fifty cents.

Q. How many people come into your establishment on a week night?

A. Again, it will run probably one hundred couples and up to four or five hundred couples on Saturday nights; six hundred couples sometimes.

Q. What gross business did you do in 1921 and 1922 and 1923 and those years, approximately?

A. I couldn't recall that.

Q. Well, did you do as much as twenty-five thousand dollars a year?

A. I say that is going pretty far back—I don't know what business we did do.

Q. Have you no recollection of what you did in 1925, 1926 or 1927?

A. I wouldn't want to say the figures.

Q. Well, you testified you now do about one hundred thousand a year, is that right?

A. One hundred thousand attendance a year, one hundred thousand paid customers.

Q. Did you do one hundred thousand attendance in 1921 and 1922?

A. No.

[fol. 1419] Q. You did considerably less, didn't you?

A. Yes.

Q. Your business increased over the years, isn't that right?

A. Yes.

Q. And from time to time Mr. Blazer asked you to pay larger sums, didn't he?

A. Yes.

Q. You know there were other dance halls in and around Omaha? You are familiar with the territory, aren't you?

A. Yes.

Q. You know you have competitors in this territory, isn't that right?

A. Yes.

Q. You know you have some large competitors and some small competitors?

A. Right.

Q. You knew right along the large dance halls were paying more than the small dance halls, isn't that right?

A. Yes, sir.

Q. You expected they should pay that, didn't you?

A. I didn't expect them to pay, the small ones.

Q. Well, didn't you expect a small dance hall to pay proportionately, and a larger dance hall to pay more?

A. Yes. Some paid, and some didn't pay anything at all.

Q. You had a large dance hall, didn't you?

A. Yes.

Q. You were one of the leading dance halls in the State [fol. 1420] of Nebraska, isn't that right?

A. That is true.

Q. You charge an admission to the Park in addition to the dance floor, don't you?

A. Yes, sir.

Q. What do you charge now?

A. Ten cents in the summer time. Now, the season is over.

Q. So that a customer has to pay you ten cents, twenty cents a couple, to get in the Park, and eighty cents to dance; that is one dollar, isn't it?

A. Tuesday nights they pay twenty cents to get in the Park, and get in to dance for fifty cents; that makes seventy cents a couple.

Q. Now, you said on Saturday nights you have had as many as four hundred people in the place?

A. Four hundred couples.

Q. That would mean an increase, approximately, between three and four hundred dollars, isn't that right?

A. Yes.

Q. The chief expense is the orchestra, isn't it?
A. Yes.
Q. You still pay about fifteen thousand dollars a year for that orchestra, is that right?
A. Yes.
Q. You also sell refreshments in the Park?
A. Yes.
Q. And you make a profit out of that?
A. We hope to.
Q. You sell drinks?
A. Yes.
[fol. 1421] Q. And sell food?

Mr. Hotz: You don't sell hard liquor, do you?
The Witness: No.

Q. You sell beverages and food?
A. Yes.
Q. Now, you organized this Amusement Protective Association of Nebraska, didn't you?
A. Yes.
Q. When did you organize it?
A. 1936, I think.
Q. Now, before you organized that, did you have any correspondence with any other body or association regarding ASCAP?
A. I had a lot of conversation with men operating different places.
Q. Did you have any correspondence with anybody on the subject?

Mr. Hotz: Just a minute. I object to that unless counsel states with whom.
Q. That is what I am trying to find out.
The Court: Overruled.

A. I don't think so.
Q. Did you get any letter from the National Association of Broadcasters?
A. No.
Q. Did you get any letters from anybody representing the National Association of Broadcasters?
A. None prior to our organization.
Q. Well, did you get them after the organization?
A. No.
[fol. 1422] Q. Did you get them at any time?

A. I don't believe we had any correspondence from the broadcasters.

Q. Who prepared the bill presented to the Nebraska Legislature?

A. Mr. Brady.

Q. Who is he?

A. One of the Representatives, State Representatives.

Q. Did you ever see the bill before it was presented?

A. Yes.

Q. Where and when?

A. I seen it before it was presented, of course.

Q. Who showed it to you?

A. Between Mr. Brady and myself and a lot of other people interested in the bill.

Q. And they did you in March, 1937 circularize the members of your Protective Association with reference to the bill?

A. Yes.

Q. I show you a document and ask you whether that is the document you sent out to your members?

A. Yes, that is one of them.

Mr. Frohlich: I will offer in evidence plaintiffs' Exhibit Number 44.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. Do you remember this part of the letter, "Our first big problem is the promotion of the bill 478 which will protect us against the payment of the so-called license to play copyrighted music at public performances for profit. [fol. 1423] We have been forced to pay the American Society of Composers, Authors and Publishers long enough, and we believe that if we all do our part we will be able to keep this graft out of the State of Nebraska." Do you remember that?

A. Words to that effect.

Q. You dictated this, didn't you?

A. Yes, sir.

Q. This was a form of graft in your estimation, wasn't it?

A. That is what it says there.

Q. You were paying two hundred and forty dollars a year for this graft, weren't you?

A. Yes.

Q. You were paying fifteen thousand dollars for an orchestra, weren't you?

A. Yes.

Q. The orchestra played music for you at each performance for your patrons?

A. Yes, sir.

Q. For two hundred and forty dollars graft that you were paying you had a license to a great many musical compositions, didn't you?

A. That is what Mr. Blazer said.

Q. Nobody ever sued you for a copyright, did they?

A. I was threatened practically every year.

Q. Were you threatened by anybody outside of the American Society for infringement of a copyright?

A. No.

Q. You never paid a cent of damage for infringement of a copyright, did you?

A. No.

[fol. 1424] Q. As a matter of fact, you didn't bother your head about the music you were playing in your establishment?

A. Yes, sir.

Q. Well, you left it to the orchestra leader, didn't you?

A. Yes.

Q. You import a lot of bands outside of the state?

A. Yes, sir.

Q. You still do that?

A. Yes, sir.

Q. You just gave the orchestra leader carte-blanche and told him to go ahead and play what he wanted, didn't you do that?

A. Yes, sir.

Q. Are you a musician?

A. No.

Q. Do you know anything at all about music?

A. Some.

Q. Did you ever keep a log or record of the pieces you played?

A. No.

Q. Did you ever tell your orchestra leader to confine himself to any particular kind of music?

A. I told him the tempo of music I would like to have him play.

Q. You told him you wanted dance music?

A. Yes, sir.

Q. And you left it to his discretion what kind he would play?

A. Yes, sir.

Q. Did you ever look at the sheets of music to see who owned the copyrights?

A. Oh, I believe I looked at some sheet music.

[fol. 1425] Q. When?

A. Occasionally if I get around to see what number they are playing.

Q. Didn't a time come when you discontinued paying ASCAP any money for a license?

A. Yes.

Q. And you were sued for infringement by Mr. Blazer on behalf of the members of ASCAP?

A. Yes, sir.

Q. That one suit went on for how long a period?

A. Well, the suit was started but it wasn't finished.

Q. How many months did it drag along?

A. Well, it was during that time we were introducing that bill, probably three months.

Q. During those three months you were not paying ASCAP a penny, were you?

A. No. It was all pending.

Q. During that three months you were running your establishment, weren't you?

A. Yes, sir.

Q. While running the establishment you were having an orchestra play music?

A. Yes, sir.

Q. During those three months when no license from ASCAP was had, did you take the trouble to investigate the kind of music being played in your establishment?

A. No.

Q. Didn't you know as a matter of fact that a great many compositions played belonged to members of ASCAP?

[fol. 1426] A. I think they did.

Q. You knew that. It didn't make any difference to you, did it?

A. Not at the time, no.

Q. Did you pay anybody for that music?

A. I think I settled it afterwards.

Q. Did you pay any author, composer or publisher a penny in all your life outside of ASCAP for the use of any music in your establishment?

A. No.

Q. Did you ever make an effort to find out whether any author, composer or publisher had his music played in your establishment? Did you ever make any effort to find that out?

A. Oh, I was told that the music was all handled——

Q. (Interrupting) Did you ever make an effort to find out who owned any music in your establishment?

A. No.

Q. Did you ever make an effort to pay any composer, author or publisher a license fee for the use of music in your establishment?

A. No.

Q. Assuming that the ASCAP cannot do business in this State under the present law, and you want to continue running your business, how would you go about protecting yourself against infringement suits? What would you do?

A. Well, if the whole State of Nebraska was situated as I would be, I don't think it would make much difference.

Q. What would you personally do to protect your business establishment and your investment if there were no ASCAP today?

[fol. 1427] A. I don't know. I think I am at the mercy of ASCAP.

Q. Suppose you wouldn't be at the mercy of ASCAP and there was no ASCAP in the State of Nebraska, what would you do about furnishing music to your patrons? Would you still have an orchestra?

A. I don't know what I would do.

Q. In other words, if there were no ASCAP you couldn't run your business, isn't that right?

A. I guess that is right.

Q. Would you make any attempt to get music from other sources?

A. I would have to.

Q. Have you ever made any attempt in your life to get music from the public domain or music that belonged to others than ASCAP.

A. No, I didn't.

Q. Now, if there were no ASCAP and you wanted to perform this music, you wouldn't want to infringe on anybody's rights, would you?

A. No.

Q. You are a law abiding citizen, aren't you?

A. Yes, sir.

Q. And want to do business legally and properly?

A. Yes, sir.

Q. And if there were no ASCAP in the State of Nebraska or anywhere, what would you do to protect yourself against infringing on somebody's rights with respect to music?

A. Well, we would have to play music that ASCAP has nothing to do with.

[fol. 1428] Q. Well, whose music would you play?

A. I believe there would be some authors come forward contributing their knowledge to the musical world.

Q. Now, you know there are a great many compositions that are not copyrighted, don't you?

A. I think there are some, yes.

Q. And as to the compositions that are not copyrighted by members of ASCAP, you would have to negotiate separate licenses with these people, wouldn't you?

A. We would have to buy music that we know doesn't belong to ASCAP.

Q. And you would have to negotiate separately with the owners of copyrights for the privilege of playing the music, wouldn't you?

A. I think our orchestras would have to.

Q. Either you or the orchestra?

A. Yes, sir.

Q. How many numbers do you play in a night?

A. Probably thirty-five.

Q. You play about thirty-five numbers one night, and play some of the same numbers the next night. How many numbers a week?

A. Multiply that by six—two hundred numbers, but most of them are repeated again.

Q. Would it be fair to say between one hundred and two hundred numbers?

A. Yes.

Q. If there were no ASCAP and you had to negotiate [fol. 1429] with respect to one hundred to two hundred numbers each week, how would you have to commence your negotiations?

A. I don't think it would be necessary to have as many numbers.

Q. Suppose you cut it down a half, you would have to negotiate for some reasonable time prior to the performance in your establishment, wouldn't you?

A. I expect so.

Q. You would have to employ somebody for that, wouldn't you?

A. Oh, I think things would work out somehow.

Q. Would you, yourself, be willing to give up your time for negotiating a license for music in your establishment?

A. No, I wouldn't have the time for that.

Q. You would have to employ somebody for that purpose, wouldn't you?

A. Yes.

Q. You would have to pay a salary for that, wouldn't you?

A. I expect so.

Q. What would you think you would have to pay some man in your establishment to clear your copyrights?

A. Well, Peony Park wouldn't want to go into the music business.

Q. You wouldn't want to go to too big an expense?

A. No.

Q. But if no ASCAP, and if you had to clear the rights, wouldn't you have to employ somebody at a substantial salary?

A. If there were no ASCAP, I think the state would get some music—you could get a great deal of music.

[fol. 1430] Q. Isn't it a fact that today with ASCAP there is a great deal of music which doesn't belong to ASCAP?

A. I don't know how much music I could get today. I was told by Mr. Blazer that ASCAP controls practically all the music.

Q. He told you that?

A. Yes, sir.

Q. Did you make any effort to find out whether that was true or not?

A. He told me they controlled about a million and a half numbers.

Q. A million and a half numbers?

A. A million numbers, yes.

Q. Did you ever make any effort to find out whether there was any other music outside of ASCAP?

A. I expect there are some musical compositions not controlled by ASCAP.

Q. You know there is, don't you?

A. The popular music is all controlled by ASCAP.

Q. You didn't make any effort because you didn't have to?

A. That is right.

Q. The ASCAP license protected you, didn't it?

A. I was on the payroll.

Q. For that two hundred and forty dollars you got complete protection again all infringement?

A. Yes, sir.

Q. And you feel you did?

A. Yes, sir.

[fol. 1431] Q. You were never bothered or paid any damages?

A. Right.

Q. You felt that paying two hundred and forty dollars against fifteen thousand dollars for an orchestra, was graft?

A. Yes, sir.

Q. You said that?

A. Yes, sir.

Q. You still feel it is?

A. Yes, sir; I feel it is unjust.

Q. In other words, you wouldn't want to pay anything for it?

A. I would want to pay it some other way.

Q. How would you want to pay it some other way, and what way?

A. In such a way that no man could tell me he can charge me whatever he wants and I have to pay it, or else.

Q. Well, did Mr. Blazer ever ask you for one thousand dollars for a contract?

A. He said he could ask me.

Q. He didn't tell you he wanted you to pay it; he didn't tell you he wanted you to pay one thousand dollars?

A. He told me I ought to pay one thousand.

Q. Did you ever make a contract for one thousand dollars?

A. No.

Q. He told you he could charge one thousand dollars, isn't that right?

A. Yes, sir.

Q. He never asked you to pay one thousand?

A. No.

Q. You never paid one thousand dollars?

[fol. 1432] A. No, I never paid one thousand dollars.

Q. You were very resentful every time he increased your rates over the years?

A. Right.

Q. You argued with him bitterly about it?

A. Yes.

Q. In all these years did he jump your rates very high?

A. I asked him for a reduction the last three years, because business was not what it was four or five years ago, but I couldn't get it.

Q. What do you take in a year in dollars and cents, this last year, 1938?

A. We lost money in 1938.

Q. Did you lose money in 1937?

A. We made some money but not very much.

Q. How much did you make?

A. We made about four thousand dollars net.

Q. What was the gross amount of money you took in in 1938 in dollars and cents, approximately?

A. I don't know. We probably took in around seventy or eighty thousand dollars.

Q. And you say out of the seventy or eighty thousand dollars you lost money?

A. Yes.

Q. Did you draw a monthly salary?

A. Yes.

Q. What did you draw?

A. Three hundred dollars a month.

[fol. 1433] Q. Thirty-six hundred dollars a year?

A. Yes, sir.

Q. Did any other member of your family draw any money out of that company in 1938?

A. Yes.

Q. Who?

A. My brother.

Q. How much?

A. The same amount.

Q. Between you, you drew out seven thousand dollars in the way of salaries out of the business?

A. Yes, sir.

Q. Did anybody else draw any money out of the business?

A. We have sixty-five people working for us.

Q. You say you lost money on the gross business that year?

A. 1938, yes.

Q. In 1937 did you draw a similar amount?

A. Yes.

Q. Did your brother draw the same amount?

A. Yes.

Q. You made four thousand dollars in addition?

A. Yes, sir.

Q. In 1936 what was the gross business ~~you did~~ in that year?

A. Somewhere near the same figure.

Q. You had the same drawings?

A. Yes.

Q. Did you make any money that year?

A. A little.

[fol. 1434] Q. How much?

A. Four or five thousand dollars.

Q. As a matter of fact, you have been making a profit in addition to your drawings practically every year, haven't you?

A. In that we have swimming and other things.

Q. Taking everything into consideration in that Park, you have been making money there, haven't you?

A. Some, yes.

Q. You have been running that park for over twenty years, and it is a profitable business today, isn't it?

A. Not today.

Q. Would you say in 1939 it was unprofitable for you?

A. I don't know how this will be, but not very profitable, I don't believe.

Q. Have you been drawing your weekly drawings?

A. Yes, sir.

Q. And is your brother drawing his?

A. Yes, sir.

Q. Is anybody else drawing anything in 1939?

A. We are the officers.

Q. And you completely control the company?

A. Yes, sir.

Q. Have you been paying any license fee in 1939?

A. I think we paid.

Q. You paid in 1938?

A. Yes, sir.

Q. Would you say the payment of two hundred and forty [fol. 1435] dollars in any way affected your business?

A. It is two hundred and forty dollars.

Q. It hasn't hurt your business any, has it?

A. Well, we may be forced to operate only one night a week this winter.

Q. That is true practically every winter, is it not?

A. We used to run four nights a week.

Q. Isn't it due to general conditions around Omaha?

A. Possibly.

Q. It isn't due to the two hundred and forty dollars you are paying, is it?

A. There is still two hundred and forty dollars there, and we are doing less business.

Q. Now, suppose there were no ASCAP in Nebraska, and the individual members of the Society, the people who write and compose and publish music of the Society, the music you play every night, wanted to do business in Nebraska and sell you the right to perform for profit, and suppose you wanted to purchase that, as a matter of fact, you would have to purchase music, wouldn't you? You wouldn't close your establishment because ASCAP went out of business in the State of Nebraska, would you?

Mr. Hotz: Object to that as having been gone over, and the question has about four or five independent parts.

The Court: Yes, I think the question is improper; it is compounded.

Mr. Frohlich: I will withdraw it.

[fol. 1436] Mr. Riddell: Furthermore, if the Court please, it is improper cross examination.

Q. If there were no ASCAP in Nebraska you wouldn't want to shut your doors, would you?

Mr. Hotz: I object to that as immaterial.

The Court: It is immaterial, but you may answer.

A. I wouldn't want to, no.

Q. You would want to negotiate for a license with people who compose, copyright and publish music which is now the repertoire of the ASCAP, wouldn't you?

Mr. Hotz: Objected to as having been gone over.

The Court: It is immaterial and fully covered. Objection sustained.

Q. Have you a list of the members of the Amusement Protective Association of Nebraska?

A. No, I haven't.

Mr. Hotz: It is available to the Secretary, but not to him.

Q. What dues are paid by these members to the Association?

A. No dues. It is just a civic association formed by us people that are interested in this fight against the ASCAP.

Q. Does this association have any bank account?

A. No.

Q. Does it have any funds at all?

A. No.

Q. Nobody supplied you with any money at all?

[fol. 1437] A. We had some money to get out this literature to our different people.

Q. How much did it cost you to get this literature out?

A. It cost quite a bit. We have sent out three hundred and fifty, probably four hundred, circular letters and cards and so forth.

Q. Did you send out more than this one in evidence?

A. Yes.

Q. A great many more?

A. We sent out two or three.

Q. Did you employ anybody to do any work in the field?

A. You mean traveling?

Q. Yes.

A. No.

Q. What did it cost you to get the circulars out?

A. Oh, I don't know now just what it cost me.

Q. Can't you give me an approximate figure?

A. Each time, forty-five or fifty dollars—each time we sent it out.

Q. Altogether, how much?

A. Two hundred and some odd dollars.

Q. Who supplied that?

A. Us men in the business.

Q. By contributions?

A. Yes.

Q. No dues?

A. No.

Q. Just contributions?

A. Contributions.

[fol. 1438] Q. Did you have a man named Paul Halpine

out doing work in the field for you in connection with the circular?

A. Mr. Halpine was probably of some help to us during the bill.

Q. Did he get any salary from anybody connected with your organization?

A. No.

Q. Does any other member of your family draw any money from this enterprise you operate?

Mr. Hotz: Objected to as not proper cross examination, and immaterial.

The Court: I think it is immaterial. Objection sustained.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. This Exhibit Number 44 contains at the top a list of the officers and directors of the association concerning which you were talking, does it not?

A. Yes.

Q. Who is H. A. Marble, whose name is signed to it?

A. H. A. Marble is the secretary of the association.

Q. And lives in Omaha?

A. Yes, sir.

Q. Now, these men in this association were made up from Matt Kobalter of Lincoln, was he one?

A. Yes.

[fol. 1439] Q. Mr. Joseph Smith from Hastings?

A. Yes.

Q. And Bert Glover of Grand Island?

A. Yes.

Q. And William Barclay of Plattsmouth?

A. Yes, sir.

Q. George Sharpnach of Lincoln?

A. Yes.

Q. Roy F. Gordon of Bennington?

A. Yes.

Q. H. H. King of Norbolk?

A. Yes, sir.

Q. H. A. Marble of Omaha, and yourself?

A. Yes, sir.

Q. They constituted the Board of Directors, did they?

A. Yes, sir.

Q. Those men were all interested in the same line of business, generally, as yourself?

A. Yes, sir.

Q. I think you stated in response to a question by Mr. Frohlich about food and so forth, and drink out there, and I interrupted. You do not hold a hard liquor dealers license, do you?

A. No.

Q. You don't sell hard liquor on the premises of Peony Park, and never have?

A. No.

Q. Is there another association also in the State of Ne- [fol. 1440] braska that has dance halls and taverns of that type? These taverns, are they separate from your beer taverns and so forth?

A. Yes, sir.

Q. Do they have an association?

A. Yes, sir.

Q. Of their own?

A. Yes, sir.

Q. You are not a beer tavern and your organization is not the beer tavern association people?

A. No.

Q. Did they cooperate with you in connection with this bill?

A. No.

Q. The men you have just spoken about, whose names I have just called out, they are all residents of the State of Nebraska, to your own personal knowledge, and reside here and operate a business interested in music?

A. Yes, they are.

Q. And were interested in this bill?

A. Yes.

Q. And are all members of this association?

A. Yes, they are.

Q. And all the members of the association are residents of the State of Nebraska?

A. They are.

Q. And carry on a business here?

A. Yes, sir.

Mr. Hotz: That is all.

[fol. 1441] Recross-examination.

By Mr. Frohlich:

Q. Don't you sell beer in Peony Park?
A. Yes, sir.
Q. Don't you also supply set-ups for hard liquor?
A. We sell beverages.
Q. You supply that to patrons?
A. We sell beverages.
Q. You furnish White Rock and gingerale for people, and ice to people?
A. Not ice no more.
Q. Do people come into your establishment with liquor, and drink it in your establishment?
A. That is possibly the case in some instances.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. They don't do that with your permission?
A. No.

The Court: That is so immaterial.
Mr. Hotz: That is all.
Mr. Frohlich: That is all.

Witness excused.

[fol. 1442] JOHN J. GILLIN, was called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

Direct examination.

By Mr. Hotz:

Q. State your name.
A. John J. Gillin.
Q. How old are you, Mr. Gillin?
A. Thirty-four, sir.
Q. Where do you reside?

A. I reside at 517 South 38th Avenue, Omaha, Nebraska.

Q. What is your business?

A. I am manager of radio station WOW.

Q. How long have you been identified with the radio business?

A. Since 1926.

Q. In what capacity at the beginning?

A. In 1926 when I finished an A. B. course at Creighton University I started working for the National Radio Advertising, Inc.

Q. Where?

A. In Chicago, as manager of their Chicago office.

Q. What were your duties?

A. My duties were to solicit advertising for national spot radio campaigns, to build program ideas and to sell those ideas to advertisers, as well as also build programs for the advertiser.

Q. Was that a comparatively new field at that time, that [fol. 1443] line of industry and business?

A. It was comparatively new from the standpoint of national spot business. There were only two national spot organizations in business—one was Scott Howe Bowen and the National Radio Advertising, Inc.

Q. What is national spot advertising?

A. National spot advertising is when an advertiser usually wants to test the radio out before he uses the network; he takes and places a program in certain spots which we commonly call "markets", like Omaha, St. Louis, Kansas City or Boston. He tests his program out in those markets, either by electrical transcription or live talent. If the program is successful he extends the campaign to other markets by electrical transcription or live talent, or purchases a network.

Q. How long after 1926 did you continue in that line of business?

A. Until 1929, when I returned to Omaha to take a course in law at Creighton University.

Q. Did you graduate from that course in law?

A. I graduated in 1931.

Q. During the time you were in law school did you still continue to be identified with the radio industry?

A. I wrote the continuity for Kozak, Inc., and also at the same time helped on the Blue Network, and called the

Maytag hour from Newton, Iowa; also announced at radio station WOW.

Q. And that continued until 1931?

[fol. 1444] A. At which time I was made program director, and in 1932 made general manager.

Q. That is what you are now?

A. Yes, sir.

Q. Have you had any musical education?

A. I had four years of piano, my last two years of grade school and the first two years of high school; and six years of vocal, my four years of high school and the first two years in college.

Q. What is a memory tune, and does that have any significance in the radio business?

A. Well, to me it has a lot of significance, because I believe any musical program of any significance on the air today has at least one memory tune. For instance, a very popular program is the Kraft Cheese program, called the "Kraft Music Hall", featuring Bing Crosby and other stars. His main spot in his program is built around a memory tune, a tune which recalls memories to people who hear it. In other words, a tune popular in 1922 and still is a leading tune on the air today and played quite often, like "Remember" or a tune of that type. That is what is commonly called a memory tune. If you have heard his program you hear him build up the memory tune by saying, "For instance, in 1922, Jack Johnson and Jess Willard fought for the world's championship, and Willard beat him at that time", or Schnozzle Durante is on Broadway with a new show, and the star motion picture at that time is so and so, and then he goes into his tune by saying, "Do you remember", and singing.

[fol. 1445] Q. That is called a memory tune?

A. Yes, sir.

Q. Are you a member of any association of broadcasters in the State of Nebraska, and if so, what?

A. I am a Director of the Nebraska Broadcasters Association, and past president of the same, and also past vice-president of the same.

Q. Do you hold any office in the national organization?

A. I was vice-president, first vice-president, of the National Association of Broadcasters, and I have been a member of its Board since 1934, for six years—the sixth year on the Board.

Q. Now, when this Bill No. 478, which is the subject matter of this lawsuit, was introduced, did you, as manager of WOW station, or of any of these organizations in reference to radio, in which you are interested, or an officer, did you have anything to do with the instigating of that bill or starting of it in the first instance?

A. No, sir.

Q. Or the drafting of it?

A. No, sir.

Q. Or did you ask anyone else to do it in your behalf?

A. No.

Q. When did you first learn about the bill, I mean in reference to what stage had it proceeded in the legislature?

A. It had been introduced in the legislature when I heard about the bill.

Q. Mr. Gillin, what are the principal sources of supply of music in the United States?

[fol. 1446] Mr. Frohlich: Just a moment. I object to that as this man hasn't qualified himself as an expert.

The Court: Objection sustained.

Q. Let me put it this way: What is the principal source of supply of music for radio stations within the United States?

Mr. Frohlich: I again object to that.

The Court: Overruled.

Q. I didn't mean that from a composers' standpoint, but from the user's standpoint.

A. The principal source of supply is ASCAP, and SESAC, the Society of European Stage Authors and Composers, Inc. SESAC, according to the survey which was made at the instigation of the Board of Directors of 1935 of the National Broadcasters had about fifty-five hundred copyrights. That survey was made by James Baldwin under our direction and under the direction of the committee which I headed.

Q. That is the Society of European Stage Authors and Composers, Inc., is that right?

A. Yes, sir.

Q. Not controlled by ASCAP?

A. No, sir.

Q. It is independent?

A. Yes, sir.

Q. Was that survey reduced to writing?
A. Yes, sir.
Q. And made available for the public?
A. Yes, sir.

[fol. 1447] Mr. Frohlich: Wait a minute. To which one are you referring?
Mr. Hotz: This one here, August 18, 1937.

Q. That was made available?
A. It was made available through the National Association of Broadcasters.
Q. Now, that is one source.
A. I would say another source is the music which is in the public domain.
Q. We know something about that, but so that there can't be any mistake about it, public domain means music that either has never been copyrighted or the music copyrighted and the copyrights having expired, is that right or not?
A. That is right.
Q. Under the copyright law, if you will pardon me, it is twenty-eight years and it may be renewed twenty-eight years under the law, so it would mean then that public domain would be such music as was no longer protected by copyright?
A. That is right, sir.
Q. Do you know anything about the extensiveness of that source of supply of music, and generally just what it consists in?
A. That source of supply is very extensive. However, in its present extensive form it is not usable for radio.
Q. Why?
A. Unless it is especially arranged by somebody to bring it up to date. For instance, take a tune like "A Tisket a Tasket" which was brought out and modernized, I would say, and placed on the radio by one of the ASCAP pub-[fol. 1448] lishers, and because of the different orchestras playing it on the networks it became a very popular number.
Q. Is that a part of the business that the publisher members of ASCAP are engaged in, is that one of the things they do?
A. Oh, certainly.
Q. When they do that, they come under the protection of ASCAP, as you understand it?
A. That is right.

Q. Would you give us, if you could, the names of pieces that are in the public domain that would not come under any present modernizations used generally? I don't mean extensively, but a few pieces.

A. Well, I believe that there is a lot of music in the public domain that copyrights have not been renewed on. However, if an ASCAP publisher makes an arrangement of that particular tune and places it in the hands of certain orchestra leaders and they play it, why, that is known as an ASCAP tune under that arrangement.

Q. Has ASCAP ever furnished to WOW a catalog or list of the copyrighted and vocal and instrumental music which it claims to have?

A. No, it never has.

Q. Did you ever ask for it.

A. We have asked twice for it.

Q. What did they say?

A. I believe the first letter I wrote to ASCAP was in 1932, written to Mr. Greenberg and Mr. Greenberg answered and said their catalog was so voluminous and had a million [fol. 1449] and a half copies that they couldn't possibly send it.

Mr. Frohlich: The letter is the best evidence.

The Court: Overruled.

Q. And then again did you take it up with them?

A. I have asked for catalogs and I believe the other radio stations have asked for catalogs.

Q. Leave out the other radio stations unless referring to your personal knowledge of the Nebraska stations. Maybe that has been a matter of discussion in some of your state meetings, has it?

A. It has been, because we have never been able to get ASCAP's catalog, and we don't know what we are buying or paying for.

Q. Explain that to the Court; why is it?

Mr. Frohlich: I object to his explanation of why.

Mr. Hotz: Withdraw the question.

The Court: The question has been withdrawn.

Q. Has the matter of what you were buying from ASCAP, as you put it, been the subject matter of discussion with the state broadcasters in reference to the music that ASCAP

is alleged to own and control and claimed to own and control?

A. Yes, it has. There hasn't been a state meeting of the association but what there hasn't been a discussion of that particular group of publishers of ASCAP.

Q. What, if anything, have you tried to do about it?

A. Well, after this particular bill No. 478 was introduced [fol. 1450] in the legislature I thought the Nebraska broadcasters association should back the bill as far as the state is concerned, in the state.

Q. Now, from your personal observation, Mr. Gillin, and as the manager of WOW station in connection with what is known as popular music, present day popular music, about what percentage of that would you say was controlled by ASCAP?

Mr. Frohlich: I object to that as he is not a qualified witness.

Q. You keep the logs, don't you?

A. We keep the logs, but not program logs. The only thing I can see, I believe, from everything I have been able to understand in our discussions, is that eighty-five per cent——

Mr. Frohlich: I am making an objection to what he believes and thinks.

The Court: Objection sustained.

Q. Well, what is the basis for your knowledge, Mr. Gillin, of the number of copyrighted compositions of music, and vocal, that ASCAP has, what would be the basis for your knowledge of the percentage of the total of popular music as distinguished from standard music?

A. The basis that I would have would be a survey made with the National Broadcasting Company in which I think during a certain portion of the time it was established that eighty-five per cent of the music was ASCAP music.

Q. How was that survey conducted?

A. From the program logs of the National Broadcasting Company by their own program department under the supervision of John Royal, vice-president in charge of programs.

[fol. 1451] Q. Were you a member of that committee?

A. I was not a member of the committee that made the survey, no. I was a member of the committee trying to find

out how much ASCAP works were being used by the networks at that time.

Q. Would that percentage apply to your own station WOW?

A. I believe it certainly would, because we are a member of the basic Red Network of the National Broadcasting Company.

Q. Explain to the Court the difference between public and standard music.

Mr. Hotz: Withdraw that question.

Q. WOW is a member of the network that is known as the National Broadcasting Company network?

A. WOW is a member of the basic Red Network of the National Broadcasting Company, and has been a member of same since 1926, at the time the network was formed.

Q. Do you have a contract with them?

A. Yes, sir, we do.

Q. Which specifies your relationship?

A. Yes, sir, we do.

Q. Does that pertain largely to musical compositions that come in over a wire?

Mr. Frohlich: I object to that, if there is such a contract.

Mr. Hotz: We have got it.

The Court: It is just a preliminary question.

[fol. 1452] A. One of the very important clauses of that contract——

Mr. Frohlich: I object to that.

Mr. Hotz: I don't want that.

Q. Does it pertain to musical compositions and everything else that comes over the wire?

A. Yes, sir.

Q. And it specified the different rights and so forth?

A. Yes, sir.

Q. Now, are there any other stations in the State of Nebraska that are so hooked up with the national network?

A. We are the only National Broadcasting outlet in the state at the present moment.

Q. Now, who are identified with the Columbia System, which we all know is another similar network?

A. Radio KOIL, Omaha, and KFAB, Lincoln.

Q. What about the other stations in the state of Nebraska?

A. Those three stations, WOW, KFAB and KOIL, are the only network outlets in the state at the present moment.

Q. There are seven other stations in addition to the three you have mentioned?

A. There are seven other stations in Nebraska, and they are what we commonly call independent stations—that is the term set out in the Association of National Broadcasters, because they have no network affiliations.

Q. Those stations that originate their programs in their studios, in other words, the musicians and singers come right in there, and so far as the music is concerned, that originates in their studio, is that right?

A. That is right.

[fol. 1453] Q. Do you have any music locally that originates in your studio?

A. We do, yes, sir.

Q. How much in dollars and cents do you pay per annum for that music which originates in your studio?

A. Are you asking about musicians now?

Q. Yes.

Mr. Frohlich: That is paid to him?

Mr. Hotz: To the musicians.

A. This year we will pay some twenty-nine thousand dollars to musicians.

Q. For music that originates in your station?

A. Yes, sir, in our studio.

Q. About what percentage of the time, so far as music is concerned over your station of so-called radio time, does such activity take up, that is, the activity of the local musicians?

A. There are usually two quarter-hour programs a day from one orchestra of five pieces, which is called the "Sophisticated Ranger", and never more than two half-hour programs from the studio orchestra, which is a contract orchestra through agreement with the American Federation of Musicians, which don't play over an hour a day. They are required to rehearse two hours a day, and play one hour a day for that amount of money.

Q. Can you give us something as to the percentage of time that consumes, forty per cent, thirty-three and a third per cent, or forty-five per cent, or what?

[fol. 1454] A. You can't say each day. For instance, the ranger group is on at 6:45 in the morning, and at the present time 11:45 to 12:00, and an orchestra is on from, say, 11:30 to 12:00 midnight, or 11:00 to 12:30 A. M. For instance, yesterday you had Hitler's speech, and that particular program was out, but it never amounts to more than an hour and a half at the most over our station that the musicians play each day by live talent orchestra music; that is, at the present time.

Q. And KOIL also has local musicians that play right in the studio, play and sing music also?

A. Oh, yes. They have a contract also.

Q. Now, what amount of money did you pay to ASCAP last year, WOW?

A. Last year we paid to ASCAP twenty-two thousand eight hundred dollars.

Q. What is the basis for that amount or charge?

A. The basis for that charge has never been known. We believe it is a very arbitrary charge.

Mr. Frohlich: We object to that. The contract is in evidence.

The Court: The answer may be stricken out as not responsive.

Q. And by the basis of the charge, Mr. Gillin, I mean——

A. How was it arrived at by ASCAP?

Q. I don't mean that, but I want to know now how the twenty-two thousand eight hundred dollars came to be that amount; why not thirty-two thousand dollars, why not eighteen thousand dollars?

[fol. 1455] A. That represents fifteen hundred dollars as sustaining fee to the Society, that is, ASCAP, and five per cent of our gross revenue after fifteen per cent agency commissions for national advertising or local advertising agencies have been deducted. That five per cent represents five per cent of all programs, whether they are musical programs or not. That is including news broadcasts where no music is ever played, dramatic programs where no music is ever played.

Mr. Frohlich: I move to strike out the last part of the answer. The contract speaks for itself.

The Court: The motion is denied.

A. (Continuing) The dramatic programs where no music is ever played, and only excepts the five per cent on pro-

grams that are of a political nature and of a religious character.

The Court: I think that is all in evidence before.

Q. Is that contract satisfactory to you?
A. No, it is not satisfactory to us.

Mr. Frohlich: I object to that. The contract is in evidence. Whether it is satisfactory or not is immaterial.
The Court: It may not be very material, but the objection is overruled.

Q. You may answer.
A. The contract is not satisfactory to us, because we believe ASCAP sells their catalog on a very unfair basis.
Q. Why did you sign it?
[fol. 1456] A. We had no other recourse but to sign it.
Q. Why?
A. Because of the fact that we have a national statute, a copyright act, that says if we infringe on any music there is two hundred and fifty dollars damage fee, and we know we can't get along without ASCAP music, at least at the present time. We would infringe at some time along the line, and how many times, we wouldn't know, and we have got a contract with the National Broadcasting Company which specifies that we have got to have an ASCAP license or we can't get a program from them.

Mr. Frohlich: I object to that unless he produces the contract in evidence.
Mr. Hotz: Mr. Mills testified to that.
Mr. Frohlich: He didn't testify to any contract between the National Broadcasting Company and WOW.
The Court: It may stand.

Q. Calling your attention to defendants' Exhibit Number 45, which states that it is a National Broadcasting Company contract with WOW Life Insurance Association, Omaha, Nebraska, radio station WOW, dated December 2, 1936, and which is a photostatic copy, I will ask you if that is an exact copy of the original of that instrument?
A. It is, sir.

Mr. Hotz: You don't raise the objection, Mr. Frohlich, as I understand it, that it is a photostatic copy?
Mr. Frohlich: No, sir.

[fol. 1457] Q. You are operating under that now?

A. Yes, sir, we are operating under this contract.

Q. In that contract does it pertain to music?

A. Yes, sir.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 45.

Mr. Frohlich: No objection.

Q. Now, Mr. Gillin, when you stated a moment ago that the contract was entered into between yourself and ASCAP, and which is in evidence here, was necessary because you had to have it, was it necessary also because the music that was controlled by ASCAP was necessary for the operation of your station from a practical standpoint of sellers of radio service or not.

Mr. Frohlich: Objected to as calling for a conclusion.

The Court: It does, but I think it may go in.

A. Because of two reasons—first of all we know we cannot get along without ASCAP music at the present time, and because our contract with the National Broadcasting Company specifically states we must have an ASCAP contract.

Q. Just explain that, why that is, as you understand it, with the National Broadcasting Company from a practical standpoint, without getting into the technical phases of it.

A. Well, the National Broadcasting Company, the network, does not clear at the source in regard to the ASCAP catalog.

Q. What does "clear at the source" mean?

[fol. 1458] A. If a program emanates from New York and includes music of the ASCAP catalog, that music is not cleared at the source or emanating point of the program. That is why we have to have a contract in Omaha to protect ourselves from any infringement suits that may be brought by this Society.

Q. In other words, the National Broadcasting Company under their contract with ASCAP, when that music comes out in Nebraska, they have made a settlement or deal with ASCAP, is that right?

A. We have to pay ASCAP five per cent of the receipts on any network that comes over our station.

Q. I think it was testified by Mr. Mills and others that the network pays nothing to ASCAP for their chain service, is that right?

A. For the network service they pay a sustaining fee for the three network stations that emanate, like our fifteen hundred dollars, but they don't pay any commercial fee on the program emanating and going out over the network stations affiliated with the network.

Q. That fee is collected from the stations throughout the nation, including WOW and the rest of the stations in Nebraska that make use of that network?

A. That is right.

Q. We will have somebody here to testify on KOIL of the Columbia System. Is that the same with them?

A. I can't testify what their contracts are with Columbia.

Q. What do you know about the practical operation of WOW station in Omaha, the mechanical parts? I want to know how the music comes in here and how it is broad-
[fol. 1459] cast, just briefly, if you can describe that machinery and that equipment, and where it is located in Nebraska, and as much as you can of it. I am talking about the wire that comes in from New York, and what would come over that wire from New York if you did not have the broadcasting station in Nebraska, WOW; explain that.

A. The National Broadcasting Company leases a specially built wire for radio broadcasts from the A. T. & T. and then sends a program or talks or dramatic programs over that wire to the affiliated stations of the basic network.

Q. Confine it to WOW.

A. The basic network from New York or Hollywood arrives at the local Northwestern Bell Telephone Company and is then sent to our studio at 17th and Farnam.

Q. By what?

A. By a trunk wire leased by the National Broadcasting Company from A. T. & T., where it goes through our amplifying units in the studio and then goes to our transmitter by special wire we lease from the Northwestern Bell, where the program is impressed on our frequency motor.

Q. What did you call that?

A. Frequency.

Q. And impressed on what?

A. Frequency motor.

Q. What is the frequency motor?

A. It controls our frequency, a[illegible] it is then sent out for consumption to the public. When a program is sent out it is still in radio frequency. And when it reaches your re-

[fol. 1460] ceiving set in your home its frequency is changed into the tones and music which you hear.

Q. If it were not for your station and machinery and equipment in the station in the City of Omaha, Nebraska, and that wire just came into the room, or into any other room, could anybody get any value out of it?

A. They would have to have a receiving set to get any value out of it.

Q. Now, WOW has the receiving set and transmitter in its Omaha establishment?

A. I mean by that if the line came into a hotel room, for instance, if we were going to have a program from NBC and send it over special leased wire to the court room in Lincoln to have the Court hear that program, if they had a loud speaker here they could hear that program, if they were listening to it off the line, but if they had no loud speaker here, they couldn't hear it. You can attach it to this post, but you have got to have the loud speaker to get the program.

Q. Do you know the number of radios there are in the State of Nebraska installed in homes and elsewhere in the state?

A. No, I couldn't give you that figure.

Q. You don't know that?

A. Not the exact figure, no.

Q. Do you know near enough so as not to be too distant, approximately?

A. I don't want to make a guess.

Q. Where would that information be available?

[fol. 1461] A. We have the information in our files, but I don't remember the figure.

Q. You could get that for us, couldn't you?

A. Yes, in ten minutes by telephone.

Q. You will do that before you conclude here?

A. Yes.

Q. When this music comes out from New York over this wire that you have just spoken of into your studio for the purpose of being rebroadcast to the public, are you able to control the numbers that are played?

A. We never know what numbers are going to be included in a program. We very seldom hear of it, unless it is a special program. We don't know who will be the guest artist or what he will sing or what orchestra will

play. We have no control over the program that emanates from NBC.

Q. That is where ASCAP enters into that situation, is that right, and why it becomes necessary for you to have a contract with ASCAP?

A. Well, the National Broadcasting Company makes us sign a contract that includes a clause which says we must have an ASCAP license, and that is why we have one. As far as the National Broadcasting Company is concerned. On our local program we would still have to have a license.

Q. That is specified in defendants' Exhibit Number 45?

A. That is not specifically shown in Exhibit 45, but it was in our contract of 1932, and changed in this contract, but it means ASCAP, because the National Broadcasting Company clears at the source, and all other performing right societies——

[fol. 1462] Mr. Frohlich: Why not read that section?

A. (Continuing) This section says, "You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereafter".

Q. There is music, of course, that comes out over this wire from New York that is not ASCAP music?

A. Oh, yes, there is music being broadcast by network that is not ASCAP music.

Q. In connection with that music you are not required to pay any attention to public performance rights and methods of infringement, isn't that right?

A. We never have.

Q. Why is that, again?

A. Well, because of the fact that ASCAP's license is supposed to protect us.

Q. I mean these other programs of music that is not ASCAP music, why do you not have to pay any attention to those?

A. Because they are cleared at the source, NBC headquarters, New York, Chicago or Hollywood.

Q. That is not true with ASCAP?

A. That is not true with ASCAP.

Q. By clearing at the source you mean they have made arrangements with the users of the music?

Mr. Frohlich: I object to that as calling for a conclusion, and not a single fact in evidence to show that.

[fol. 1463] The Court: You might say, "What do you mean by clearing at the source?"

Q. Answer that; what do you mean by "clearing at the source"?

A. By clearing at the source I mean that any liability would be taken care of at the source, and payment of any sum of money for the right to broadcast that particular music would be paid at the source at which it emanates.

Q. You are talking about infringement of copyrights?

A. Specifically.

Q. And you are talking about copyright fees?

A. Yes.

Q. And public performance rights and everything else?

A. That is right.

Q. I want to get at the negotiations leading up to this contract that is in evidence here now with ASCAP, between ASCAP and WOW. How were the terms and conditions of that contract arrived at as between your organization and ASCAP?

A. ASCAP sent us the contract and asked us to sign the contract through their Omaha office, which is Mr. Blazer. We held it up because we received a wire in 1932 from Mr. Loucks; he negotiated with Mr. Mills or Mr. Paine for extension of the contract, I believe, to September 1st, until the time that the negotiations would be settled, and we received a wire in the early part of January from ASCAP and it said specifically if we didn't sign the contract before January 15th, that was the deadline, we would then give ASCAP a cause of action for infringement suits against the station.

[fol. 1464] Q. Was the contract in satisfactory form for WOW at that time or not, when you signed it?

A. Not to us.

Q. Why not?

A. There were no discussions about the contract so far as the station was concerned at all. It was just sent to us and they said, "Here is your contract; sign it or else."

Q. What were the objectionable features?

A. The objectionable features are that you are paying five per cent on everything that goes out over our facilities of a commercial nature, whether news, dramatic programs

or what it is, and we have always tried since 1932 as an industry to ask ASCAP to give us a contract on a per program basis. In other words, for the amount of music that ASCAP controls, and that we use, if we use ASCAP music on that program. In other words, if the program includes ASCAP music, we will pay for it the same contract as the newspapers have today. If it doesn't include ASCAP music, we don't want to pay for it, because we are either paying for public domain music or somebody else's music then and ASCAP is still getting the money for it.

Q. That is the condition that exists today as far as your WOW station is concerned, and no doubt other stations in the State of Nebraska?

A. That is right.

Q. So that if I understand it, in conclusion of your testimony, WOW's contract with ASCAP today is not the result of trading and negotiating which resulted in a satis- [fol. 1465] factory contract to your organization?

Mr. Frohlich: I object to that.

A. No.

The Court: Objection sustained, and the answer stricken.

Q. Some mention was made of a Lang-Worth catalog here in the direct examination on the other side. What is the Lang-Worth catalog?

A. The Lang-Worth catalog is the old N. A. B. bureau of copyrights of some twenty hours of music and eighty hours of music out of the original one hundred hours of music. Mr. Langloise and Mr. Wentworth who own the catalog now, were able to get together from the public domain and other particular sources of music that does not carry any copyright fees. Once you purchase the Lang-Worth catalog it is free from any copyright fees, but it is only one hundred hours of music, and a radio station cannot just use one hundred hours; it is not sufficient to carry the bulk of its program.

Q. Mr. Mills made the statement, and I think Mr. Buck did the same, that WOW or one of these stations here in the State of Nebraska, if it wanted to, it could run and operate without ASCAP music. Is that true from your viewpoint or not?

Mr. Frohlich: I object to that as characterizing another witness' testimony.

Mr. Hotz: Well, he said that.

The Court: Overruled.

[fol. 1466] A. WOW could not run without an ASCAP contract. We are willing to pay ASCAP for the music we use.

Q. I think you testified you never had furnished to you a catalog showing the ASCAP music, and that you had asked for it.

A. Yes, sir.

Q. And they never furnished it?

A. No, sir.

Q. I will call your attention to this book I have had the court reporter mark Exhibit Number 46, and will ask you to state if that is the catalog of the SESAC Society of European composers you spoke about having some fifty-five hundred pieces of music in it.

A. Fifty-five hundred. That is the N. A. B. report, sir—a special edition sent out.

Q. About how many pieces of music are there in the Lang-Worth catalog?

A. I wouldn't be able to specifically state how many numbers are in there, but there are one hundred hours of music available to broadcasters at the present time, of which no copyright fees are attached.

Mr. Hotz: Offer in evidence defendants' Exhibit Number 46.

Mr. Frohlich: No objection.

Q. That is not a catalog but is a survey by the National Association of Broadcasters, this Exhibit Number 46, but it does contain the names and the pieces of music in SESAC?

A. It contains the names and pieces of music as of that date.

[fol. 1467] Q. Of date August 18, 1937?

A. Yes, sir.

Q. Where does most of the music that is in Exhibit Number 46 originate—where did it originate?

A. Most of the music in that catalog originates in Europe of certain publishing houses that have not received a license from ASCAP, and have made no overtures to ASCAP to receive a license from ASCAP.

Q. It is mostly foreign music?
A. Foreign music.
Q. Most of it is foreign music?
A. Most of it.
Q. Is it of any great commercial value?
A. No, it is not of any great commercial value. The SESAC library's only commercial value at the present time comes from the hill-billy tunes in it, like M. M. Cole and so forth which SESAC picked up.
Q. Do you know who the association music publishers are? That was referred to by Mr. Mills as having music for your station?
A. Yes.
Q. Who are they and what did they put out?
A. The Association Music Publishers, if I am right, now has—I am trying to think of two organizations; one of them gives you the right to play certain music and transcribe certain music, and the other one has a library, and I can't differentiate between the two, which is the exact name of the two.
Q. The Associated Music Publishers is the library?
[fol. 1468] A. The Associated Music Publishers have a library of music that they sell to radio stations, like Lang-Worth and so forth.
Q. Is that a recorded library for records?
A. It is a transcription library of very fine music.
Q. Does it license the performance rights, or don't you know that?
A. We do not have the Associated Music Publishers library service, but I don't think there is any difference to the Source or the World whereby if you have a commercial program you have to pay five per cent of that particular program, that is, sale of time.
Q. Does it amount to any considerable amount of music?
A. It is a nice library, but not the library the Source or World is. It is fine music, but not as extensive as the Source or World. In other words, the Source has about three thousand numbers in it today, and I don't think the Associated has half that many.
Q. Would those combined with others that you speak of, be sufficient to run and operate your station?
A. I say we can't get along without ASCAP, unless public domain music is arranged by broadcasters in suitable form for playing over the air, to be able to say, "Here, we

have got enough music", and that is very, very hard to say because you never know when you are going to infringe upon an ASCAP publisher. I know at the present time if we took a fifteen minute program each day and put in it [fol. 1469] nothing but SESAC hill-billy tunes, and another fifteen minutes with Lang-Worth, all right, that is a half an hour of these that we could run on the average from day to day of copyrighted free music.

Q. Add to that this Associated Music Publishers and the World.

A. Those are transcription services on which we still have to pay five per cent on the receipts. If we have a program with Lang-Worth, which is copyrighted free music, in the morning at 6:45 A. M., and your client decides to take Lang-Worth because it is cheaper than the Source, still you have to pay five per cent of the receipts to ASCAP, and it is not ASCAP's music.

Q. Mr. Gillin, another question: When this bill was pending in the legislature, after it was introduced, did the National Broadcasters or the association as such have anything to do with it at all?

A. No, the National Broadcasters had nothing to do with it.

Mr. Hotz: That is all.

Cross-examination.

By Mr. Frohlich:

Q. What is the call letter of your station?

A. WOW.

Q. What is the corporate operating station?

A. Woodmen of the World Life Insurance Association.

Q. How long have you operated that station?

A. Since 1923, April 8th.

Q. How long have you been connected with them?

[fol. 1470] A. Since 1930.

Q. During all this period since 1930 were you also personally a member or connected in any shape, manner or form with the National Association of Broadcasters?

A. I went to the first meeting in 1932 and was elected to the Board in 1934.

Q. So that in 1932 you attended the first meeting of the National Association of Broadcasters?

A. Right.

Q. You knew the National Association of Broadcasters was in negotiation at that time with ASCAP, didn't you know that of your own knowledge?

A. I say there were discussions in the matter.

Q. There were discussions at that time, were there?

A. Yes, sir.

Q. These discussions were going on between the National Association on behalf of all the broadcasters who were members of that body, isn't that right?

A. Until a certain point in which you didn't recognize them any more, and sent out your contracts.

Q. Will you please answer my question? Weren't these discussions going on by the National Association of Broadcasters on behalf of its members? Yes or no.

A. Yes, they were.

Q. And wasn't WOW and the Woodmen of the World Life Insurance Association at that time in 1932 a member of the National Association of Broadcasters?

A. Yes, sir.

[fol. 1471] Q. Did you, yourself, participate in any of these negotiations or discussions with the Society in 1932?

A. No, sir.

Q. Did a time come later when you did participate in discussions on behalf of the National Association of Broadcasters with the American Society?

A. No, but there was a time when I sat on the Board on which all negotiations or discussions were taken up with the Board and a special committee, of which I was a member—the executive committee.

Q. You knew way back in 1934 and 1932 and all those years that there had been a discussion between the National Association of Broadcasters and the American Society with respect to a per piece system, a broadcast system and a blanket license system, you knew that, didn't you?

A. I already testified to that; yes, sir.

Q. There was a lot of discussion going back and forth all those years, and the broadcasters brought out the suggestion of the per piece system, that they would like the per piece system?

A. We made a demand for the per piece system and the per program system, and were never able to get it.

Q. You got the blanket license system?

A. Yes, sir, but it covers everything on our program schedule; we pay for everything.

Q. Let us take the program system. Wasn't there a discussion between your association and the American Society which went into the practical operation of such a system; [fol. 1472] were you present at any of those discussions?

A. On the per piece system?

Q. On the program system.

A. I have been at all those negotiations as far as the Board is concerned. The committee reported back to the Board, and the Board took it up and discussed it at great length, yes.

Q. If the program system were operated, how do the broadcasters want it to be operated, in what manner?

A. We want to pay the same as any other newspaper station today, on the music used on the air. That is, if we have dramatic program, for instance, and there is no ASCAP music on that program, we don't want to pay you for the music we use. If it is a news program, and you have no copyright on news, we don't want to pay you for that program.

Q. Didn't your association sit in on discussions with respect to newspaper contract that was formulated in 1932?

A. I don't think they sat in directly. I think certain members of the National Association of Broadcasters went out and made their own deal, like the networks did in 1932 with you gentlemen.

Q. As a matter of fact, didn't the National Association of Broadcasters approve of a newspaper form of contract?

A. Later they did, yes, because of the fact they wanted to hold all portions of the industry together.

Q. In 1932 the situation was more or less experimental in your industry, wasn't it?

A. We had had a contract, I think WOW, for a number [fol. 1473] of years with ASCAP, and every other station did too.

Q. It was a young industry and had not been in business long prior to 1932, WOW?

A. I had had discussions with ASCAP over the payment in 1926 of fees on the Maytag program.

Q. The plan with respect to the newspapers hadn't been worked out prior to 1932?

A. No, sir, not to my knowledge.

Q. That was worked out in 1932 with the knowledge and approval of the National Association?

A. The contract was made first and later approved to

hold everybody in the industry so that there would be no breaking up of the industry, of the National Association of Broadcasters.

Q. So that at that time in the year 1932, or shortly thereafter, the National Association approved of this newspaper contract and felt that it was fair and just?

A. They had to do it or the newspapers would have formed their own organization.

Q. They really approved of the contract, didn't they?

A. Yes; they had to.

Q. It was approved by the association?

A. Under everybody's protest.

Q. Now, the National Association sat in with the Society with respect to the commercial contract between the Society and the various broadcasters throughout the country, isn't that right?

A. There has been a committee appointed every time a contract has come up, but were never able to get a satis- [fol. 1474] factory agreement.

Q. Wasn't there a committee representing the National Association of Broadcasters in a discussion and negotiation with ASCAP in 1932?

A. Yes, there was until Mr. Levy and the networks went out and made a deal with you gentlemen, and we had to take it or else.

Q. Didn't that committee represent the entire association and each member of the National Association?

A. That is right, and Mr. Levy—there should be a full explanation.

Q. I didn't ask you for a full explanation. I simply want the facts. After the National Association had approved of the commercial contract, your station was notified that there had been an agreement between the American Society and the various broadcasting stations, isn't that right?

A. No. The networks made their contract, and the gentlemen that were running the National Association then from the executive standpoint in Washington wired us, and they wired every other station. The networks made a deal with ASCAP and they were leaving it up to us, and the demand came from your office to either sign on January 15th or there would be infringement suits.

Q. Were you ever notified by any person on behalf of the National Association away back in 1932 that an agreement had been made between ASCAP and the association?

A. No. The only agreement that was made was the letter that was sent out by Mr. Loucks stating he had an agree-[fol. 1475] ment with Mr. Mills extending the contract under its present basis from September 1st until negotiations or discussions were arrived at a satisfactory point. That is the only thing we received.

Q. Subsequently your station signed an agreement with ASCAP?

A. We signed it before January 15th.

Q. January 15, 1933?

A. January 1, 1933—between January 1st and January 15th, sometime in between that time.

Q. So far as you know, the other members of the National Association signed a similar agreement?

A. They had no recourse but to sign.

Q. They signed it, didn't they?

A. Sure.

Q. The agreement was perfectly satisfactory at that time to the National Association, wasn't it?

A. No.

Q. Did the National Association advise you not to sign any such agreement?

A. They said if you do not sign it, you are doing it at your own risk.

Q. Now, Mr. Gillin, I understood you to testify that last year you paid to the American Society approximately twenty-two thousand dollars?

A. Twenty-two thousand eight hundred dollars.

Q. Of which fifteen hundred dollars was a sustaining fee?

A. Right.

Q. And the balance of about twenty-one thousand dollars [fol. 1476] was five per cent of the time on the air you sold?

A. That is right.

Q. What did your station take in in gross receipts in 1938? These figures you have given us represent 1938?

A. Yes, 1938—twenty-two thousand eight hundred dollars. I have it here. Do you mind if I read it to you? $472,451.21.

Q. That is the amount your station took in in cash from advertisers for the sale of time on the air during the entire year 1938, isn't that right?

A. That is the gross amount of money taken in for time, for talent and for everything that we did.

Q. For the sale of time on the air, is that right?

A. This is our gross receipts and it includes talent fees. If we sell a singer to somebody, it includes that service. We may send out a troup of actors out to Nebraska, and it includes that.

Q. I didn't ask you for those figures.

A. It includes a lot of things.

Q. Are you able now to give this Court the amount of money that your station took in in 1938 for the sale of time on the air?

A. No, I can't give the exact amount, but I can give them the gross receipts for time and every other function of the station; that is all I can do. I think you will find that this particular amount here, if you will deduct your fifteen hundred dollars sustaining fee which we pay you, and then take——

[fol. 1477] Q. (Interrupting:) Let us do that.

A. Well, the whole thing, after you get your fifteen per cent off, and deduct talent and commercial programs of political and religious character and get down to that, and all expenses, it would not be within the scope of the five per cent tax levied on the station. You have got your five per cent, and that five per cent is right.

Q. What did you pay to the advertising agency during 1938?

A. I can't give you that figure—it is fifteen per cent.

Q. Of what?

A. Of the gross sale of time on the air—only time; no talent.

Q. Don't you know that figure?

A. You mean the figure in time?

Q. The time on the air.

A. I know the gross figure. I will tell you why I don't know that, because I am manager of the station and our particular station is merely a department of the Woodmen of the World Life Insurance Association. Whatever the sale of time of the station is, I never look at it because it goes to the auditing department of the Woodmen of the World Life Insurance Association. At the end of the month I get what the station made net, and I also get at the end of the year what the station grossed. That is all I get and that is all I am supposed to know. Mr. Bradshaw, president, or Mr. Patterson, or Mr. Shepherd can tell you exactly what our time sales were, but I can't.

Q. You as general manager negotiate for the deals where [fol. 1478] the advertisers do business with you?

A. Right, but I don't know how much money the corporation made or the time sales grossed.

Q. What did you receive from the National Broadcasting Company for the hook-up?

A. That is all included in this figure.

Q. In what figure?

A. In the four hundred thousand dollar figure.

Q. Just give us that figure again, please.

A. $472,451.21.

Mr. Hotz: And the amount you paid ASCAP was $21,800?

The Witness: Twenty-two thousand, eight hundred paid to ASCAP in 1938.

Mr. Hotz: Multiply that by twenty.

The Court: Multiply by twenty and you will have the total.

Q. Now, you testified you don't keep logs of the particular musical compositions you play, is that right?

A. We are keeping logs of the program in which we are playing only copyrighted music to find out how much we can play if we had to, but not keeping logs on the amount of ASCAP music because we don't know what their catalog is.

Q. Do you play any transcription records at all?

A. Yes.

Q. You know that the Federal Trade Commission recently propounded a rule that all of you stations should file with it a complete log of each and every musical composition played [fol. 1479] in that manner?

A. They just retracted that rule last week.

Q. You know the chief objector to that rule was the National Association?

A. Why, naturally, it would take four more auditors to work in the station, in every station in the United States.

Q. These four auditors would be required to keep track of the records played by transcription?

A. Required to take part—every program and selection and so forth was wanted on the log.

Q. In other words, you would have to increase your clerical staff in order to keep track of this rule of the Federal Trade Commission with respect to the transcription records only, is that right?

A. Sure, you would have to increase it.

Q. By how many employees would you have to increase your staff?

A. I don't know. We have seventy-two now, and I don't know how many it would be increased to.

Q. How many hours of transcription do you have a day?

A. Well, we have forty-five minutes—about an hour and five minutes a day of transcriptions.

Q. A little over an hour?

A. Yes.

Q. About how many hours do you broadcast?

A. Nineteen and a quarter hours a day.

Q. About eighteen hours of general broadcasting, and one hour of transcription records?

A. That is right.

[fol. 1480] Q. Suppose you had to keep a record of each and every musical composition that came into your studio, transferred or broadcast by your studio, for the eighteen hours a day, would there be a necessity for additional employees?

A. Certainly, but we would be willing to do that.

Q. Please don't volunteer.

A. I think I ought to explain why we would be willing to do it.

Q. Please, I don't want it.

A. Neither do I, but I will give you the full picture of it.

Q. We will get the full picture of it. If you were running a program system you would have to report either to ASCAP or to any individual owner of copyrights or any other society what programs contained their music, wouldn't you?

A. That is right.

Q. In order to do that, you would have to keep a fairly accurate log of each and every program emanating from your studio?

A. Right. We would pay only for what music we could use.

Q. You would have a record of each and every composition on the program?

A. Certain stations do that in the United States, because they save money.

Q. Wouldn't it entail a tremendous expense to you?

A. Not when we pay you for something else.

Q. Wouldn't keeping track of the musical compositions and programs in detail for the purpose of reporting prop-

[fol. 1481] erly, entail very substantial increase in your operations?

A. Yes, but it would be less in the long run, because we wouldn't have to pay on all programs of a commercial nature.

Q. Wasn't it pointed out in the negotiations in 1932 by Mr. Mills and Mr. Paine to the broadcasters that the operation of the program system would be tremendously expensive to the broadcasters? Wasn't that shown to them?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No. We have asked for it since 1932, and we are still asking for it in the present discussions.

Q. If you were operating on the program system you would have to report to the owners of the copyrights with respect to each and every composition played on each and every program, wouldn't you?

A. I believe that could be worked out differently.

Q. Wouldn't you have to report it?

A. We could buy a catalog, whether it was Schirmer or Berlin and so forth, and we would buy it for a certain price. If the price was too great we would go over to Jesse Lasky, or Metro-Goldwyn-Mayer and say, "We would like to buy your catalog."

Q. I didn't ask you what you would buy. I want to know as a business proposition in the practical operation of your studio whether, if you were operating on a program system under which you were paying the owners of the copyrights of musical compositions, you wouldn't have to keep accurate records of each and every program and report that to the respective owners?

[fol. 1482] A. That is right. About eight hours a day of our particular program schedule now, Mr. Frohlich, is N. B. C. commercial programs of a dramatic nature, four hours a day of music from N. B. C. cleared at the source. There would be only about three hours a day you would have to keep tab on. What do I have a program director and two assistants and a production manager for?

Q. If the music from N. B. C. is not cleared at the source, and came into the studio, wouldn't you likewise have to report that music to the copyright owners?

A. Certainly, we would.

Q. Wouldn't that entail substantial expense to your organization?

A. Yes, but I believe it would be a saving of expense under what we are paying now.

Q. You mean you wouldn't have to hire additional people?

A. I say some.

Q. You would have to pay salaries?

A. But not as heavily.

Q. You would have to pay these people salaries?

A. Yes, certainly. We have a contract department and a program department that is pretty competent.

Q. When you furnished these statements to the owners of the copyrights after you had made your program inspection and had broken down each and every program, wouldn't you expect that they would have the right to check up the accuracy of your reports?

A. Certainly, sure.

Q. If on a program system, you would expect that the [fol. 1483] owners of these copyrights would want to check up to see if you were giving accurate reports?

A. We would want them to.

Q. It would entail expense on their part?

A. Yes, sir.

Q. Wouldn't it be the natural and practical thing in your business, inasmuch as you have got to take the music from them, that they would pass that expense onto you? Isn't that the picture of the proposition, they would pass that onto you?

A. Certainly.

Q. Taking that into consideration with other expense you would have, wouldn't that increase the cost of your operations considerably?

A. But it would decrease the amount of money we are paying because we wouldn't pay them for news broadcasts, which means a substantial amount of money, or dramatic programs eight hours a day.

Q. You are making the assumption that you would continue to pay five per cent on such programs, aren't you?

A. No; I never said that. In all our discussions, nothing has been reached as yet, because you gentlemen will not discuss it with the National Association. You haven't said any figure, except you must pay more.

Q. Did we ever tell you you would have to pay more?

A. Yes.

Q. When?

A. I was told——

Q. Who, on behalf of the American Society, told you you [fol. 1484] would have to pay more?

A. The ASCAP—I beg your pardon, the ASCAP did not, but Ed Klauber did.

Q. Is he an official of the Columbia System?

A. Right.

Q. Did anybody on behalf of ASCAP tell you in words and substance you would have to pay more?

A. No, but Mr. Klauber has been discussing the thing with you and reported back to the Directors of the N. A. B.

Mr. Frohlich: I move to strike that out.

The Court: It seems to be about as pertinent as the rest of it. It may stand.

Q. Now, as I understood it, you were unable to tell whether or not you were infringing on the music owned by ASCAP members or not?

A. No, because we have never received their catalog.

Q. Your orchestra brings into the studio musical compositions from which they perform, don't they?

A. That is right.

Q. And at the foot of each musical composition, on the first page, you have noticed the copyright notice, haven't you?

A. Yes.

Q. And you have seen the name of the publisher or the owner of the copyright?

A. We play a little non-copyrighted music, too.

Q. You know the name of the publisher and the copyright proprietor?

A. I know, but why should we go into that because we [fol. 1485] have got a contract now with ASCAP.

Q. I am not asking that. I say, you know that is shown on each musical composition?

A. Yes, sir.

Q. All you have to do is look at the foot of the page at the notice and see whether the name on that notice is included in the membership list of ASCAP?

A. On a lot of transcriptions we play we don't know whether we are infringing or not.

Q. In those transcriptions do you play some copyrighted musical compositions?

A. We don't know. They come from N. B. C.

Q. Don't they come into your studio?

A. Yes.

Q. If you were trying to avoid infringement, couldn't you examine the music?

A. Certainly.

Q. You would find that there, wouldn't you?

A. What?

Q. You would find the name of the owner of the copyright.

A. On the transcription? Not on the transcription.

Q. There is nothing on the transcription?

A. Nothing on the transcription says it is copyrighted by the owner, author and composer.

Q. Well, couldn't you obtain from the person supplying the transcription the name of the owners of the copyright, couldn't you get that from them?

A. I imagine we could.

[fol. 1486] Q. In other words, the transcriptions are not published, are they?

A. No. We buy them from N. B. C. for a hundred and seventy-five dollars a week.

Q. You don't know how they get them?

A. We know they transcribe them themselves and sell them to us.

Q. N. B. C. has been trying for a long time to build up a library of copies not owned by members of the Society?

A. Most of the music they have transcribed is ASCAP music, that we have in our library.

Q. Do you mean to tell me that N. B. C. takes ASCAP music and makes a copy of it?

A. No copies of it, but they are in the form of transcriptions, and they charge us a hundred and seventy-five dollars a week for the use of those transcriptions.

Q. Are they printed?

A. Phonograph records.

Q. You are speaking of transcription records now?

A. That is right.

Q. When you pay that hundred and seventy-five dollars, it doesn't indicate how much or how little of those records you use?

A. No.

Q. You can dip into all the records and use as much or as little as you please?

A. That is right, but we only play what we think we should play.

[fol. 1487] Q. In other words, you are paying N. B. C. for the records a blanket license, aren't you?

A. That is right. We are not paying a blanket license on those records, no. We don't own those records. We pay a hundred and seventy-five dollars a week for the use of those records, but they own them. It doesn't include any copyright fee. We still have to pay you five per cent on top of that.

Q. Do any network programs originate in your station?

A. Not at the present time. We used to emanate three per week on the basic Red Network.

Q. Under your contract at the present time with the National Broadcasting Company, these network programs originate outside of the State of Nebraska, don't they?

A. Right.

Q. And they come into the state as you have described, by telephone wires?

A. Yes.

(Whereupon an adjournment was taken until 1:30 o'clock P. M.)

[fol. 1488] (Pursuant to adjournment, Mr. John J. Gillin resumed the stand and testified further as follows:)

By Mr. Frohlich:

Q. Now, Mr. Gillin, did I understand your testimony this morning to state that your station had a license with SESAC at this time?

A. Yes, sir.

Q. Now, what year did it first obtain a license from SESAC?

A. I don't remember the exact year. It certainly isn't as long as ASCAP.

Q. Could you give us the approximate period or date of year?

A. It was about the time when they took over the copyrights of the Cole Publishing Company, and the reason they bought it was because they needed some hill-billy numbers.

Q. When would you say that happened?

A. Well, I don't know when they took it over.

Q. Prior to your taking a license from SESAC had you played in your station or performed any of the numbers that are covered by SESAC catalog?

A. Not to my knowledge, but we may have through the National Broadcasting network service, but not locally, I don't believe.

Q. Of course, if you played any of those through the National network service, you were infringing on the SESAC music?

A. No, because the N. B. C. clears at the source.

Q. Under their arrangement with SESAC they alone are liable for any infringements over any stations on which they hook up that particular program?

[fol. 1489] A. That is right. In other words, they cleared at the source.

Q. In other words, you were perfectly free then?

A. Yes, sir.

Q. I show you this defendants' Exhibit Number 46, and direct your attention to the number 758 under the word SESAC on the front page. Can you tell us what that signifies?

A. No, I can't.

Q. Did you know that SESAC made a claim against the National Association of Broadcasters, and that it was going to bring suit for publishing this volume or book, defendant's Exhibit Number 46?

A. I think they made a claim, but they never sued N. A. B. on it.

Q. Did you know the claim was based on the fact that this book did not contain all the compositions which SESAC claims it owns or controls?

A. They may have claimed it, but they didn't bring suit, Mr. Frohlich.

Q. How did you get in possession of this document?

A. It isn't my document.

Q. Who furnished that to you?

A. The defendants' attorneys.

Q. You mean Mr. Hotz?

A. Mr. Hotz had the document. I believe we have got the same document at the station, but I didn't bring it down.

Q. Are you sure that you have that document?

A. I think we have.

[fol. 1490] Q. Was this circulated publicly, do you know?

A. I think it was circulated to those stations that desired it, just like any other publication.

Q. Was it circulated to members of the National Association of Broadcasters?

A. Mr. Frohlich, any publication of the N. A. B. report comes out once a week, that is the official organ and publication of the National Association of Broadcasters, the N. A. B. Reports. Now, the N. A. B. Reports go out to every member of the National Association of Broadcasters.

Q. You know this defendants' Exhibit Number 46 contains a facsimile of the contracts which are entered into between the broadcasting stations, including all of the network stations and SESAC, you know that, don't you?

A. A facsimile of all the contracts?

Q. A facsimile of their form of contract.

A. I have never looked over that. I didn't know that.

Q. Will you look at this document that is part of Exhibit number 46 designated Exhibit 1?

A. Yes, sir.

Q. Is that document a facsimile of your contract with SESAC?

A. I would have to read it over very thoroughly and get our contract at the station with SESAC and compare it very thoroughly before I would say it does.

Q. Is your contract available?

A. It is at the station and I can get it for you.

Q. I wish you would. Did you ever read this sentence on the first page of this report of defendants' Exhibit Number [fol. 1491] 46: "Because of the equivocal terms and phrases contained in the SESAC's license agreements (copies of which are marked Exhibits 1 and 2 are attached to and made a part of this report), we were unable to determine from that instrument specifically what the SESAC had to offer"; did you ever read that?

A. I don't remember reading it, no.

Q. Do you know that in this document, Exhibit 1, being the form of contract which is mentioned in the sentence I just read to you, there is this clause——

A. I have never read that contract.

Q. No. 7 in the contract——

The Court: If he hasn't read it, he wouldn't know what the clause is.

Mr. Frohlich: Well, we can get that from his contract.

Q. Your station has fixed rates which it charges to advertisers for its service and facilities?

A. Yes, sir.

Q. Now, those rates vary from time to time, don't they?

A. Yes, sir, it varies at the particular hour of the day. In other words, from 6:30 to 8:30 A. M., and 8:30 A. M. to 6:00 P. M. there is a certain rate, and from 6:00 P. M. to 11:00 P. M. there is a certain rate, and then the early morning rate goes back into effect.

Q. Have you ever seen this magazine, "Radio Advertising"?

A. Yes.

Q. Is that an accurate and truthful survey of the rates of [fol. 1492] the various broadcasters?

A. I believe it shows what the broadcasters charge for their time at the present time. If that is the September issue, it would be accurate so far as I know.

Q. And in the September, 1939 issue, which I am going to show you, did you supply the information to the magazine with reference to your rates?

A. Certainly.

Q. Now, I call your attention to page 143 of this magazine, and ask you whether that accurately represents the various rates of your station WOW?

A. Yes, sir, it does.

Mr. Frohlich: I would like to offer in evidence plaintiffs' Exhibit Number 47, this one page.

Mr. Hotz: Objected to as not proper cross examination.

The Court: Overruled.

Q. Are you familiar with the other rates charged by the broadcasters in Nebraska?

A. No. I have got our story to tell, and that is enough.

Q. You have no idea of the accuracy of the rates of the other stations?

A. No.

Q. Now, on this Exhibit Number 47 there is this statement: "Week days, 6:00 P. M. to 11:00 P. M., one hour, $320.00." That is correct, isn't it?

A. That is correct.

[fol. 1493] Q. That is the rate to the advertisers for use of one hour of station facilities for that period of the week day?

A. Yes, sir.

Q. From 8:30 to 6:00 P. M. you charge for one hour $160.00?

A. Right, sir.

Q. And from 6:30 A. M. to 8:30 A. M. you charge for one hour $100.00?

A. Yes, sir.

Q. On Sundays you charge for one hour $320.00?

A. Yes, sir.

Q. And from 7:00 A. M. to 6:00 P. M. on Sunday, $200.00?

A. Yes, sir. That is for an hour's broadcast—a continued hour broadcast.

Q. Are you familiar with the rates that were charged by your station in 1929?

A. I just don't remember. I think it was $70.00 a quarter hour—most of our programs are sold on the quarter hour basis. We have a few half hours at $165.00, but most of them are sold on quarter hours for spot and local programs.

Q. Isn't it a fact that in 1929 your rate for week days from 6:00 P. M. to 11:00 P. M. was $190.00?

Mr. Hotz: Objected to as not proper cross examination and immaterial.

Mr. Frohlich: I want to show the increase in these rates over the years.

The Court: He may answer.

A. May I explain why we raised the rates, your Honors?

The Court: Yes.

[fol. 1494] A. The rate in 1929, is that what you stated?

Q. 1929.

A. Was how much, sir?

Q. $190.00.

A. At that time our national network rate was $190.00. Now N. B. C. charges the advertisers $320.00 and ask us to conform to it, and that is why we charge $320.00 an hour.

Q. Will you show me anything in this table of rates, Exhibit Number 47, which differentiates between the rates charged by the network hour and the rates for advertisers on your station?

A. Yes.

Q. Where?

A. There isn't in here, but there is in the book. I will show you in the book the basic Red Network on page num-

ber 16 of this Exhibit Number 47. On page 16 the basic rate for a quarter hour on the network at night, WOW, is $128.00 per hour. Our basic rate for spot is $95.00 per quarter hour.

Q. I am not asking you about spot.

A. Well, now, I am saying this spot programs, not network. That is not our network rate.

Q. On page 143 of this document which has been put in evidence as plaintiffs' Exhibit Number 47, the following appears: "The following rates apply to national advertising. For local advertising rates consult station management."

A. That is for national—can I interrupt here?

Q. Yes.

[fol. 1495] A. Those rates are for a national advertiser who wants to use the entire coverage arrangement that WOC can give to him on a program they will send us, or electrical transcription. The national network rates apply back on page 16 when a program emanates from New York over the basic network of N. B. C. There is one spot program and one network program.

Q. Take the advertiser in Omaha who wants to use your station for one hour on a week day at any time between 6:00 P. M. and 11:00 P. M., what rate do you quote him for that one hour?

A. We charge him the same rate for an hour as the network rate, but the other rates are lower.

Q. You charge him $320.00, is that right?

A. Yes. And our other rates are lower.

Q. In 1929 for that same hour you would have charged him $190.00, is that right?

A. The same as the National network for the quarter hour.

Q. In 1929 the National Broadcasting Company, when they sent a hook-up hour into your station in Omaha, paid you at the rate of $190.00, is that right?

A. Yes, sir.

Q. And tonight, if they send a program in through your station on a hook-up, they pay you $320.00, is that right?

A. In 1929 they paid us for any broadcast emanating from New York on the basis of $50.00 an hour revenue to us. Today that revenue is a little bit more than that—it is about twenty-six per cent of the $320.00.

[fol. 1496] Q. I would like to get the figures in 1929 when

the broadcaster sent a hook-up program into your station in Omaha. He paid you how much?

A. $50.00 an hour.

Q. For one hour for a week day between 6:00 P. M. and 11:00 P. M.?

A. Yes, sir.

Q. Today the National Broadcasting Company pays you how much for that one hour in dollars and cents?

A. Twenty-six per cent of $320.00, whatever it is.

Q. Roughly, about $80.00, isn't that right?

A. Right.

Q. There has been an increase for that one hour in moneys you received from the National hook-up?

A. That is right.

Q. That is true all down the line on all hook-up programs you receive?

A. Yes, except sixteen free hours we give them each week.

Q. So that for sixteen free hours they have increased your rate on the hook-up generally, isn't that it?

A. We pay actually to N. B. C., if you charge it on the hourly basis, sixty thousand dollars a year for our sustaining basis, whereas we were paid fifteen hundred dollars a month, which was much less when we take our time charges and add it up.

Q. Is your revenue from National hook-up time on the air today greater than your revenue from that same source in 1929?

A. I would say there is a difference of about two thousand dollars a month revenue.

[fol. 1497] Q. In other words, about twenty-four thousand dollars a year?

A. About twenty-four thousand dollars a year.

Q. Just on the hook-up alone?

A. That shows it in your check very definitely.

Q. What did you receive annually in gross receipts for 1938 from the National Broadcasting Company?

A. I can't tell you that.

Q. You are the general manager of this company, aren't you?

A. Mr. Frohlich, I told you before I am manager of the radio station. The radio station is a department of the Woodmen of the World Life Insurance Association, just like the receipt department and just like the insurance department for each particular state—they operate in forty-

eight states, and I do not have any access to the general report of the station except at the end of the year they tell me how much the station grossed. If the president of the company that hired me don't want me to know what they are getting in net receipts in their station, it is all right with me, and I would prefer to have it that way, and as a loyal employee I should expect that.

Q. Isn't the revenue from the National Broadcasting Company the largest single item of revenue you receive?

A. No, sir.

Q. Which item is greater?

A. The local and national spot items are greater.

Q. When you speak——

A. (Interrupting) And those are for dramatic programs and news programs.

[fol. 1498] Q. How can you tell that the spot program is greater if you have no access to the books?

A. Because of the number of contracts we have.

Q. Would the number of contracts mean to you that the revenue, gross revenue, from those contracts is greater than the money you received from the National Broadcasting Company?

A. It is in this respect, the National Broadcasting Company has more time over our station, there is no doubt about that, than we have locally to sell, but we get more money in return for our spot program than we do for the time allotted to the National Broadcasting Company. For instance, your Honors, for a spot program we get $95.00 for a quarter hour, but we don't get $95.00 every quarter hour on the network.

Q. How many hours a day of your nineteen hours do you devote to hook-up programs from the National Broadcasting Company?

A. I would say about twelve hours of the nineteen.

Q. And the revenue you derive from that source is quite substantial, isn't it?

A. Not as substantial as the other revenue.

Q. And you want to tell us now you don't even approximately know what that revenue was for 1938, in gross?

A. No; I am not supposed to know.

Q. What are you supposed to know in that company as general manager?

A. I am supposed to know everything that happens in that radio station with regard to running it properly, but

I am not supposed to know about the revenue. That is for [fol. 1499] my employer to know.

Q. You are the man that goes out and obtains advertising, aren't you?

A. Yes, sir.

Q. You do manage the advertising?

A. I do, but as soon as I get that contract, the job is done and I forget about his paying up at the auditing department.

Q. You know what the advertiser pays for a spot program, don't you?

A. Yes, sir.

Q. Can you tell us those figures in gross for 1938?

A. No, sir. It is around four hundred and seven thousand dollars.

Q. Where did you get that four hundred and seven thousand dollars?

A. I got that from the chief accountant of the Woodmen of the World Life Insurance Association by telephone so that I would have it if you wanted it.

Q. Well, now, who were some of your important advertisers for 1938 and 1939?

Mr. Hotz: I object to that as improper cross examination.

The Court: Objection sustained.

Q. By the way, this plaintiff's Exhibit Number 47 is a standard work in the radio industry?

A. It is not a standard work in the industry. It is the publication of a company that puts out rates of the broad- [fol. 1500] casting stations, like it puts out the rates of the newspapers for advertising.

Q. It is consulted by the people in the industry?

A. It is consulted by advertising agencies when they go about a particular spot campaign, they look in that organization's publication to find out which station he wants his products advertised over.

Q. Is it a reliable publication?

A. Certainly, it is.

Q. It is reliable, isn't it?

A. Yes, or it wouldn't live as long as it has, certainly. I also talked about page 16.

Mr. Frohlich: I offer in evidence the entire document.

Mr. Hotz: Objected to as encumbering the record.

The Court: It seems so.

Mr. Hotz: Let him tear out the pages.

Mr. Frohlich: I will put in evidence pages 16 and 140 to 143, inclusive, because they contain the data with respect to Nebraska broadcasters, just those pages.

Mr. Hotz: Objected to as immaterial.

The Court: Overruled.

Q. You said something about a spot program or a spot announcement. What is a spot announcement?

A. An announcement of one hundred words or less broadcast for an advertiser over the facilities of our station to [fol. 1501] exploit his products.

Q. What is your present rate for a spot announcement?

A. It depends on the time of day.

Q. Take week days from 6:00 P. M. to 11:00 P. M.

A. A spot announcement of one hundred words would be fifteen dollars. For a chain break-in between two dramatic programs it would be fifteen dollars.

Q. And between two musical programs?

A. We have none at the present time, except two quarter hours.

Q. I am speaking of between 6:00 P. M. and 11:00 P. M.

A. Let's see. From 6:00 to 11:00 P. M. at the present time if we put on an announcement between musical programs, the rate is twenty-five dollars, and we can get about six of them in.

Q. How much do you get for the entire day for spot announcing?

A. In gross revenue?

Q. Yes.

A. I don't know.

Q. Do you pay ASCAP any part of that money?

A. We certainly do; five per cent.

Q. Do you pay ASCAP for any church, religious, educational or political programs?

A. We used to put on political programs until you gentlemen finally decided you thought it would be well not to let the politicians alone. As far as spot announcements are concerned during the day or during the evening, during dramatic programs when no music is played at all, we still [fol. 1502] have to pay you five per cent.

Q. You pay five per cent for all the time on the air for which you receive revenue, don't you?

A. Right, whether any of your music is used or not.

Q. The four hundred and seven thousand dollar figure you gave us included all spot announcements, didn't it?

A. It includes every revenue WOW has, whether from talent or time on the air, no matter what it is, for script writing, for anything we have, that is the gross. Every service of the station is included in that gross amount.

Q. Who prepares the programs in your station?

A. Mr. Harry Burk, Mr. Lyle DeMoss, production manager, and myself.

Q. Don't you employ any musical arranger?

A. We do.

Q. What is his name?

A. The musical arranger we have at the present time is Mr. Ledington.

Q. What do you pay him?

A. The orchestra pays him out of the amount we give the orchestra. That is something for the contractor of the station to pay Mr. Ledington.

Q. Is he permanently stationed in your station?

A. Just as long as the orchestra wants to hire him.

Q. Have you different arrangers from time to time?

A. I think so—it is up to him.

Q. These men are skilled in music?

A. I think they are. They are musicians and make a [fol. 1503] livelihood of arranging music.

Q. They are able to do a pretty good job, aren't they?

A. I think they are.

Q. You testified on direct examination that the public domain music was very extensive?

A. It is or you wouldn't be using it yourself.

Q. As a matter of fact, the public domain contains the finest music in the world right now, doesn't it?

A. I wouldn't be competent to say it is the finest music. I think you or Mr. Paine would be better able to say. It is more extensive than your catalog, far more extensive, and as far as I am concerned I believe that if we had your organization of publishers to arrange like you have, we would have one of the finest libraries in the world, too.

Q. Well, now, with this large, extensive public domain reservoir to dip in, have you, as a broadcasting station, ever tried to make any suitable arrangements from those public domain pieces?

A. We are doing it at the present time.

Q. Well, did you ever try to do it over the years to any extent?

A. Just started it now—started about three months ago.

Q. And how do you do it?

A. Why, that is up to our particular program department. I believe we find out what is in the public domain and pick out an arrangement.

Q. And there is no trouble finding out what is in the public domain, is there?

A. No.

[fol. 1504] Q. And all you have to do is to take a piece in the public domain and turn it over to a skilled arranger?

A. It is pretty slow.

Q. Well, slow or fast, he can make a modern arrangement?

A. Yes.

Q. He can take any kind of a song and put it into swing music or a fox trot suitable for modern dancing?

A. You must realize one thing, and that is we have just started this; in fact, the industry has just started a program like it, because of the fact that we want to get away from the oppressive rates we are paying you.

Q. You can take a great many thousands of compositions now?

A. Our station only?

Q. When I say your station, I am speaking of WOW.

A. If we hired four or five thousand men to make special arrangements. Maybe you have that many.

Q. However, if you hired a sufficient number of arrangers, you could take all the public domain music and make suitable arrangements for your radio needs, isn't that so?

A. Over a period of time we might be able to do that, but 1941 is coming awfully fast and when our contract is up with you.

Q. If you did that it would involve the expenditure of some money, wouldn't it?

A. Certainly; you have got to pay a man for his work.

Q. The reason you haven't done it up to now is that you have found it much cheaper to pay ASCAP to do that?

A. No. We have tried it twice and the network scuttled [fol. 1505] it both times. We started a public domain free from copyright music. First of all it was—I forget the name of the corporation we formed—in the N. A. B., and the second one, the Bureau of Copyrights, and we started that and it was scuttled, and I hope we are going to get this one over the hump.

Q. I am not talking about N. A. B. but about your station.

A. You have got how many publishers in your organization?

Q. You are not cross-examining me.

A. You have got thousands of arrangers, and it is very difficult for one radio station to get enough music in their files to present programs and compete with other radio stations at the same time and not have an intringement suit from you.

Q. Will you listen to the question? If WOW were willing to spend the money and hire suitable arrangers and men skilled in music, couldn't you take a great many thousand compositions presently in the public domain and make them into arrangements that are suitable for your radio needs?

A. If we wanted to spend a million and a half dollars, sure.

Q. Isn't it a fact that you don't want to do it, and that it is much cheaper to pay ASCAP than do that?

A. No; we are going to do it, if you gentlemen don't treat us better than you have, and we are willing to spend a million and a half dollars to get to a point where we can actually go into the field, unless ASCAP says, "We want to negotiate rather than discuss".

Q. Now, you have commenced to do that as an industry, haven't you?

[fol. 1506] A. Yes, because of the oppressive rates you have placed upon us, whether we use your music or not.

Q. The National Association of Broadcasters has now formed a corporation for the purpose of doing that very thing, isn't that so?

A. To relieve ourselves of the oppressive rates you have placed upon us.

Q. And you are selling stock in that corporation to its members, including WOW?

A. That is right.

Q. Have you already purchased any of that stock?

A. No.

Q. The object of that corporation now is to provide from the great fund of the public domain music sufficient music for your radio stations needs?

A. And also see if we can't purchase the catalog of Mr. Irving Berlin at a particular price if he leaves your organization. All we are interested in is the copyright performance rights; we are not interested in the music. If we get the copyright performance rights from the different

publishers, they can have all the revenue and we will be perfectly satisfied.

Q. If you were able to arrange the public domain music in sufficient quantities you wouldn't get a catalog of the publishers now members of the Society, would you?

A. If we arranged the music?

Q. If you got sufficient public domain music for your needs you wouldn't need the publishers?

[fol. 1507] A. I beg your pardon. We have made popular your music and exploited your music with our facilities at no charge to you, and advertised your music for years and made it popular, and we can't say to the public it is out of the window like that.

Q. Would you want to continue using our music?

A. Certainly, at equitable rates at, we will say, so much per program and put it on a per program rate, and we will pay you that.

Q. If there were no ASCAP at all, would you still want to continue using music now owned by ASCAP members and the repertoire?

A. Certainly.

Q. You would want it?

A. Yes, sir; that would be fair. I will tell you why; I would like to tell you why.

Mr. Hotz: I think the witness ought to be permitted to answer that.

The Court: I think not.

Q. In the event there were no ASCAP at all in the United States, and all the music was in the hands of the copyright owners of the American Society, you say you want to continue using that music in your radio station operations? Please tell the Court how you are going about to protect yourself against infringement in your operations.

A. Well, there is no ASCAP now?

Q. No.

A. I would go to Irving Berlin and ask him the price on [fol. 1508] his catalog, and I would go to the other members of your publishing organization and the other publishers and ask them for a price, and if their price was equitable we would play their music; if not equitable, we would deal with somebody else.

Q. Suppose there were no catalogs, how would you get the individual pieces of music?

A. If there were no catalogs?

Q. Yes.

A. In other words, a restraint in trade?

Q. If there were no ASCAP and you wanted to use ASCAP music.

A. I say if there were no ASCAP the catalog owners are certainly going to try to get revenue for those catalogs, and we would buy them and pay for them—they are going to do business with us.

Q. Suppose some of those people want a great deal of money from you, what would you do?

A. We would pay for it if we thought it worth it.

The Court: This is getting into remote speculation.

Q. Did you ever see this advertisement of Lang-Worth in the Broadcasting Magazine of July 15, 1939?

A. It is the largest public domain recorded library in the world. Yes, I saw that.

Q. Do you agree that is the largest?

A. It has one hundred hours, that is all, just one hundred hours, that is all, Mr. Frohlich, and that certainly isn't enough to run a radio station today.

[fol. 1509] Q. They now propose to have two hundred additional hours.

A. That would make three hundred hours, but still it would not be enough to run a radio station on.

Q. Not on Lang-Worth alone, but it is a pretty substantial number of hours from one source?

A. A stop gap for about three weeks.

Q. You would run——

A. (Interrupting) I mean by putting in a lot of other programs of a talking nature and so forth. You couldn't run a program on any station—it is worth about fifteen minutes a day at the present time.

Q. Did I understand you to testify this morning you don't originate any programs in your studio; they are transmitted or broadcast elsewhere?

A. At the present time, no.

Q. Do you pick up music in and around the State of Nebraska and broadcast it from your studio?

A. No.

Q. Well, did you ever hear of the Music Box?

A. Yes.

Q. That is a dance hall in Omaha?

A. Yes.

Q. Have you been broadcasting any music from that dance hall over your station?

A. Yes, sir.

Q. I show you this little program and ask you whether that has been circulated around Omaha?

A. No. This was on September 14th—it was September [fol. 1510] 14th of last year. I told you last year we had three programs per week over the network. That was orchestras from Omaha—two from our studio orchestra and once a week from the Music Box—that was last year.

Q. You don't do that this year?

A. No.

Q. Now, when you sell your time on the air to an advertiser, you try to convince him you have a very large listening audience, don't you?

A. Why, certainly we do.

Q. As a matter of fact, that is a most important sales argument, is it not?

A. That is our audience appreciation; otherwise, the advertiser is not going to advertise.

Q. In how many states are your broadcasts heard?

A. If broadcasting a local program?

Q. Yes.

A. I think it will reach the northern part of Kansas and the western part of Iowa and reach a portion of Nebraska, and it will reach a portion of South Dakota and I think a portion of lower Indiana and of Minnesota, and that is about all.

Q. Will it reach Detroit, Michigan?

A. No. They might be able to hear our sky-wave there, like you are able to hear Los Angeles, but that is a fluke as far as broadcasting is concerned.

Q. Today is Wednesday, September 20th, isn't it?

A. Yes, sir.

[fol. 1511] Q. On your program of the Music Box you will note, Wednesday, September 20th, 27th and October 4th. Please look at that.

A. Yes, sir.

Q. Does that refresh your recollection whether that is last year's program or this year's program?

A. I will tell you this, that the advertising of this particular Music Box on here is wrong, if it is this year, because

we are not emanating any programs on the N. B. C. network at the present time, because the only time we did that, N. B. C. made such a rumpus.

Q. I didn't ask you that; I asked you whether it was over your station.

A. Yes, but not N. B. C.

Q. Is it your testimony that station WOW did broadcast a program emanating at the Music Box this year?

A. Network programs? If you are talking about programs from the Music Box that were broadcast locally, yes, but we don't broadcast over the network from the Music Box.

Q. So you are mistaken when you said this was distributed last year?

A. No; I said that the advertisement was wrong if they state on there we are broadcasting over N. B. C. from Omaha, because we are not and have not since last spring.

Q. But you are broadcasting over your own station?

A. We are broadcasting from the Music Box over our own station, but not on any network.

Q. When you broadcast from the Music Box you don't make any inquiry as to what musical compositions come [fol. 1512] over that Music Box program at all, do you?

A. No, because we have an ASCAP license and it protects us, it is supposed to. Nobody ever brought suit—we don't know whether it does or not.

Q. Does this advertisement represent an advertisement issued by your station?

A. Yes, sir.

Q. How recently?

A. That advertisement, I think, was issued in the fall of 1937 or the fore part or the first part of 1938.

Q. Does it purport to show the coverage of your station in the surrounding territory?

A. That is where we have most of our coverage, in the six cities we dominate as far as appreciation is concerned.

Mr. Frohlich: Offer in evidence plaintiffs' Exhibit Number 50.

The Witness: Mr. Frohlich, Mr. Searle of the Central States will disagree with that seriously.

Mr. Hotz: I object to this plaintiffs' Exhibit Number 50 as not proper cross examination, and tending to encumber the record. The exhibit I am referring to is nothing more nor less than an advertisement of the WOW station.

Mr. Frohlich: It shows the extent of the operation of this station, and the field it covers.

The Court: It may be received.

Mr. Frohlich: Also offer in evidence this program of the [fol. 1513] Music Box, plaintiff's Exhibit Number 51.

Mr. Hotz: Objected to as immaterial.

The Court: I don't see the materiality of that.

Mr. Frohlich: Withdraw that offer.

Q. Have you ever read "Radio Day"?

A. No. I have read "Radio Daily" quite often.

Q. Are you familiar with some of the statistical figures of the industry?

A. No. I am familiar with our own figures from the standpoint of coverage, as I have already given you. I am not competent to speak about stations throughout the United States.

Q. Have you ever seen these figures I show you, before?

A. No, sir.

Q. Did you ever have an author and composer in the State of Nebraska come into your station and ask to have one of his songs played on your station?

A. Yes, sir.

Q. How recently did one come in?

A. Not over six months ago.

Q. Do you know the name of the particular author?

A. Yes.

Q. What was his name?

A. He is a judge in the City of Omaha, Judge Palmer.

Q. He asked you to play one of his numbers?

A. That is right.

[fol. 1514] Q. Is he a member of ASCAP?

A. No.

Q. Did you play one of his numbers?

A. No.

Q. Prior to that request have there been other requests from time to time of citizens who are residents of the State of Nebraska and who have come into your station?

A. Yes, sir.

Q. Have you on occasions played such compositions?

A. They have come to us with this in mind, if we would play their selection they would be very, very willing to let us play it free so that they would be able to sell some sheet music.

Q. On the occasions that you played these compositions they were played without any performance fee?

A. That was their offer.

Q. And you accepted the offer?

A. We accepted the offer. It was not published by one of your organization.

Q. Did you ever in your life pay any composer or author a penny for performing his compositions over your station outside of ASCAP?

A. Yes.

Q. And SESAC?

A. Yes.

Q. Whom did you pay?

A. I believe a gentleman out in Montana. We wanted to play his selection on a special salute and we paid him a [fol. 1515] certain amount of money, I forget what is was—he asked us to pay for it, and we did.

Q. Do you remember what you paid for it?

A. I think around one dollar or something like that.

Q. Did you ever pay any more than one dollar to an author or composer?

A. I don't think so. The general conception of the composers is that they can't get on the air unless they are members of your particular corporation, and they certainly don't want to take any exception to your organization because of the fact that they would like to belong to it some day so that they could collect fees too.

Q. Did you ever play any Davis & Schwegler music?

A. Yes.

Q. You don't pay for that, do you?

A. For the copies, yes.

Q. You pay for the transcription record?

A. We pay for the orchestrations, and they want us to play it so that they can compete with you, and that is the reason why we play it for them.

Q. You don't pay them any fee for performing for profit in your organization, do you?

A. We will have to pay them if we continue to use their music.

Q. Are you paying them presently?

A. No. They said, "Here, play this for a while and see if it becomes popular, and if there are many requests for it, and if you do, we will come back and strike a bargain."

[fol. 1516] Q. You do popularize some of them by playing them?

A. Certainly, for years.

Q. And you can popularize a great many other compositions by playing them constantly?

A. Yes.

Q. You could take the compositions in the public domain and make them quite popular, if you wanted to?

A. Yes, but it would take a million and a half to do it.

Q. You don't want to spend a million and a half dollars, is that right?

The Court: This has been gone over so often, gentlemen.

Q. Did you ever receive any communication from ASCAP offering to give you an index of musical compositions?

A. A card file, but that is not your catalog.

Q. Did they offer to give you a list of musical compositions which were publicly used by radio broadcasters?

A. They will send any radio station now a catalog of tunes by placing stickers on what ASCAP thinks is popular. That is not what we believe is popular. We make it popular for you. We want your catalog and then we can do business with you, but we don't know what we are buying from you gentlemen.

Q. Have you ever accepted the offer of ASCAP to take one of these collections of musical compositions?

A. You mean this card file?

Q. Yes.

A. Which is sent out to radio stations?

[fol. 1517] Q. Have you ever taken them up on it and asked for it?

A. I think it is laying around some place, but it is nothing to us.

Q. It was offered gratis?

A. If we bought files and kept them up and so forth. It was like paying for books fifteen dollars a month and paying for them in seven years.

Q. Do you know how many compositions there are in that list at the present time?

A. No, I have never inquired because it wasn't the catalog—I want your catalog.

Q. Have you ever been sued for infringement by anybody

for performing without any right or authority any musical composition on the air?

A. We were joined in one suit in 1932, a certain composer in Europe sued us as well as the National Broadcasting Company for broadcasting over our station; that was the only time. We were threatened by Warner Bros. when they dropped out of ASCAP, and we had to pay them an additional nine hundred dollars for the use of their music until we got their own catalog straightened out and deleted.

Q. This suit in 1932 was by a composer not a member of ASCAP?

A. No, but the National Broadcasting Company made settlement with him.

Q. Have you ever been sued by anyone for infringement of any compositions owned or controlled by members of ASCAP?

A. No, except that Warner Bros. threatened us with suit for infringement at the time you claimed they were still in [fol. 1518] your group, but still we had to pay them nine hundred dollars.

Q. As a matter of fact, you know Warner Bros. were out of the membership of ASCAP for a six months period?

A. Yes, but you claimed that any suits brought you would be pleased to fight.

Q. And were any suits brought?

A. No, because you made a deal with Warner Bros. and got them back in, and you got Joe Malec back in.

Q. During the period Warner Bros. was out of ASCAP did you continue to use any of their compositions?

A. For the first three months we did, and then last three we didn't.

Q. When you did, you knew you had no right to do it?

A. We certainly did; we paid three hundred dollars a month for it.

Q. There is a station in Omaha called KOIL?

A. Yes, sir.

Q. Do you know of your own knowledge whether the transmission comes in from Nebraska or from Iowa?

A. You mean network service or their own transmission?

Q. Yes.

A. Their own transmitter is located on the Iowa side of the river.

Mr. Frohlich: That is all.

Redirect examination.

By Mr. Hotz:

Q. Mr. Gillin, attached to some of the depositions that [fol. 1519] were taken there are a large number of catalogs that were called for in the interrogatories and in the depositions of the various publishers of ASCAP music, one of them is Exhibit Number 5 to the depositions and another one is 7-A, thirteen booklets of Carl Fischer, another one is Exhibit 2-B of Fischer, another one is 2-C of Fischer, and Exhibit Number 7-O of Carl Fischer, and another one Exhibit 7-E of the same publishing company, another one 7-F, another one 7-G from the same company, and 7-A and 7-D and 7-K, 7-L, 7-M, and then in Irving Berlin's another one 5-A, and I will ask you to just tell us briefly without examining those what those are? Take, for example, the first one here, the copyrighted musical works of Irving Berlin, Inc.

The Court: Doesn't it already appear in the testimony?

Mr. Hotz: Not what I want to bring out, your Honors please.

A. It states it is a catalog of copyrighted music of Irving Berlin, Inc.

Q. It has been testified to here that the copyrights are owned by Irving Berlin in this catalog, that is, the composers and Berlin have made a deal and the copyrights are vested in this organization, Irving Berlin, Inc., so far as these numbers are concerned. Now, the question was asked you in connection with the event of ASCAP being dissolved or going out of business or being declared an unlawful monopoly, what then would you do, for example, in connection with Irving Berlin music if you wanted Irving Berlin [fol. 1520] music. Who would you then deal with if you didn't have ASCAP to deal with?

A. With Irving Berlin, Inc.

Q. For the public performance rights?

A. Yes, sir.

Q. And what about the other publishing houses?

A. I would deal with them each individually.

Q. And would you attempt to negotiate and select from his catalogs the pieces you wanted the public performance rights and attempt to negotiate for the price that they would

charge for public performance rights in the State of Nebraska for those pieces?

A. Yes, sir.

Mr. Frohlich: I move to strike out the answer, and object to the question as already having been testified to.

The Court: I think it has been. Sustained.

Q. That would be true in connection with all these other catalogs of the members of ASCAP called for in this suit, and some of which have been furnished, is that right?

A. Yes, sir.

Q. In other words, it would throw open to you an opportunity to go and shop and deal from one of these big publishing houses to the other and pick out what you wanted in connection with vocal and instrumental music for public performance purposes, is that right?

A. It would open up the competition of these particular publishers for their particular catalogs on the air.

[fol. 1521] Q. Is there a difference in the style and kind of music these various publishing houses put out, some better and some not so good?

A. I think one catalog, obviously, is worth more than another.

Q. Do the different publishing houses have different styles of music, different kinds?

A. I imagine they do, but I have never examined that closely. When you are going out to compete in the open field you are going to decide what catalogs you are going to buy, and you are going to buy a certain type of music to take care of the desires of your radio audience.

Q. Would it be beneficial to your organization to have the right and privilege of building up your own musical library from the published works of the publishing houses so that you wouldn't have to go into the publishing business?

Mr. Frohlich: I object to that.

The Court: Objection sustained as argumentative, calling for a conclusion, and speculation.

Q. In connection with the question that was put to you by counsel on cross examination about the power and authority of the committee of the National Broadcasting Association, the last committee in dealing with ASCAP for contracts, I do not think you answered whether or not that committee of the National Association of Broadcasters has

any authority or power to deal for WOW or any of these stations in Nebraska and bind them to any agreement of [fol. 1522] any nature or kind with reference to that.

Mr. Frohlich: Just what committee do you mean?

Mr. Hotz: The last committee he spoke about.

Mr. Frohlich: He spoke about committees in 1932.

The Court: That is so indefinite. Objection sustained.

Q. Was there a committee in 1934 that you spoke about?

A. I spoke about a committee appointed by the Board of Directors to carry out the discussions with ASCAP in regard to renewing the ASCAP contracts of 1932 and 1934.

Q. When was that appointed?

A. The first one in 1932 and the second one in 1934, and third one appointed, I imagine, around four or five months ago.

Q. In that last committee that was appointed have they any authority to bind station WOW in connection with any dealings it might have with ASCAP?

A. No. In explanation I should say this as to what authority the committee has. The committee is appointed by the Board of Directors to carry on discussions with ASCAP, and if they believe that they have got a contract from ASCAP where we can pay on a program that is to be paid for at the source, and the broadcasters will pay ASCAP for only such music as they use on their programs, that is, ASCAP music and records, on a per program basis, [fol. 1523] then they will come back to the industry and offer it to each individual broadcaster, and then it is up to that broadcaster whether he wants to take that contract with ASCAP or not. In other words, it was appointed to carry on for the industry, but it has no right to act for any individual broadcaster in the United States.

Q. And that goes for the Nebraska stations?

A. Every station in Nebraska.

Q. In order to prepare music for use of WOW station from the public domain, would it be necessary—I am speaking now for WOW alone—for you to enter into the publishing field?

Mr. Frohlich: I object to that. It has already been testified to.

The Court: Sustained.

Q. Does it take special machinery and equipment to publish musical compositions?

A. Yes, a great lot of it.

Mr. Frohlich: I object to that.

The Court: Objection sustained, and the answer stricken out.

Mr. Hotz: That is all.

Recross-examination.

By Mr. Frohlich:

Q. Look at this again. Isn't this the exact copy of the contract?

A. I wouldn't want to say unless I took the contract and compared it with you. I will be glad to send it to you, and [fol. 1524] let the Court compare it.

Mr. Frohlich: That is all.

Mr. Hotz: We wanted the number of radios in use in the State of Nebraska.

The Witness: I will be glad to send that to you.

If it please your Honors, I was subpoenaed by ASCAP and I would like to be released.

Mr. Frohlich: You are released of your duties.

Witness excused.

[fol. 1525] The following exhibits, being a part of the depositions and the testimony of the Nebraska Case, are, hereby, readmitted in evidence, according to the stipulation of the parties in open court, and renumbered, for the purposes of this trial, as follows:

Former Number	New Number
No. 15	No. 6
No. 16	No. 7
No. 17	No. 8
No. 21-A	No. 9
No. 21-B	No. 10
No. 21-C	No. 11
No. 21-D	No. 12
No. 21-E	No. 13
No. 22	No. 14

Former Number	New Number
No. 23	No. 15
No. 24	No. 16
No. 25	No. 17
No. 27	No. 18
No. (—)	No. 19

[fol. 1526] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE, DEPOSITIONS AND EXHIBITS—Filed November 2, 1940

It Is Hereby Stipulated between Counsel for plaintiffs and counsel for defendants as follows:

1. That the stenographic transcript of the proceedings had at the trial of the cause on April 15 and 16, 1940 be included in the record as reported by E. Marshal Stiefel, shorthand reporter, being pages 1 to 732 inclusive of such minutes of said trial, and that the same shall also be designated for printing accordingly.

2. That the stenographic transcript of the depositions of witnesses taken in New York City on February 6 to 9 inclusive, 1940 be included in the record as reported by [fol. 1527] Laurence S. Muller, shorthand reporter, being pages 1 to 489 inclusive of such depositions, and that the same shall also be designated for printing accordingly.

3. That the indexes appended to both of the transcripts mentioned above shall be included in said transcripts.

4. That the exhibits introduced in connection with the above transcripts be incorporated in the record in full, or condensed, or omitted, as indicated by the annexed statement of exhibits, and that the same shall also be designated for printing accordingly.

5. This stipulation shall serve for both the defendants' appeal and any cross-appeal which may be taken by the plaintiffs.

6. By entering into this stipulation, neither party waives any objection which he has made to any evidence introduced at the trial.

George Couper Gibbs, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett, Solicitors for Defendants. Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Solicitors for Plaintiffs.

Dated, Gainesville, Florida, November 2nd, 1940.

[fol. 1528] **Statement of Exhibits**

EXHIBITS FILED AT TRIAL

PLAINTIFFS' TRIAL EXHIBIT 1

Alphabetical gummed sticker list compiled by the Society of 2870 music publishing houses located throughout the United States, giving the name and address of each such house, and separately indicating those which are members of the Society.

[fol. 1529] PLAINTIFFS' TRIAL EXHIBIT 2

This exhibit contains a list of approximately 200 copyrighted compositions, of which the lyrics or words were written by Gene Buck. Such compositions were copyrighted at various dates between 1912 and 1931. Most of them were used in the "Ziegfeld Follies" of various years. Specimen compositions giving the collaborator, the publisher, and the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Remarks
Chu Chin Chow	Dave Stamper	Harms, Inc	6/ 6/17	Ziegfeld Follies of 1917
Daddy Has a Sweetheart and Mother Is Her Name	Dave Stamper	Wm. H. Penn, Gene Buck & Dave Stamper (Marks Music)	10/ 7/12	
Florida, The Moon and You	Rudolf Friml	Harms, Inc	6/30/26	Ziegfeld's Palm Beach Girl
Garden of My Dreams	Dave Stamper & Louis A. Hirsch	Harms, Inc	6/21/18	Ziegfeld Follies of 1918
Hello Frisco	Louis A. Hirsch	M. Witmark & Sons	6/21/15	Ziegfeld Follies of 1915
In Khorassan	Victor Herbert	Harms, Inc	6/27/21	Ziegfeld Follies of 1921
Just Because You're You	Jerome Kern	T. B. Harms, Inc	6/25/17	Ziegfeld Follies of 1917
Legend of The Golden Tree	Victor Herbert	Harms, Inc	6/27/21	Ziegfeld Follies of 1921
Love Boat	Victor Herbert	Harms, Inc	6/26/20	Ziegfeld Follies of 1920
Maid Of Gold	Rudolf Friml	Harms, Inc	12/ 4/23	Ziegfeld Follies of 1923
My Man	James Hanley	Harms, Inc	3/31/20	Girls of 1920
'Neath The South Sea Moon	Dave Stamper & Louis A. Hirsch	Harms, Inc	6/20/22	Ziegfeld Follies of 1922
No Foolin'	James F. Hanley	Harms, Inc	2/ 3/26	Palm Beach Nights
Princess of My Dreams	Victor Herbert	Harms, Inc	6/27/21	Ziegfeld Follies of 1921
Rose of My Heart	Albert Sermay	Harms, Inc	7/ 3/24	Ziegfeld Follies of 1924
Settle Down In A Little Town	Werner Janssen	Harms, Inc	3/28/25	Ziegfeld Follies of 1924–25
Tulip Time	Dave Stamper	Harms, Inc	6/21/19	Ziegfeld Follies of 1919
Underneath The Japanese Moon	Gus. W. Haenschen	Harms, Inc	7/16/14	Ziegfeld Follies of 1914
When The Lights Are Low	Jerome Kern	Harms, Inc	6/21/16	Ziegfeld Follies of 1916
Where Is My Wandering Boy Tonight	Dave Stamper	Shapiro, Bernstein & Co	2/11/14	
Can't You Hear Your Country Calling	Victor Herbert	T. B. Harms & F. D. & H	6/12/17	Ziegfeld Follies of 1917

[fol. 1530] PLAINTIFFS' TRIAL EXHIBIT 3

Broadcast Music Inc.

Performing Right License Agreement

AGREEMENT made this .... day of ....., 19..., between BROADCAST MUSIC, INC., a corporation organized under the laws of the State of New York (hereinafter called MUSIC) with principal offices in New York, New York, and .....

Strike out Inapplicable Lines { A corporation organized under the laws of the State of ..... / A partnership ..... / An individual residing at ..... }

(hereinafter called BROADCASTER) with offices located at ..... City of ....., State of .....

Witnesseth:

I. MUSIC hereby granted to BROADCASTER a non-exclusive license to perform by radio broadcasting over Station ..... all musical works the copyrights or rights to grant broadcasting performing licenses of which MUSIC may, during the term hereof, own. MUSIC agrees to deliver to BROADCASTER from time to time during the term hereof lists of musical works covered by this license. The rights granted hereby shall include the right to broadcast dramatic performances of such musical works as MUSIC at any time shall have given notice to BROADCASTER that it owns the dramatic performing rights thereof.

II. BROADCASTER agrees to pay to MUSIC, as a license fee hereunder, such sum, not in excess of $....., as MUSIC may require BROADCASTER to pay, payment to be made in instalments as and when required by MUSIC, within ten days after written demand therefor, provided that no demand shall be made for the payment of any instalment or instalments aggregating in excess of 15% of the foregoing maximum total license fee during any consecutive thirty day period. In the event that BROADCASTER shall fail to make any payment when and as due, MUSIC may, in addition to any and all other remedies which it has at law or in equity, terminate this license upon ten days' notice in writing.

III. MUSIC agrees to indemnify, save and hold harmless and to defend BROADCASTER, its advertisers and advertis-

ing agencies, from and against all claims, demands and suits that may be made or brought against BROADCASTER, its advertisers and advertising agencies, with respect to the performance under this license agreement of any material licensed hereunder, provided that this indemnity shall not apply to broadcasts of any composition performed by BROADCASTER after written request from MUSIC to BROADCASTER that BROADCASTER refrain from performance thereof. BROADCASTER agrees to give MUSIC immediate notice of any such claim, demand or suit, and agrees immediately to deliver to MUSIC all papers pertaining thereto. MUSIC shall have full charge of the defense of any such claim, demand or suit, and BROADCASTER shall cooperate fully with MUSIC therein.

IV. The term of this license shall commence on such date, not later than April 1, 1940, as may be designated in writing by MUSIC, provided, however, that the term of this li- [fol. 1531] cense shall be for not less than one year from the commencement date thereof. This license shall be non-assignable, except to the person, firm or corporation legally acquiring the Federal Communications Commission license of the broadcasting station designated in Article I hereof.

V. BROADCASTER, on written request made on no less than one week's notice, agrees to furnish to MUSIC weekly lists of BROADCASTER'S performances of musical compositions under this license, indicating the compositions performed by title and composer or by such other convenient method as may be designated by MUSIC.

VI. In the event that the Federal Communications Commission revokes or fails to renew the broadcasting license of BROADCASTER, or in the event that the Governmental rules and regulations applicable to the station referred to in Article I hereof are suspended or amended so as to forbid the broadcasting of commercial programs by BROADCASTER, BROADCASTER may notify MUSIC thereof and MUSIC, within ten days of the receipt of such notice, shall, by written notice to BROADCASTER, at MUSIC'S option, either terminate this license, or shall suspend this license and all payments and service hereunder for the period that such condition continues. In the event that MUSIC elects to suspend this license, such suspension shall not continue for longer than six months, and this license shall automatically terminate at the end of six months' suspension. In the event that the

condition giving rise to the suspension shall continue fo
less than six months, MUSIC, at its option, and on writte
notice to BROADCASTER may reinstate this license at an
time within thirty days after the cessation of such cond
tion.

VII. MUSIC agrees, (a) that all of the initial performin
right license agreements between MUSIC and its stockholde
shall terminate simultaneously, (b) that no demand wi
be made by MUSIC for any instalment payment in accor
ance with the provisions of ARTICLE II hereof unless Mus
simultaneously demands instalment payments in the sam
percentage from all other stockholders, and (c) that th
initial performing right license agreements between Mus
and its stockholders shall each provide for the paymen
to MUSIC of such sum as MUSIC shall demand, not, howeve
in the aggregate in excess of a sum equal to 40% of th
total sums paid or payable to the American Society o
Composers, Authors and Publishers as performing righ
fees for the entire calendar year 1937 for or with respec
to the radio broadcasting station named in such agreemen
with MUSIC (except that a different maximum amount ma
be specified in the initial license agreement of any stock
holder if performing right fees were not paid or payabl
to the American Society of Composers, Authors and Pub
lishers for the entire calendar year 1937, for or with re
spect to the radio broadcasting station named in such li
cense agreement, or if there has been a material chang
in the power or hours of operation of the radio broadcast
ing station named in such license agreement).

VIII. The term "stockholder-licensee" as hereinafte
used shall include only such stockholders as have uninter
ruptedly held performing right licenses from MUSIC durin
all periods that performing right licenses of MUSIC shal
have been available. For the purposes of this paragraph
"stockholder-licensees" are hereby divided into the fol
lowing categories: (1) stockholder-licensees whose radi
stations have no network affiliations; (2) stockholder-li
censees operation both radio stations and national networks
and (3) stockholder-licensees operating radio stations af
filiated with, but not operated by, national networks. I
the event that MUSIC, with respect to performing right li
cense agreements for any period subsequent to the expira
tion of this license, shall propose, (a) the alteration of ma

terial terms of licenses or the method of fixing or allocat-
[fol. 1532] ing performing right license fees, so as to effect a change discriminatory against any of the foregoing categories of stockholder-licensees, or (b) the denial of licenses to stockholder-licensees, or (c) the omission from future performing right license agreements with MUSIC's stockholders of provisions to the same effect as any of those contained in this Article VIII, then, MUSIC shall give notice of such proposal to all stockholder-licensees in any category which contains adversely affected stockholder-licensees, and, in the event that notice of objection to such proposal shall not, within thirty days, be given to MUSIC by stockholder-licensees to whom such notice was given, and whose annual license payments to MUSIC under the license agreements with stockholders in effect at the time of such proposal shall aggregate one-third or more of the annual license payments made by all stockholder-licensees in the same category, such proposal may be put into effect.

IX. This agreement shall become effective as a license agreement only upon the giving of notice by MUSIC that, in its opinion, MUSIC has sufficient funds and license agreements to permit effective operation of MUSIC, and upon the subsequent execution and delivery of a copy hereof by MUSIC, and such notice, if given, shall be given on or before February 1, 1940, or such later date, not more than 30 days thereafter, as shall be fixed by MUSIC. In consideration of MUSIC using its best efforts to obtain the signature of agreements similar to this by other broadcasters, and in consideration of the signature of agreements similar to this by other broadcasters, BROADCASTER agrees that this instrument shall constitute a continuing offer which cannot be revoked by BROADCASTER prior to March 2, 1940.

X. All notices required or permitted to be given hereunder shall be duly and properly given if mailed to the party to whom such notice is required or permitted to be given, by United States mail, postage prepaid, addressed to said party at its main office for the transaction of business. This agreement constitutes the entire understanding between the parties and shall be construed in accordance with the laws of the State of New York.

Broadcast Music, Inc., by —— —— (Corporations or partnerships sign here). By —— —— (Individuals sign here).

(This agreement should be executed in duplicate by the licensee of the station named in paragraph I hereof. If such licensee is a corporation, the title of the officer signing the agreement should be stated.)

(The National Broadcasting Company and the Columbia Broadcasting System have declared their approval of the principle of clearance at the source when an economically and legally feasible method of so clearing can be devised which is not unduly burdensome to the said networks in comparison with their present method of operation and payment, and they have declared that at an appropriate time the said networks will make an earnest cooperative effort with the network affiliates to work out such a feasible plan of clearance at the source.

[fol. 1533] The National Broadcasting Company and the Columbia Broadcasting System also have declared their willingness, at an appropriate time, to consider any proposals by their affiliates for a new method of distributing the cost of music, which is not unduly burdensome to the said networks in comparison with their present method of operation and payment, and that nothing in this license agreement shall be construed as working against an earnest cooperative effort by the various elements of the industry to such end, such effort to involve consideration not only of future payments of license fees to Broadcast Music, Inc. but also of payments to other organizations.)

[fol. 1534] PLAINTIFFS' TRIAL EXHIBIT 4

Copy

April 12, 1938.

Mr. L. S. Mitchell, Manager, Radio Station WDAE, Tampa Terrace Hotel, Tampa, Florida.

MY DEAR MR. MITCHELL:

You are of course aware of the contents and intention of the recently enacted Florida anti-ASCAP Statute. And, of course, you know that a Federal Constitutional Court has granted a temporary injunction against enforcement of the Statute and has said "that there is grave doubt of the constitutionality of the Act."

The point is that the promoters of this legislation apparently would prefer to deal with copyright owners individually for their respective licenses to publicly perform their compositions instead of dealing through ASCAP as a central clearing house for a single collective license.

I have written twice to the principal broadcasting promoter of the legislation asking him if that would be his preference, but so far he has failed to answer. Personally, I believe that nothing conceivable would make a broadcasting operation more difficult than the necessity of dealing directly with hundreds and even thousands of different copyright owners scattered all over the world. But, I may be wrong.

Your are a practical operator. Would you mind telling me with entire frankness and candor just what your preference would be as between the two different methods of securing licenses to publicly perform copyrighted music? ASCAP desires to be constructive in its consideration and treatment of this matter. We desire above all to have a friendly and good will relationship with our licensees.

The present formula was adopted after extended conferences with the N. A. B. It met with the approval of that organization. Until now not one single broadcaster in the United States has ever asked us to arrange for him to deal directly with individual copyright owners. It is my prediction that none ever will.

Be that as it may, I would appreciate a frank, candid comment from you, and be assured that it will be carefully consid-red in an entirely friendly manner.

With all good wishes.

Yours very truly, E. C. Mills.

ECM:pk
ADR

[fol. 1535] PLAINTIFFS' TRIAL EXHIBIT 5

Bill introduced in Florida Legislature, 1939 session, repealing certain sections of Chapter 17807, Laws of Florida, 1937, and amending certain other portions of said chapter. Same as Exhibit "M" to Further Supplemental Bill.

(Here follows 1 photolithograph, side folio 1536.)

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PLAINTIFFS' TRIAL EXHIBIT 6

CHAPPELL & CO., Ltd.
LONDON

CABLE ADDRESS
"WANG"

HARMS
INCORPORATED
62-64 WEST 45TH STREET
NEW YORK

Plaintiff's Exhibit No. 19
MAY 24 1938
STENOGRAPHER
NOTARY PUBLIC

February 21, 1927.

New Fields and Vincent Youmans,
New York City.

Gentlemen:-

Confirming our arrangement in reference to the musical numbers of your new musical play tentatively entitled "Hit the Deck" (title subject to change), hereinafter called the "Play", we agree to pay you a royalty of two cents (2¢) per copy for each regular pianoforte copy of music of the Play published, sold by and paid for to us in the United States of America and Canada.

We hereby pay you the sum of One Thousand ($1000) Dollars as an advance upon the first royalties accruing to you hereunder, receipt of which is hereby acknowledged by you.

We agree to make up accounts of royalties to the first day of January, April, July and October in each year, and to make payments of all royalties due you hereunder within thirty days thereafter.

On your part, as a consideration for the payment of said royalty and the advance made you thereon, you agree:

(a) That said Play will be produced by you in a first-class manner in a first-class theatre in the Borough of Manhattan, City of New York, not later than June 1st, 1927, in default of which you agree to pay us upon demand all sums advanced by us to you hereunder.

(b) That you will not permit or allow to be rendered or performed in the Play at any time or place any musical number whatsoever (regular or interpolated) unless the exclusive publication rights thereof are first vested in us.

If the foregoing meets with your approval, please indicate your acceptance hereon, and this letter and your acceptance will constitute the entire contract between us.

Very truly yours,

HARMS INC.
By

APPROVED & ACCEPTED:
New Fields & Vincent Youmans.

1536

926A

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[fol. 1537] PLAINTIFFS' TRIAL EXHIBIT 7

Agreement made this 8th day of February, 1923, by and between George Gershwin, of the City of New York, hereinafter designated the "Composer", and Harms Inc., a New York corporation, hereinafter designated the "Publisher",

Witnesseth

For and in consideration of the sum of One Dollar and other good and valuable considerations by each of the parties hereto to the other in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby mutually acknowledged, the parties hereto do promise and agree as follows:

Whereas, the Composer is a composer of music for musical compositions; and

Whereas, the Publisher is engaged in the business of publishing and selling sheet music, musical compositions, etc.; and

Whereas, the Publisher is desirous of acquiring from the Composer, the sole, exclusive, absolute and unlimited right, license, privilege and authority, in and for the civilized world, to publish, copyright, print, reprint, copy and vend all the music for musical compositions in whole or in part composed and written by the Composer, alone or in collaboration with others, during the period hereinafter stated, and the Composer is agreeable thereto; Now, Therefore:

First. The Composer hereby gives and grants unto the Publisher the sole, exclusive, absolute and unlimited right, license, privilege and authority to publish, copyright, print, [fol. 1538] reprint, copy and vend (inclusive of use upon parts of mechanical instruments) in and for the civilized world, during the terms of the respective copyrights and all renewals of copyright thereof, all the music for musical compositions (whether separate numbers or books or scores of musical plays), in whole or in part conceived, created, composed and written by the Composer, alone or in collaboration with others, during the period of two years from the date hereof.

Second. The Composer agrees to deliver to the Publisher at its place of business in the Borough of Manhattan, New York City, as soon as the same shall have by him been

written, a complete manuscript of each and all of such music.

Third. The Composer hereby gives to the Publisher full permission and authority to publish, copyright, print, reprint, copy and vend in the civilized world, the music of the Composer in conjunction with the lyrics of any author, and the Publisher may, in its discretion, adopt any name or title for any composition published hereunder.

Fourth. The Publisher agrees that it will receive from the Composer any and all music composed and written as herein provided and will publish, copyright and place the complete musical compositions on sale at such times and places as the Publisher may deem proper and advisable and to the best interests of the parties hereto.

Fifth. The Publisher agrees to pay to the Composer, and the Composer agrees to accept, as full compensation, three [fol. 1539] cents (3¢) per copy upon each and every regular printed pianoforte copy of a musical composition, separately published and sold by and paid for to the Publisher under this agreement in the United States and Canada; ten cents (10¢) per copy for each and every copy of the piano selection of a theatrical representation published and sold by and paid for to the Publisher, under this agreement, in the United States and Canada, and fifteen cents (15¢) per copy for each and every copy of the vocal score of a theatrical representation published and sold by and paid for to the Publisher, under this agreement, in the United States and Canada.

Sixth. The following are exempt from royalty:

Professional pianoforte copies; copies known as new issues; copies circulated as complimentary or for advertising purposes.

Seventh. The Publisher also agrees to pay to the Composer 50% of the aforesaid American royalty rate for each regular pianoforte copy sold in countries outside of the United States and Canada of the compositions written by the Composer, whether such publication and sale shall be made direct by the Publisher or any other person, firm or corporation to whom or which such rights may be by the Publisher assigned.

Eighth. The Publisher further agrees to pay to the Composer twenty-five per cent (25%) of any and all net royalties or other net sums that the Publisher shall or may receive from the use of the compositions of the Composer [fol. 1540] delivered to the Publisher hereunder upon parts of instruments serving to reproduce the same mechanically.

Ninth. The Publisher agrees to advance to the Composer on account of royalties to be earned hereunder the sum of $100 00/100 per week, payable on Saturday of each week during the term hereof, which sum shall be deducted from the first royalties accruing to the Composer hereunder.

Tenth. The Publisher agrees that it will deliver to the Composer, at the place of business of the Publisher, quarterly on the first days of January, April, July and October in each year, a statement showing all royalties or other sums due and owing to the Composer hereunder and within thirty days after the rendition of each of such statements, pay to the Composer any sum that such statement may show to be then due, first, however, deducting all sums advanced to the Composer by the Publisher as per paragraph "Ninth" hereof.

Eleventh. It is understood and agreed by and between the parties hereto, that the failure of the Publisher to render statements or make payments as they may respectively become due, shall not be deemed a breach of this contract so as to terminate the same, but that the Publisher may have sixty days after each and all of such statements become due and payments payable, within which to make the same.

Twelfth. The Composer agrees that during the term hereof, he will not conceive, create, compose or write any music for musical compositions for any person, firm or cor- [fol. 1541] poration, other than the Publisher; nor will he assist any person when the result of such assistance or collaboration is to be published or sold by any person, firm or corporation other than the Publisher; nor will he conceive, create or write music for any lyrics unless the publication rights to all such music and lyrics be vested exclusively in the Publisher; nor will he allow any lyrics to be composed or set to any music he shall have conceived, created or written, unless the publication rights to all such music and lyrics be vested exclusively in the Publisher; nor

will he write or collaborate in writing any musical play or other theatrical representation containing music, unless the publication rights of any and all such music and lyrics be vested exclusively in the Publisher; nor will he allow or permit his name to be used, printed or published upon or in connection with any song, musical composition or theatrical representation, as the composer, except as herein provided, and with the exception of those already published and copyrighted. And the Composer hereby represents that he is not now under contract to write music for publication purposes during the term covered by this agreement for any person, firm or corporation except the Publisher.

Thirteenth. It is agreed that the Composer is well, favorably and extensively known and that his compositions have been distinctive, and his services are extraordinary and unique and cannot be duplicated, and that in the event of the breach of the negative covenant contained in preceding paragraph (Twelfth) hereof, the Publisher will suffer ir-
[Vol. 1542] reparable damage and inestimable loss.

Fourteenth. The Composer agrees for himself, if living, and for his widow, children, executors and next of kin, if not living, to renew, pursuant to law, the copyrights of each and all of the numbers delivered to the Publisher and copyrighted by the Publisher hereunder, and to assign such renewals of copyright to the Publisher for continued publication pursuant to the provisions hereof.

Fifteenth. Nothing herein contained shall be construed to divest the Publisher at the termination of this agreement of the right to continue the publication and sale of the compositions and numbers acquired by it during the term hereof, but the same shall continue in full force and effect forever, and the royalties required to be paid to the Composer hereunder, shall continue after the expiration of this agreement, for the full term of the copyrights, providing the Composer on his part has fully performed all the terms and conditions hereof.

Sixteenth. The Composer hereby accords to the Publisher the right to renew this contract for a further term of two years upon all the terms and conditions hereof, provided the Publisher shall communicate its intention to renew this agreement in writing, by registered mail, addressed to the Composer at his last known post-office ad-

dress, at least thirty days before the expiration of this agreement.

[fol. 1543] Seventeenth. This agreement is binding upon the Composer and his personal representatives, and upon the Publisher, its successors and assigns.

In Witness Whereof, the Composer has hereunto set his hand and seal, and the Publisher has caused these presents to be signed by its President and its corporate seal to be hereunto affixed the day and year first above written.

George Gershwin (L. S.). Harms, Inc., by [Signature illegible], President.

[fol. 1544] PLAINTIFFS' TRIAL EXHIBIT 8

Agreement made this 21st day of January, 1933, by and between Cole Porter, of the City of New York, hereinafter designated "Composer", and Harms Inc., a New York corporation, hereinafter designated "Publisher", witnesseth:

For and in consideration of the sum of One Dollar and other good and valuable consideration by each of the parties to the other in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby mutually acknowledged, the parties hereto do promise and agree as follows:

Whereas the Composer is a composer of music and lyrics for musical compositions by profession; and

Whereas the Publisher is engaged in the business of publishing and selling sheet music, musical compositions, etc., and

Whereas the Publisher is desirous of acquiring from the Composer the sole, exclusive, absolute and unlimited right, license, privilege and authority in and for the civilized world to publish, copyright, print, reprint, copy and vend all the musical compositions composed by the Composer alone or in collaboration with others during the period hereinafter stated, and the Composer is agreeable thereto; Now, Therefore,

[fol. 1545] First. The Composer hereby gives and grants unto the Publisher the sole, exclusive, absolute and unlimited right, license, privilege and authority to publish, copyright, print, reprint, copy and vend (inclusive of me-

chanical and electrical reproducing rights) in and for the civilized world, during the terms of the respective copyrights thereof, all the musical compositions (words and music), whether separate numbers or scores of musical plays, in whole or in part conceived, created, composed and written by the Composer, alone or in collaboration with others, during the period of one (1) year from the 13th day of June, 1933, in addition to such music and musical compositions of which the Composer may acquire the ownership or control during said period.

Second. The Composer agrees to deliver to the Publisher at its place of business in the City of New York, as soon as the same shall have by him been composed, a full and complete manuscript of each and all of such music and musical compositions.

Third. The Composer hereby gives to the Publisher full permission and authority to publish, copyright (in its own name), print, reprint, copy and vend in the civilized world, the musical compositions of the Composer, and the Publisher may, in its discretion, adopt any name or title for any musical composition published hereunder.

Fourth. The Composer hereby reserves unto himself the [fol. 1546] sole and exclusive stage performing rights of all production numbers composed by him and the Composer hereby grants to the Publisher all other performing rights of such production numbers, and all performing rights of all other numbers composed by the Composer hereunder.

Fifth. The Publisher agrees that it will receive from the Composer any and all musical compositions (words and music) composed and written by him and delivered as herein provided, and will publish, copyright and place on sale them and each of them at such times and places as the Publisher may deem proper and to the best interests of the parties hereto.

Sixth. Nothing herein contained shall be construed to mean that it is mandatory upon the part of the Publisher to use and publish all the musical compositions composed by the Composer delivered to the Publisher hereunder, but that if any of such numbers shall remain unpublished for eighteen (18) months after the delivery thereof to the Publisher, then the numbers so remaining unpublished shall at

the expiration of said eighteen months be returned to the Composer.

Seventh. The Publisher agrees to pay to the Composer, and the Composer agrees to accept in full for royalty upon musical compositions (words and music) composed by the Composer, published and sold by and paid for to the Publisher under this agreement in the United States and Canada:

[fol. 1547] Production numbers, six (6¢) cents per copy to cover words and music, and popular numbers, three (3¢) cents per copy to cover words and music.

Eighth. The following are exempt from royalty: professional pianoforte copies, arrangements; copies known as "new issues"; copies circulated as complimentary or for advertising purposes.

Ninth. The Publisher agrees to pay to the Composer the following percentages of all net royalties or other net sums received by it from the use in the United States and Canada of the musical compositions delivered by the Composer to the Publisher hereunder upon parts of instruments serving to reproduce the same mechanically:

Production numbers, fifty (50%) per cent to cover words and music, and popular numbers, thirty-three and one-third (33⅓%) per cent to cover words and music.

Tenth. When publication of the musical compositions delivered by the Composer to the Publisher hereunder is made outside of the United States and Canada, it is agreed that the Publisher shall pay to the Composer one-half of the foregoing American royalty rates, except that if any of such musical compositions shall be sold at less than the regular rate, the Publisher shall pay to the Composer fifty (50%) per cent of all royalties that the Publisher shall receive [fol. 1548] on sales of production numbers, and thirty-three and one-third (33⅓%) per cent of all royalties that the Publisher shall receive on sales of popular numbers, all subject to deduction for foreign taxes.

Eleventh. It is expressly agreed that the world-wide motion picture synchronization rights of the music of the separate musical compositions (not of entire plays) composed by the Composer during the term of this agreement

shall be the sole and exclusive property of the Publisher or its designated licensees, and the Composer shall be entitled to the same percentage of receipts therefrom as in the case of mechanical royalties. "Synchronization rights" as herein used means the right to mechanically and/or electrically record and to reproduce, perform, use, represent and exhibit as a part of or in connection with motion pictures with sound accompaniment.

Twelfth. The Publisher agrees that it will deliver to the Composer at the place of business of the Publisher quarterly thirty days after the first day of February, May, August and November in each year, a statement showing all royalties or other sums due and owing to the Composer hereunder, and pay to the Composer any sum such statement may show to be then due.

Thirteenth. The Publisher hereby pays to the Composer [fol. 1549] receipt of which is hereby acknowledged, which shall be considered an advance and deducted from the first royalties accruing to the Composer from the Publisher.

Fourteenth. The Composer hereby represents that he is not now under contract to write music for publication purposes during the period hereinbefore mentioned, for any person, firm or corporation, and he agrees that he will not compose or write music or musical compositions, or assist or collaborate therein, for publication by any person, firm or corporation other than the Publisher.

Fifteenth. It is agreed that the Composer is well, favorably and extensively known and that his compositions have been distinctive, and his services are extraordinary and unique and cannot be duplicated, and that in the event of the breach of the negative covenant contained in the preceding paragraph hereof, the Publisher will suffer irreparable damage and inestimable loss.

Sixteenth. The Composer agrees for himself, if living, and for his widow, children, executors, administrators and next of kin, if not living, to renew, pursuant to law, the copyrights of each and all of the numbers composed and written by him and delivered to the Publisher, and copyrighted by the Publisher hereunder, and to assign such renewals of [fol. 1550] copyright to the Publisher for continued publication pursuant to the provisions hereof.

And the Composer hereby empowers the Publisher to renew, pursuant to law, for and in the name of the Composer, if living, the copyrights of each and all of the numbers published by the Publisher hereunder, and in his name to execute formal assignments to the Publisher of each and all of such renewal copyrights.

Seventeenth. This agreement is binding upon and shall inure to the benefit of the Composer and his personal representatives and the Publisher and its successors and assigns.

In Witness Whereof, the Composer has hereunto set his hand and seal, and the Publisher has caused these presents to be signed by its duly authorized officer the day and year first above written.

Cole Porter (L. S.) (Signature illegible.) Harms Inc., by Henry M. Spitzer.

[fol. 1551] PLAINTIFFS' TRIAL EXHIBIT 9-A

Agreement dated June 8, 1910 between Victor Herbert and M. Witmark & Sons, granting the latter exclusive license to publish and sell libretto and lyrics, piano and vocal score, of Herbert's musical play, "TRENTINI" in terms substantially similar to Exhibit 13.

PLAINTIFFS' TRIAL EXHIBIT 9-B

Agreement dated April 2, 1914 between Victor Herbert and M. Witmark & Sons, granting the latter exclusive license to publish and sell libretto and lyrics, piano and vocal score, of Herbert's musical play "THE ONLY GIRL", in terms substantially similar to Exh-bit 13.

PLAINTIFFS' TRIAL EXHIBIT 9-C

Agreement dated September 6, 1898 between Victor Herbert and Witmark & Sons, granting the latter exclusive license to publish and sell libretto and lyrics, piano and vocal score, of Herbert's Comic Opera "THE FORTUNE TELLER", in terms substantially similar to Exhibit 13.

PLAINTIFFS' TRIAL EXHIBIT 10

Agreement dated August 9, 1905 between Victor Herbert and Witmark & Sons, granting the latter exclusive license to publish and sell libretto and lyrics, piano and vocal score of dramatic composition "M'LLE MODISTE", in terms substantially similar to Exhibit 13.

PLAINTIFFS' TRIAL EXHIBIT 11

Agreement dated October 23, 1906, between Victor Herbert and M. Witmark & Sons, granting the latter exclusive [fol. 1552] license to publish and sell libretto and lyrics, piano and vocal score, of Herbert's musical play, "THE RED MILL" in terms substantially similar to Exhibit 13.

PLAINTIFFS' TRIAL EXHIBIT 12

Agreement dated March 27, 1903, between Victor Herbert and M. Witmark & Sons, granting the latter exclusive license to publish and sell libretto and lyrics, piano and vocal score of Herbert's musical play "BABES IN THE WOODS" in terms substantially similar to Exhibit 13.

[fol. 1553] PLAINTIFFS' TRIAL EXHIBIT 13

Agreement made this 16th day of ——, 1919, between Victor Herbert of the Borough of Manhattan, City of New York, hereinafter designated as the Composer, and T. B. Harms & Francis, Day & Hunter, a New York corporation, hereinafter designated as the Publisher.

Whereas, the Composer has undertaken to compose all the music for the musical production at present entitled "LITTLE MISS WISE" (to be changed) which is to be produced during the season.

Whereas, the Publisher desires to acquire the exclusive license to print, publish and sell such music, or any part or parts thereof, or any arrangement or selection of or from the whole or any part thereof in the United States of America, and Canada,

Now, Therefore, in consideration of the mutual covenants in this agreement contained, it is agreed as follows:

I. The Composer grants to the Publisher the sole and exclusive license to print, reprint, publish and vend in the United States of America, and Canada, all the music that he shall compose for and that shall be introduced in the performance of —— and any arrangement of or selection from the whole or any part thereof made under his supervision, during the terms of the copyrights thereof and of the renewals of such copyrights.

II. The Composer grants to the Publisher, subject to the terms hereof, the right to secure copyrights in such countries and renewals of copyrights in the said scores and in each and every part thereof, and in all arrangements or selections of the whole or any part thereof. The Publisher agrees, at its own cost and expense, to do all acts and take all proceedings necessary or expedient to the securing of such copyrights and renewals of the same, and all such copyrights so secured shall be held by the Publisher in trust for the Composer. The Publisher agrees at its own [fol. 1554] cost and expense, to do all acts and take all proceedings necessary or expedient to the securing of such copyrights and renewals of the same, and all such copyrights so secured shall be held by the Publisher in trust for the Composer. The Publisher agrees at its own cost and expense to take all necessary and proper steps for the purpose of protecting the said copyrights from infringements or otherwise. That all arrangements and selections of such scores and any part thereof shall be made under the supervision of the Composer, but at the cost and expense of the Publisher.

III. (a) The Publisher agrees to insert upon the title page of each copy published all the copyright notices required by the law of each country, and to insert on each such copy the name of Victor Herbert as sole composer of the music so published.

(b) The Publisher agrees that all publications containing any of the music of the Composer shall be devoted exclusively to the compositions of the Composer and shall contain neither the whole nor any part of the work of any other composer, nor shall any of the music of the Composer be joined with the music of any other Composer in any col-

lective or composite work. And the Publisher further agrees that the title page of any publication containing the music of the Composer shall contain the name of no other Composer save and except that of Victor Herbert.

IV. The Publisher agrees to pay to the Composer upon each and every copy sold the following royalties:

(a) Eight cents per copy for each pianoforte copy of each separate number.

(b) Twelve and one-half cents for and upon each and every copy of the piano score.

(c) Fifteen cents per copy for each vocal score.

(d) Fifteen cents upon each and every copy of any se-
[fol. 1555] lection for any instrument.

(e) An amount equal to fifteen per cent of the retail marked price thereof upon each band or orchestra arrangement and of any miscellaneous numbers or arrangements not otherwise herein provided for.

V. The Publisher further agrees:

(a) To pay regularly on or before the second Tuesdays of January and July in each year during the terms of the copyrights and of the renewals of copyrights in said scores, arrangements and selections, and so long thereafter as it shall continue to publish and sell said scores, or any part thereof, or any arrangement or selection thereof, the royalties earned from, because or on account of the publication and sale of said scores, arrangements and selections, or any part thereof, such payment to be made to the Composer at his residence, No. 321 West 108th Street, Borough of Manhattan, New York City.

(b) At the same time to account for all the copies of the whole or any part of said scores, selections and arrangements printed and sold by it, and to deliver to the Composer, or the duly authorized representative of the Composer, at No. 321 West 108th Street, Borough of Manhattan, New York City, a full, true and itemized statement showing in detail the number of copies of the whole or any part of said scores selections and arrangements printed and sold by it during the preceding six months, the number of such copies stamped with the autograph signature of

the Composer as hereinafter provided, the number of stamped and unstamped publications on hand, and the royalties due to the said Composer.

(c) The Publisher agrees not to distribute, sell offer or expose for sale any copy of the said scores, or of any part [fol. 1556] thereof, or of any arrangement or selection of the whole or any part thereof, without the signature of the said Composer conspicuously stamped or impressed upon the title page thereof, either by the Composer or by such other person as may be thereunto duly authorized by the Composer, and the Publisher agrees immediately after printing any copy of any such scores or of any parts, selections or arrangements thereof, to submit the same to the Composer for signature. The Composer agrees that at all reasonable times his representative will impress or stamp said signature on any such copy as frequently as the Publisher may reasonably require.

(d) The Publisher agrees that it will keep or shall cause to be kept true books of account in which full and complete entries shall be made of the number of copies of the scores and parts thereof, and of the selections and arrangements and parts thereof, printed and sold by the Publisher and its agents, and the said books shall at all reasonable times be open to the inspection of the Composer, or his agents or representatives with the privilege to make copies of the same; and the said Publisher agrees to keep all original orders for the printing of said scores, parts, selections and arrangements, and all original orders for shipment of said publications, and that said Composer and his representatives shall have the right to examine any and all books of account of said Publisher containing any item, memoranda or information relating to the said printing, shipment and sales of said publications, as well as the stock of said publications on hand, and all orders for the printing and shipment of said publications.

(e) The Publisher agrees that all orders for the printing of said publications shall be first submitted to the Composer, or some other person thereunto duly appointed by the Com- [fol. 1557] poser, who shall countersign the same, and no order for the printing of said publications shall be given unless the same is countersigned.

(f) The Publisher agrees that all the printing of said publications shall be done at and by one and the same printing house, located in New York City.

(g) The Publisher also agrees to secure from the printer and to deliver to the Composer every three months, in the first weeks of December, March, June and September in each year, a full true and itemized statement signed by the printer in his own hand, showing the number of copies of each of the publications above mentioned printed and delivered by him during the preceding three months.

(h) It is expressly agreed that the Composer shall be entitled to the payment of the said royalties in full, free from any charge or deduction whatsoever; the Publisher hereby agrees to arrange with the Author of the lyrics of said production for his compensation, and the Publisher hereby assumes the payment of all compensation and royalties that the author of the lyrics may be entitled to from or because of the publication and sale of the said music and lyrics.

VI. The Publisher agrees immediately after the publication of the score of said production and parts thereof, to deliver to the Composer free of cost two complete copies thereof.

VII. Nothing herein contained shall be construed as granting to the Publisher the right to represent or perform the music, musical numbers, settings and orchestrations, or any part thereof, or any selection or arrangement thereof or as granting to it the right to make parts of instruments serving to reproduce mechanically such music, musical numbers, settings and orchestrations, or any part, arrangement or selection thereof, nor as granting to it any rights in such [fol. 1558] music, except the right to copyright and renew copyrights in the same in trust for the Composer, and to print, reprint, publish and vend the same in sheet music form only in accordance with the terms of this agreement.

The Composer agrees to pay to the Publisher as agent for —— —— fifty per cent of all moneys which he shall actually collect on account of the reproduction on phonograph records of any number containing any lyrics written by —

VIII. The Publisher agrees not to assign or make any other disposition of this contract, or any right, title or

interest therein, nor to grant any right, title or interest therein or in said scores or any part thereof, or in any selection or arrangement thereof, to any person, firm or corporation without the written consent of the said Composer first had and obtained.

The grant of said rights being personal to the Publisher, the said rights shall not be transferrable by operation of law or legal proceedings.

IX. The rights of the Publisher under this agreement are dependent upon the due performance by it of each of the terms and covenants herein contained, all of which are hereby agreed upon as being of the essence of this contract, and in case of the Publisher's default in the due performance of any of the terms and covenants on its part to be performed, the Composer may at his election mail a notice addressed to the Publisher, whose office for the purpose of this agreement is fixed at 62-64 West 45th Street, New York City, specifying the nature of the default complained of, and in case said default shall not be rectified in five days, this agreement shall forthwith terminate and all rights hereby granted to the Publisher shall thereupon cease and come to an end, but without prejudice to any right or rights to compensation or damages or to any cause of action which the [fol. 1559] Composer may or might have in respect to any breach of this agreement.

It is agreed that if the Publisher shall be adjudicated a bankrupt in proceedings instituted by or against it, or take advantage of the insolvency laws of any State, Territory or Country, or should its property be advertised for sale in pursuance of any judicial, statutory or summary proceedings, or a Receiver of its property be appointed, or in the event of the voluntary or involuntary dissolution of the Publisher, then and in any of such events this contract shall end and all rights granted thereunder to the Publisher shall revert to the said Composer, and he shall be at liberty to make such disposition of the publishing rights of such music, musical settings, numbers, orchestrations, etc., as he may desire, and any and all payments theretofore made to him shall be retained by and belong to him absolutely, and in any such case or in the case of the termination of this agreement because of the Publisher's breach of any covenant, the said Publisher agrees that it and its legal representatives will immediately assign to said Composer in due form any

and all copyrights and renewals thereof which said Publisher may have secured in pursuance of this contract, and to return and deliver to the Composer all manuscripts belonging to the said Composer, and all copies of all scores of said production and all parts thereof and of all arrangements and selections and parts thereof in its possession or under its control.

In Witness Whereof, the Composer has hereunto set his hand and seal and the Publisher has caused this agreement to be subscribed and its corporate seal to be affixed hereto the day and year first above written.

In the presence of:

T. B. Harms & Francis, Day & Hunter, by Louis Dreyfus, Treasurer; Victor Herbert.

[fol. 1560] PLAINTIFFS' TRIAL EXHIBIT 14

Schedule I

Acknowledgements from the Copyright Office of the Receipt of Two Copies of the Following Compositions from "The Red Mill"

1		Dramatic Composition
		(Because You're You
		" " " Arr. for Trombone Solo
		" " " " " Cornet Solo
7	(6)	" " " " " Mandolin Orch.
		" " " " " Guitar Solo
		" " " " " Hotel Orch.
8		Entrance (Governor and Chorus)
9		Every Day Is Ladies Day With Me
10		Good-A-Bye John
11		Go While The Goin' Is Good
12		The Red Mill Fantasia
13		Finale 11
15	(2)	(If You Love But Me
		" " " " " Arr. for Orchestra
16		I'll Ring the Bell
17		I'm Always Doing Something I Don't Want To Do
		(In the Isle of Our Dreams
21	(4)	" " " " " Arr. for Hotel Orch.
		" " " " " " " Cornet Solo
		" " " " " " " Trombone Solo
23	(2)	(The Legend of the Mill
		" " " " " Arr. for Hotel Orch.
25	(2)	(Mignonette
		" Arr. for Hotel Orch.
26		Moonbeams
27		Opening Chorus Act 1
29	(2)	(The Streets of New York
		" " " " " Arr. for Hotel Orch.
30		When You're Pretty the World is Fair
32	(2)	(Whistle It
		" " Arr. for Hotel Orch.
33		A Widow Has Ways
34		You Never Can Tell About A Woman
35		The Red Mill Vocal Score

37	(2)	Lancers	
		"	
39	(2)	March and Two Step	Arr. for Band
		" " " "	" " Orchestra
40		Schottische	Arr. for Orchestra
43	(3)	Selection	
		"	Arr. for Orchestra
		"	" " Band
46	(3)	Waltzes	
		"	Arr. for Mandolin Orch.
		"	" " Orchestra

46 Copyrights

[fol. 156]

Certificates of Publication Covering the Following Arrangements of "Moonbeams" from "The Red Mill"

		Mixed Voices
		Vocal Orchestra
		Male Voices
11	Arrangements	Duet in D
		Female Voices
		Two Part Song
		Three Part Song
		S. A. B.
		Cello and Piano
		Violin Cello and Piano
		Violin and Piano

Renewal Certificates Covering the Following Compositions from "The Red Mill"

1		Dramatic Composition
2		Because You're You
3		Act 1 Opening Chorus
4		" 2 " "
5		Ensemble
6		Entrance Song and Chorus
7		Everyday Is Ladies Day With Me
8		Good A Bye John
9		Go While The Going Is Good
10		Finale 1
11		" 2
12		If You Love But Me
13		I'll Ring the Bell
14	Renewals	In The Isle of Our Dreams
15		I'm Always Doing Something I Don't Want To Do
16		Lancers
17		The Legend of The Mill
18		Mignonette
19		Moonbeams
20		Overture
21		Selection
22		The Streets of New York
23		Teach Them What To Say
24		Whistle It
25		Vocal Score
26		When You're Pretty and the World Is Fair
27		A Widow Has Ways
28		You Never Can Tell About A Woman
11		Arrangements on Moonbeams
28		Renewals
46		Copyrights (originals)
—		
85		Separate copyrights and renewals

[fol. 1562] PLAINTIFFS' TRIAL EXHIBIT 15

Schedule II

Certificates of Publication Covering the Following Numbers from "Naughty Marietta"

1		Dramatic Composition
		(Ah Sweet Mystery of Life
		" " " " " Arr. for Violin, Cello & Piano
		" " " " " " " Dance Orch.
		" " " " " " " Piano
		" " " " " " " Violin Piano
		" " " " " " " Duet In D
		" " " " " " " " " B Flat
17	(16)	" " " " " " " Three Part Song
		" " " " " " " Mixed Voices
		" " " " " " " Male Voices
		" " " " " " " Two Part Song
		" " " " " " " Male Voices
		" " " " " " " Vocal Orch.
		" " " " " " " Female Voices
		" " " " " " " S. A. B.
		" " " " " " " Cello & Piano
18		All I Crave Is More of Life
19		Barn Dance Schottische
20		Dance of the Marionettes
		(The Dream Melody
23	(3)	(The Dream Melody Arr. for Orchestra
		(The Dream Melody " " Band
24		If I Were Anybody Else but Me
		(I'm falling in Love with Someone
28	(4)	" " " " " " Arr. for Mixed Voices
		" " " " " " " " Hotel Orch.
		" " " " " " " " Mandolin Orch.
		(Italian Street Song
		" " " Arr. for Hotel Orch.
		" " " " " Duet in F
		" " " " " Soprano Solo
37	(9)	" " " " " Mixed Chorus
		" " " " " Three Pt. Song
		" " " " " S. A. B.
		" " " " " Two Pt. Song
		" " " " " Voc. Orch.
38		It Never Never Can Be Love
40	(2)	(It's Pretty Soft for Simon
		" " " " " Arr. for Hotel Orch.
41		Lancers
42		Live for Today
43		Mister Voodoo
45	(2)	(Naughty Marietta
		" " " " Hotel Orch.
46		Neath the Southern Moon
47		New Orleans Jeunesse
		(Selection
51	(4)	" " Mandolin Orch.
		" " Band
		" " Orchestra
52		The Sweet By and By
54	(2)	(Tramp Tramp Tramp
		" " " " " T. T. B. B.

[fol. 1563] Certificates of Publication Covering the Following Numbers from "Naughty Marietta"

56	(2)	(Waltzes
		" Arr. for Orchestra
57		We've Hunted the Wolf in the Forest
58		You Marry a Marionette
58		Copyrights

[fol. 1564] PLAINTIFFS' TRIAL EXHIBIT 16

Schedule III

M'lle. Modiste

Music—Victor Herbert
Book—Henry Blossom, Jr.

Partial List of Original Copyrights—in name of:
(M. Witmark & Sons, New York, as trustees for Victor Herbert
and
(Henry Blossom, Jr.

1 Book—Copyrighted October 6, 1905—Entry D 7367
2 Vocal Score—Copyrighted October 30, 1905—Entry C 105903
Individual Numbers
"If I Were on the Stage" (Note: original title of "Kiss Me Again")
3 Song:—Copyrighted October 13, 1905—Entry C 104750
4 Arrangement for Hotel Orchestra—Copyrighted November 3, 1905, Entry C 106471
5 Arrangement for Mandolin Orchestra by T. P. & Geo. J. Trinkaus Copyrighted December 21, 1906—Entry C 137558
6 "In Dreams So Fair"
Song:—Copyrighted January 25, 1906—Entry C 112826
"Kiss Me Again" (part of "If I were on the Stage")
7 Copyrighted: April 16, 1915—Entry E 358936—song
8 June 7, 1915—Entry E 364261—Vocal Orch. Arrg.
9 April 20, 1916 —Entry E 388379
10 Oct. 18, 1916 —Entry E 398837
11 April 12, 1918 —Entry E 424236—Band Arrangement
12 May 10, 1918 —Entry E 427376—Arrg. by Otto Langey
13 August 20, 1921—Entry E 533584
14 August 11, 1928—Entry E 699618
15 Dec. 7, 1931 —Entry E 523779)—Arrg. for violin
16 E 523781)—and piano
"I Want What I Want When I Want It"
17 Copyrighted:—October 4, 1905—Entry C 104028
18 January 20, 1906—Entry C 112488
19 May 5, 1906 —Entry C 120630
"Chorus of Footmen"
20 Song Copyrighted October 13, 1905—Entry C 104751
21 Piano Arrangement Copyrighted October 13, 1905—Entry C 104752
"Dear Little Girl Who is Good"
22 Copyrighted September 29, 1905—Entry C 103563
[fol. 1565]
"Hats Make the Woman"
23 Copyright September 29, 1905—Entry C 103564
"I'm Always Misunderstood"
24 Copyright October 7, 1905—Entry C 104282
"I Should Think You Could Guess"
25 Copyright October 7, 1905—Entry C 104283
"Mascot of the Troop"
26 Song—Copyright October 7, 1905—Entry C 104281
27 March—Copyright July 2, 1906—Entry C 134697
28 Two Step for Piano—Arrg. by Karl L. Hoschner
Copyright January 20, 1906—Entry C 112489
29 Arrg. for Hotel Orchestra
Copyright October 27, 1905—Entry C 105784
30 March & Two Step Arrg. for Orchestra
Copyright February 21, 1906—Entry C 114739
"Keokuk Culture Club"
31 Song—Copyright October 16, 1905—Entry C 105025
"The Time, The Place, and The Girl"
32 Song—Copyright October 12, 1905—Entry C 104690

PLAINTIFFS' TRIAL EXHIBIT 16—Continued

33 Arrg. for Hotel Orch.
Copyright November 3, 1905—Entry C 106470
34 Arrg. by Trinkaus for Mandolin Orch.
Copyright February 9, 1906—Entry C 113860
"The Nightingale and The Star"
35 Copyright October 14, 1905—Entry C 104803
"When The Cat's Away the Mice Will Play"
36 Song—Copyright October 16, 1905—Entry C 105026
37 Arrg. by George Trinkaus for Mandolin Orch.
Copyright December 20, 1924—Entry C 606021
"Ze English Language"
38 Song—Copyright October 12, 1905—Entry C 104691
"Love Me, Love My Dog"
39 Song—Copyright September 25, 1905—Entry C 103305
Opening Chorus—Act I
40 Copyright October 23, 1905—Entry C 105504
[fol. 1566]
Finale Act I
41 Copyright November 3, 1905—Entry C 106468
Opening Chorus—Act II
42 Copyright October 20, 1905—Entry C 105311
Entr Acte
43 Piano—Copyright December 29, 1905—Entry C 105023
44 Arrg. for Orch. by H. L. Rogers—Copyright January 29, 1906
Entry C 113103
Ballet
45 Piano—Copyright October 16, 1905—Entry C 105023
Selections
46 Piano Arrg. Copyright October 30, 1905—Entry C 105902
47 Orch. arrg. by Otto Langey Copyright January 15, 1906
Entry C 112206
Miscellaneous
48 Fantasia Arrangement by Tom Clark for piano and trombone
Copyright August 24, 1907—Entry C 160407
49 ditto for piano and coronet
Copyright August 24, 1907—Entry C 160408
50 Waltz Arrangement for Orchestra by Otto Langey
Copyright March 3, 1906—Entry C 115495
51 ditto for piano by Karl J. Hoschner
Copyright February 21, 1906, Entry C 114732
52 March and Two Step
Arrangement for Orchestra by Otto Langey
Copyright February 21, 1906—Entry C 114738
53 Lancers Arrangement for Orchestra by Otto Langey
Copyright January 29, 1906—Entry C 113104

[fol. 1567] PLAINTIFFS' TRIAL EXHIBIT 17-A

Renewals of Copyrights

M'lle. Modiste

1 Book—Renewed in name of Marjorie Wilson, widow of author; November 5, 1932—Entry R 22194 (7367)

Following Renewed in name of Ella Herbert Bartlett, Clifford Herbert, and Marjorie Wilson:

Vocal Score
2 December 2, 1932—Entry R 22367 (105903)
"If I Were on The Stage" ("Kiss Me Again")
3 Song December 2, 1932—Entry R 22366 (104750)
4 Hotel Orch. Arrg. December 10, 1932—Entry R 22495 (106471)
"I Want What I Want When I Want It"
5 November 5, 1932—Entry R 22026 (104028)
"Chorus of Footmen"
6 Song December 2, 1932—Entry R 22368 (104751)

Piano Arrg. } December 2, 1932—Entry R 22369 (104752)
"Dear Little Girl Who is Good"
November 5, 1932—Entry 22024 (103563)
"Hats Make the Woman"
November 5, 1932—Entry R 22025 (103564)
"I'm Always Misunderstood"
November 5, 1932—Entry R 22022 (104282)
"I Should Think that you Could Guess"
November 5, 1932—Entry R 22023 (104283)
"Mascot of the Troop"
Song—November 5, 1932—Entry R 22021 (104281)
"Keokuk Culture Club"
Song—December 2, 1932—Entry R 22387 (105025)
"The Time, The Place and The Girl"
Song—December 2, 1932—Entry R—22363 (104690)
Hotel Orch. Arr. December 10, 1932—Entry R 22494 (106470)
[fol. 1568]
"The Nightingale and The Star"
December 2, 1932—Entry R 22375 (104803)
"When The Cat's Away"
December 2, 1932—Entry R 22388 (105026)
"Ze English Language"
December 2, 1932—Entry R 22364 (104691)
"Love Me Love My Dog"
October 5, 1932—Entry R 21656 (103305)
Opening Chorus—Act I
December 2, 1932—Entry R 22402 (105504)
Finale—Act I.
December 9, 1932,—Entry R 22493 (106468)
Opening Chorus—Act II.
December 2, 1932—Entry R 22395 (105311)
Entr Act
Piano—January 3, 1933—Entry R 33851 (111033)
Ballet
Piano—December 2, 1932—Entry R 22386 (105023)
Selections
Piano—December 2, 1932—Entry R 22413 (105902)

PLAINTIFFS' TRIAL EXHIBIT 17-B

Schedule IV

Red Mill

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Henry Blossom, Jr. Renewals issued to Ella H. Bartlett, Clifford Herbert and Marjorie Wilson.

		Original		Renewals		
		Date	Entry No.	Date	Entry No.	
1	Book	Aug. 27, 1906	D-8998	Jan. 29, 1934	R-29233	1
2	Vocal Score	Sept. 27, 1906	C-130652	Jan. 6, 1934	R-28441	2
	Individual Numbers					
3	Overture—Piano Score	Sept. 24, 1906	C-130367	Jan. 6, 1934	R-28420	3
4	Opening Chorus—Act I	July 25, 1906	C-126164	Aug. 25, 1933	R-26740	4
5	Entrance Song and Chorus	Aug. 22, 1906	C-127973	Aug. 25, 1933	R-26766	5
6	Finale I	Aug. 6, 1906	C-126953	Aug. 25, 1933	R-26749	6
7	Opening Chorus—Act II	Aug. 6, 1906	C-126954	Aug. 25, 1933	R-26750	7
8	Ensemble	Aug. 10, 1906	C-127259	Aug. 25, 1933	R-26756	8
9	Finale II	Sept. 24, 1906	C-130368	Jan. 6, 1934	R-28425	9
10	Because You're You	Sept. 7, 1906	C-129045	Sept. 21, 1933	R-27086	10
11	Every Day Is Ladies Day	Sept. 7, 1906	C-129046	Sept. 21, 1933	R-27087	11
12	Good-a-bye, John	Sept. 24, 1906	C-130414	Jan. 6, 1934	R-28433	12
13	Go While the Going is Good	Aug. 22, 1906	C-127974	Aug. 25, 1933	R-26767	13
14	If You Love But Me	Mar. 30, 1907	C-147028	Apr. 3, 1934	R-30899	14
15	I'll Ring the Bell	Sept. 24, 1906	C-130415	Jan. 6, 1934	R-28434	15
16	I'm Always Doing Something	Aug. 22, 1906	C-127975	Aug. 25, 1933	R-26768	16
17	In the Isle of Our Dreams	Aug. 22, 1906	C-127977	Aug. 25, 1933	R-26770	17
18	Legend of the Mill	Aug. 6, 1906	C-126956	Aug. 25, 1933	R-26752	18
19	Mignonette	July 19, 1906	C-125813	Aug. 25, 1933	R-26734	19
20	Moonbeams	Oct. 6, 1906	C-131451	Jan. 6, 1934	R-28455	20
21	Streets of New York	Aug. 22, 1906	C-127976	Aug. 25, 1933	R-26769	21
22	Teach Them What To Say	Aug. 10, 1906	C-127258	Aug. 25, 1933	R-26755	22
23	When You're Pretty and the World is Fai-	Jan. 24, 1907	C-140923	Jan. 29, 1934	R-29202	23
24	Whistle It	Aug. 6, 1906	C-126955	Aug. 25, 1933	R-26751	24
25	A Widow Has Ways	July 19, 1906	C-125812	Aug. 25, 1933	R-26733	25
26	You Never Can Tell About A Woman	July 19, 1906	C-125811	Aug. 25, 1933	R-26732	26
27	Because You're You—Arrg't for Guitar by T. P. & Geo. J. Trinkaus	Mar. 5, 1907	C-144656			

28	In The Isle of Our Dreams—Arrg't for Mandolin Orch. by Trinkaus	Feb. 2, 1907	C–142116				
29	Selections—Arrg'd for Military Band by Herbert L. Clarke	Mar. 4, 1907	C–144584				
30	March and Two Step—Arrg'd for Band by Herbert L. Clarke	Mar. 4, 1907	C–144585				
31	March and Two Step—Arranged for Orchestra by Otto Langey	Dec. 31, 1906	C–139003				
32	Waltzes—Arrg'd for Mandolin Orch. by Trinkaus	May 1, 1907	C–150181				
33	Schottische—Arrg'd for Orchestra by Otto Langey	Dec. 31, 1906	C–139002				
[fol. 1570]							
34	Lancers—Arrg'd by Otto Langey Orchestra Parts only	Oct. 29, 1906	C–133348				
35	Because You're You—Arrg'd for Mandolin Orch. by Trinkaus	Dec. 13, 1906	C–136836				
36	Selections—Arrg'd for Orchestra by Otto Langey	Nov. 17, 1906	C–134786				
37	Waltzes—Arrg'd for Orchestra by Otto Langey	Dec. 7, 1906	C–136302				
38	If You Love But Me—Arrg'd for Orchestra by W. C. O'Hare	June 4, 1907	C–153642				
39	Fantasia—Arrg. for Piano and Trombone by Tom Clark	Aug. 24, 1907	C–16404				
40	Fantasia—Arrg. for Piano and Cornet by Tom Clark	Aug. 24, 1907	C–16405				
41	In the Isle of Our Dreams—Song with Guitar Accom. arr. by Trinkaus	Mar. 8, 1907	C–146181				
42	Selections—Arrg. for Mandolin Orch. by Trinkaus		C–146606				
43	Waltzes—Arrg. for Military Band by Herbert L. Clarke	Apr. 3, 1907	C–147325				
44	Lancers—Arrg. for Piano by Karl L. Hoschna	Jan. 23, 1908	C–172634	Apr. 11, 1935		R–37148	27
	Selections—Arrg. by Karl L. Hoschna				1934	R–28472	28

44 Original Copyrights
28 Renewals
72 Copyrights Total

[fol. 1571] PLAINTIFFS' TRIAL EXHIBIT 18

Schedule V

Babes in Toyland

Original Copyrights issued to M. Witmark & Sons—as trustees for Victor Herbert & Glen MacDonough. Renewals issued to Ella H. Bartlett, Clifford Herbert and Alan MacDonough.

		Original		Renewals		
		Date	Entry No.	Date	Entry No.	
1	Book	June 15, 1903	D-3587	June 26, 1930	9435	1
2	Vocal Score	Aug. 22, 1903	C-53514	Aug. 22, 1903	R-9900	2
	Individual Numbers					
3	March of the Toys—Piano Score	June 25, 1903	C-50193	July 25, 1930	R-9794	3
4	Babes in Toyland Waltzes Arrg't for Piano by Karl Hoschna	Aug. 11, 1903	C-52908	Sept. 3, 1930	R-9990	4
5	Selections—Piano Arrg't by K. Hoschna	Aug. 13, 1903	C-53048	Sept. 3, 1930	R-9991	5
6	March and Two Step Arr. for Piano by Hilding Anderson	Aug. 27, 1903	C-53819	Sept. 3, 1930	R-10028	6
7	Toyland	May 14, 1903	C-47877	July 25, 1930	R-9793	7
8	Opening Act 3—Chorus	Sept. 23, 1903	C-55185	Sept. 24, 1930	R-10300	8
9	Opening Act 2— "	Aug. 13, 1903	C-53068	Sept. 3, 1930	R-9992	9
10	Barney O'Flynn	July 1, 1903	C-50620	July 25, 1930	R-9790	10
11	Beatrice Barefacts	May 28, 1904	C-71675	June 3, 1931	R-14757	11
12	Before and After	May 11, 1903	C-47607	July 25, 1930	R-9792	12
13	Birth of the Butterfly—Finale Act I	Aug. 19, 1903	C-53345	Sept. 3, 1930	R-10023	13

14	Country Dance	Aug. 13, 1903	C–53067	Sept. 3, 1930	R–10021	14
15	Contrary Mary	May 11, 1903	C–47608	Sept. 3, 1930	R–9989	15
16	Floretta	June 5, 1903	C–49100	July 25, 1930	R–9796	16
17	Go to Sleep, Slumber Deep	July 22, 1903	C–51815	July 22, 1930	R–9798	17
18	Gavotte (Eccentric Dance)	Aug. 19, 1903	C–53344	Sept. 3, 1930	R–10024	18
19	He Won't Be Happy Till He Gets It (Words by Chas. N. Douglas)	Jan. 11, 1904	C–62674	Jan. 14, 1931	R–12327	19
20	I Can't Do That Sum	Oct. 31, 1903	C–57876	Nov. 1, 1930	R–11039	20
21	In the Toymakers Workshop	Oct. 7, 1903	C–56203	Nov. 19, 1930	R–11431	21
22	Jane	June 17, 1903	C–49789	July 25, 1930	R–9795	22
23	John Johnson	May 14, 1903	C–47876	Sept. 3, 1930	R–9988	23
24	Legend	Aug. 22, 1903	C–53511	Sept. 3, 1930	R–10027	24
25	Mignonette	Aug. 19, 1903	C–53342	Sept. 3, 1930	R–10022	25
26	Military Ball	July 1, 1903	C–50619	July 25, 1930	R–9791	26
27	The Moon Will Help You Out	July 8, 1903	C–51047	July 25, 1930	R–9799	27
28	Never Mind Bo Peep	Aug. 19, 1903	C–53343	Sept. 3, 1930	R–10025	28
29	Our Castle in Spain	Dec. 7, 1903	C–60317	Dec. 10, 1930	R–11786	29
30	Song of the Poet	Aug. 22, 1903	C–53509	Sept. 3, 1930	R–10026	30
31	With Downcast Eye Renewals	May 28, 1903	C–48664	July 25, 1930	R–9797	31
32	I Can't Do That Sum—Polka Two Step Arr. by Karl. Hoschna	June 11, 1904	C–72377			

32 Original Copyrights
31 Renewals
63 Copyrights Total

[fol. 1572] PLAINTIFFS' TRIAL EXHIBIT 19

Contains a list of the 135 copyrighted compositions of Ethelbert Nevin, the deceased husband of plaintiff Anne Paul Nevin, such works having been copyrighted between 1874 and 1913, the compositions subsequent to 1901 being posthumous works. Among such compositions are "The Rosary" (1898) and "Mighty Like a Rose" (posthumous, 1901).

PLAINTIFFS' TRIAL EXHIBIT 19

This exhibit contains a list of approximately 280 copyrighted compositions, of which the music was written by Ethelbert Nevin. Such compositions were copyrighted at various dates between 1874 and 1922. Specimen compositions, giving the collaborator, the publisher, the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Remarks
Barcarolle	Arr.–T. W. Surette	Boston Music Co.	1/24/1893	12/23/20–Boston Music Co.	
Evening Song		Boston Music Co.	3/ 9/1893	12/23/20–Boston Music Co.	
March of the Pilgrims		John Church Co.	1898	2/18/29–John Church Co.	
Mighty Lak A Rose	Frank Stanton	John Church Co.	9/ 6/01	6/13/29–John Church Co.	
My Love's Waiting	Richard Hovey	Boston Music Co.	1898	11/27/25–Boston Mus. Co.	June Night in Washington
Rosary	Robert Cameron Rogers		1898	9/1/25–Boston Music Co.	
Slumber Song (Dream of Blest Repose)	Edward Teschemacher	Boston Music Co.	12/ 1/09	3/20/37–Boston Music Co.	
Stars of the Summer Night	Henry W. Longfellow	Oliver Dit-Son Co.	10/14/'87	3/8/15–Oliver Ditson Co.	
Valse Caprice		Boston Music Co.	4/16/1890	11/16/17–Boston Music Co.	Op. 6 Three Duets for Piano
Water Nymph		Boston Music Co.	5/28/1891	12/20/18–Boston Music Co.	

[fol. 1573] DEFENDANTS' TRIAL EXHIBIT A-1

Compilation made by William Burton Richardson purporting to show the number of musical compositions copyrighted from July 1, 1909 to November 27, 1939 by publishers mentioned in ASCAP stickers (Plaintiffs' Trial Exhibit 1) other than those who are members of ASCAP, SESAC or Associated Music Publishers, as follows:

1. Total number of compositions registered for copyright by such publishers is 43,139.

2. Total number of music publishers listed is 2.644.

3. According to the compilation, 82 publishers who have registered more than 100 compositions each for copyright, have a total of 26,292 copyright entries;

4. The total number of published musical compositions registered for copyright by such publishers is 24,927;

5. The total number of arrangements of musical compositions registered for copyright by such publishers is 11,631;

6. The total number of unpublished manuscripts registered for copyright by such publishers is 6,581.

7. The witnesses' notes on the tabulation in the form as appearing on the title page and sample page 1, a photostat copy of which is appended below, shows the following tabulations of the witnesses (numbers on the left below correspond with classification numbers appearing on appended title page of Defendants' Exhibit A-1):

Classification	Number of Copyright Entries
1	5,236
1 & 3	104
1 & 4	406
1 & 6	62
1 & G	482
1 & 2 & 4	44
[fol. 1574]	
2	82
2 & 3	19
2 & 4	1,692
2 & G	104

Classification	Number of Copyright Entries
2 & 3 & 4	17
2 & 4 & 5	42
2 & 4 & 6	45
3	779
3 & 4	1,695
3 & 5	283
3 & 6	74
3 & G	672
3 & 4 & 5	57
3 & 5 & G	219
4	5,414
4 & 5	149
4 & 6	88
4 & G	697
5	44
6	848
G	15,903
Works specially arranged for musical instruments in addition to those appearing in Class "3"	1,179
Foreign titles	1,059
Miscellaneous	707
Exercises for music students	196
There is no notation by the witness as to the nature of works	4,741
	43,139

8. Plaintiffs reserve all of their objections taken at the trial to this entire exhibit and each and every part thereof.

(Here follow 2 photolithographs, side folios 1575-1576)

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CLASSIFICATION OF MUSICAL ...PYRIGHTS AS DESIGNATED BY THE UNITED STATES COPYRIGHT ...FICE, LIBRARY OF CONGRESS, WASHIN...ON, D. C.

E Published Compositions Reproduced f Sale or Distribution to the Public and Placed on Sale, Sold or Publicly Distrited.

E-1 Published musical copyright arrangents on old copyrighted material either E material, E-2 material or public domain marial.

E-2 Unpublished mamuscripts.

Figures in Ink Next to Totals Designate ...assification by General Type of Music, as Follows:

1 Religious and Spiritual.
2 Dance Music.
3 Instrumental Variations and Fugues.
4 Ballads - Railroad and Sentimental.
5 Spring and Nature Music
6 Marches and Patriotic

G General, including all types above.

1575

NAME AND ADDRESS	JULY 1, 1909, to JUNE 30, 1927			JULY 1, 1927 to NOVEMBER 5, 1937			NOVEMBER 7, 1937 to (Current)			TOTAL	
	E	E-1		E	E-1	E-2	E	E-1	E-2		
A & B Music Co., New York, N. Y.	0	0		5	0	0	0	0	0	5	
A. G. Publishing Co., Haskill, Okla.	0	0		0	0	0	0	0	0	0	
Abby Music Co., Indianapolis, Ind.	0	0		0	0	0	0	0	0	0	
Abingdon Press, 150 Fifth Avenue, New York, N. Y.	0	0		0	0	0	0	0	0	0	
Academic Co., 381 Fourth Avenue, New York, N. Y.	0	0		0	0	0	2	0	0	2	Renewal by L. Feist Co.
Ace Music Pub., Inc., 145 West 45th St., New York, N. Y.	0	0		2	0	3	0	0	0	5	
Ackley, B., 1018 Arch Street, Philadelphia, Pa.	211*	23*	*	11	0	0	12	0	0	257*	Religious Music
Ackley, B. D., Hotel Markeen, Buffalo, N. Y.	0	0		0	0	0	0	0	0	0	
Acosta, Dionisio, P. O. Box 1121, Los Angeles, Calif.	0	0	2	588	0	15	0	0	0	625	Foreign Italian
Adams Music Co., Passaic, New Jersey	0	1		0	0	0	0	0	0	1	
Adams Music Pub. Co., 745 Seventh Avenue New York, N. Y.	0	0		5	0	3	0	0	0	8	G
Adams, Pub., Joseph, #15 Cannon Passage, Birmingham, Ala.	0	0		0	0	0	0	0	0	0	This is Birming
Adams, J. O. Music Pub., Wichita, Kansas	0	0		0	0	0	0	0	0	0	ham, England, Pub. - Has approx 32 E's.
Adams, Vee & Abbott, Inc., 218 So. Wabash Ave., Chicago, Illinois	0	0		10	1	5	0	0	0	16	3+4
Adams, Willard G., 185 Main Street, White Plains, N. Y.	4	0		0	0	0	0	0	0	4	
Adelphia Music House, 1317 Arch Street, Philadelphia, Pa.	2	0		0	0	0	0	0	0	2	
Adirondack Songs, Inc. Gloversville, N. Y.	0	0		0	0	0	0	0	0	0	
Advance Publications, Chicago, Illinois	0	0		1	0	0	0	0	0	1	

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B-1

Information as required by Section 2 (a), New Florida Law, Exhibit M, Page 15, Further Supplemental Bill of Complaint filed in United States District Court, Northern District of Florida, Gainesville Division, by Messrs. Frank J. Wideman and Manley P. Caldwell, 1400 Harvey Building, West Palm Beach, Florida.

Gene Buck, et al. v. George Couper Gibbs, et al.

Sample Publisher: Broadway Music Corp., Will Von Tilzer, 619 Broadway, New York, N. Y.

Name and Title of Copyrighted Composition	Date of Copyright	No. of Copyright	Name of Composer	Name of Author of Words	Name of Publisher	Name of Present Copyright Owner	Name of Present Owner Of Performing Rights	Schedule of Prices for Each Performance for Profit of Each Composition (Sec. 4-A)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
E - Heatin' the Melodeon	11/23/38	72964	Gilbet Roe	J. Alexand Geo. C. MacKimon	BMC	BMC	BMC	
E - In a Cozy Little Blue Room	12/28/39	81799	Joe Jamyn	Jimmy Dupre Doe Werges	BMC	BMC	BMC	
E2 - Little Red Riding Hood	10/5/39	206277	Bee Kimus	Jack Beller	BMC	BMC	BMC	
E - Little Red Riding Hood	11/3/39	80658	Bee Kimus	Jack Beller Kay Schloss	BMC	BMC	BMC	
E2 - Put it away	11/13/39	207621	Herb Waters	Willie Bums Ted Choate	BMC	BMC	BMC	
E - "Sassin' the boss	5/31/39	77440	Geo. MacKimon	Larry Wagner Chick Adams	BMC	BMC	BMC	
E - Sha-Sha	11/23/38	73327	Mammy Kertz Jimmy Van Hauser		BMC	BMC	BMC	
E2 - Sweethearts Forever	4/12/39	192976	Loreta Clemens	Loreta Clemens	BMC	BMC	BMC	
E2 - Sweethearts of Tomorrow	6/8/39	198481	Eli Dawson	Ian Donez	BMC	BMC	BMC	
E2 - Swing on Out	11/13/39	207620	Frank Novak	Graham Prince Gerald Griffen	BMC	BMC	BMC	
E - Was it Meant to Be	3/14/30	84009	Arnold New	George Le Claire	BMC	BMC	BMC	
E - Where Was I Last Night	11/1/38	72473	Eugen West	Otis Spencer	BMC	BMC	BMC	
E2 - You let Me down	8/17/39	202467	Francis Colwell	Geo. C. MacKimon	BMC	BMC	BMC	
E - You Set Me on Fire	6/1/39	77456	Francis Colwell	Geo. C. MacKimon	BMC	BMC	BMC	

1937 TO DATE ALL FILE COMPLETE

1578

Grand total = 938 E2

DEFENDANTS' TRIAL EXHIBIT A-3

ASCAP PUBLISHER MEMBERS AND THEIR SUBSIDIARIES AS DISCLOSED BY ASCAP PUBLICATIONS, INCLUDING BOOK DATED JANUARY 1, 1936 AND SUPPLEMENT THERETO, ENTITLED "SUPPLEMENT TO DIRECTORY OF COMPOSERS, AUTHORS AND PUBLISHERS OF MUSICAL WORKS AND OF PERFORMING RIGHTS SOCIETIES THROUGHOUT THE WORLD" (BEING EXHIBIT 6, BUCK v. SWANSON, U. S. DISTRICT COURT, DISTRICT OF NEBRASKA, LINCOLN DIVISION, EQUITY NO. 562).

Name	Copyrights
A B C Music Corp.	0
A B C Standard Music Publications, Inc.	0
Abrahams, Maurice, Inc.	0
Abt, Valentine	1
Acme Music Publishing Co.	0
Ager, Yellen & Bornstein, Inc.	14
Alfred Music Company, Inc.	1
Allen, Thornton W., Co.	0
Allen & Harrison Mus.Co.	0
Aloha Music Company	1
Amsco Music Sales Co., Inc.	0
Artmusic, Inc.	0
Ascher, Emil, Inc.	1
Gene Austin, Inc. (Eugene Austin)	1
Barnhouse, C. L., Inc.	23
Baron, M., Inc.	17
Bates & Bendix	0
Beck, Mort	0
Bellfield Publ. Co.	1
Belwin, Inc.	61
Bendix, Theodore	2
Berg, S. M.	0
Bergstrom Mus. Co., Ltd.	0
Berlin, Irving, Inc.	272
Berlin, Irving, Standard Music Corp.	0
Berliner, Leo E., Pub. Co.	0
Bibo-Lang, Inc.	0
Bigelow-Main-Excell Company	0
Bilhorn Bros. Mus. Co.	0
Birchard, C. C., & Company	19
Bleyer, Archie, Inc.	0
Bloom, Harry, Inc.	0
Blues Music Company	3
Bond, Carrie Jacobs, & Son	0
Boston Music Company	71
Bradford, Perry, Inc.	6
Bradford, Perry, Music Company	16
Briegel, George F., Inc.	1
Broadway Music Corp.	51
Brooks & Denton	0
Brooks Music Pub. Co.	0
Brown, Macie Herb, Inc. (N. H. Brown)	9
Browne, Ted., Music Co.	6
Burke Doyle Music Co.	0
Caesar, Irving	2
Caesar, Irving, Inc.	6
Campano Music Pub., Frank	0
Capano, Frank, Music Pub.	0
Carlson, M. L. (Rubank, Inc.)	0
Century Music Pub. Co.	54
Chappell & Co., Inc.	0
Chappell-Harms, Inc.	0
Chilton, Forrest S. (Marks, Edw. B., Music Corp.)	1
Church, John, Co., The	118

Name	Copy-rights
Cinema Music Co. (Belwin,Inc.)	0
Circle Music Pub., Inc.	1
Clark, Frank, Mus. Co. (Mills Music, Inc.)	0
Coleman, Robt. H.	32
Composers' Music Corp.	205
Conrad, Con. Music Pub., Ltd.	26
Crawford Music Corp.	5
Crumit, Frank, Songs Co.	6
Cundy-Bettoney Co. (Ed. B. Marks Music Corp.)	14
Curtis Music Pub., L. B.	1
Daly, Joseph, Mus.Pub.Co.	0
Davis, Joe, Inc.	1
Davis, Coots & Engel, Inc.	0
Deane, H. F. W., Catalogue	18
Denton & Haskins Music Pub. Co., Inc.	3
De Sylva, Brown & Henderson, Inc.	4
Dillon, Carl	0
Ditson, Oliver, Co., Inc.	193
Dixon-Lane (Music Pub. Co.)	18
Donaldson, Douglas & Gumble, Inc.	49
Down Home Music Co.	0
Dresser, Paul, Pub. Co.	2
Eby, Walter	0
Edwards, Gus, Mus.Pub. Co.	8
Empire Music Co., Inc.	0
Engel, Harry, Inc.	0
Elkan-Vogel Co., Inc.	0
Ellis, Robin	8

Name	Copy-rights
Evans (George Honeyboy Evans)	1
Evans Music Co.	0
Excell, E. O., Co.	7
Exclusive Pubs., Inc.	0
Famous Music Corp.	0
Famous Writers Music Corp.	0
Farrand, Van L.	0
Fassio, A.	0
Feature Music Syndicate	0
Feist, Leo., Inc.	470
Fillmore Music House (Fillmore Bros.Co.)	14
Finder & Urbanok	9
Fischer, Carl, Inc.	431
Fischer, J., & Bro.	139
Fisher, Fred, Inc.	86
Fisher, Fred, Music Co.	0
Fitzsimons, H. T., Co.	9
Flammer, Harold, Inc.	59
Foley, Charles	0
Forster Music Pub., Inc.	70
Fox Publishing Co., Sam	[illegible]
Franklin, John, Music Co.	10
Galaxy Music Corp.	0
Gamble-Hinged Music Co.	18
Gay, Mace, Catalog	0
Geibel, Adam, Music Co.	7
Gem Music Corp.	0
Georgeoff Music Pub. Co., Evan	2
Georgia Music Co.	0
Gershwin Pub. Corp.	21

959

Name	Copyrights
Gilbert, L. Wolfe, Music Pub. Co.	6
Globe Music Pub. Co.	0
Goodman Music Co., Inc.	0
Gordon, Hamilton S., Inc.	12
Gordon & Rich, Inc.	0
Gotham Attucks Mus. Co.	0
Goulden-Long Music Co.	0
Gray, H. W., Co.	186
Green & Stept	0
Green & White, Inc.	0
	44
Hall-Mack Co.	
Halle, R. L.	3
Handman & Goodman, Inc.	0
Handman, Kent & Goodman, Inc.	0
Handy Bros. Music Co., Inc.	5
Harms, Inc.	319
Harms, T. B., Co.	18
Harms-Friml Corp.	5
Harris, Charles K., Music Pub.	9
Hatch Music Co.	22
Haviland, F. B., Pub. Co.	32
Heffelfinger, R. W.	0
Helf & Hager Co.	0
Hope Publishing Co.	14
Homeyer, Chas. W., & Co. Inc.	6
Huntzinger, R. L., Inc.	12
HERBERT. VICTOR	34
Italian Book Co.	413
Jacobs, Walter, Inc.	24
Jaques, Percy	0
Jenkins Music Co. (Jenkins, J. W., Sons Music Co.)	10

Name	Copyrights
Jerome, M. K.	5
Jerome & Schwartz Pub.Co.	0
Jones, Isham Music Corp.	6
Jordan, Julian, Mus. Co.	1
Jungnickel, Ross, Inc.	8
Kalmar & Ruby Music Corp.	0
Kalmar, Puck & Abrahams Consolidated	0
Kalmus, L. F., Inc.	0
Kay & Kay Music Pub.Corp.	0
Keane, Michael	0
Keit Music Corp.	0
Keit-Engel, Inc.	0
Kendis Music Corp.	0
King, Chas. B.	3
Kornheiser, Phil, Inc.	0
Kornheiser-Gottler, Inc.	0
Kornheiser-Schuster, Inc.	0
Krey, Geo. M. Music Co.	0
KREITZLER FRITZ	
Lawrence Music Pubs., Inc.	0
Lecuona Music Co.-Cuba	0
Leslie, Edgar, Inc.	0
Lewis Music Pub. Co.	0
Lillenas Pub. Co.	0
Lincoln Music Corp.	0
Lorenz Publishing Co.	61
Lowe-Goulston, Inc.	0
Luckhardt & Belder	5
Ludwig Music Pub. Co.	0
Luz Brothers Mus.Pubs.	0
Lyceum Music Co.	0
Madison Music Co.	0

960

Name	Copy-rights
Major Music, Inc.	0
Manus Music Co., Inc.	0
Mayfair Music Corp.	0
Marlo Music Corp.	0
Marks, Edw. B., Music Corp.	74
McKinley Music Co.	162
Melo-Art Music Pubs.	3
Melrose Bros. Mus. Co., Inc. (Melrose Bros.)	4
Metro-Goldwyn-Mayer Corp.	0
Metropolitan Music Co.	0
Metz, Theodore, Music Co.	0
Miller, Bob, Inc.	2
Miller, Roy M.	0
[illegible] Music, Inc.	0
Mills Music, Inc. (Mills, Jack, Inc.)	129
Milsons Music Pub. Corp.	0
Morris, Joe, Music Co.	32
Morse, Theodore, Music Co.	4
Movietone Music Corp.	0
Music Buyers Corp.	0
Musiclovers Co.	0
Musin, Ovide	0
Nazarene Pub. House	10
Nelson, Jack, Mus. Co.	0
New World Music Corp.	0
Olman Music Corp.	0
Oxford University Press	0
Pallma Music Pubs., Inc.	0
Palmer, Robert, Music Pub. Co.	0
Paramount Music Corp.	0
Partee, C. L., Music Co.	0
Paull-Pioneer Music Co.	0
Peate Music Co.	0
Penn, Wm. H.	0
Petrie, H. W., Catalog	0
Photo Play Music Co. Inc.	39
Piedmont Music Co., Inc.	0
Piantadosi, Al., Mus.Pub.	11
Pond, Wm. A., & Co.	12
Popular Melodies, Inc.	0
Prelude Music Co.	0
Presser, Theodore, Co.	692
Primrose & West Mus. Co.	0
Quincke, W. A., & Co.	24
Recker, Robert, Music Co.	0
Red Star Music Co., Inc.	0
Red Star Songs, Inc.	0
Reed, Bert, Catalog	1
Reed & Keller Catalog	0
Remick Music Corp. - Jerome H. Remick & Co.	151
Ricordi, G., & Co., Inc. of New York	95
Ringle, Dave	8
Robbins Music Corp.	0
Rodeheaver Co., The (Homer A.)	114
Root, Frank K. & Co.	1
Rosey, Geo., Band & Orch. Catalog	0
Rossiter, Will	36
Rossiter, Harold, Mus.Co.	0

Name	Copy-rights
Weil, Milton, Music Co., Inc.	0
White-Smith Music Pub.Co.	60
Whiteman, Paul, Publications	3
Wiedoeft, Rudy, Mus.Pub.Co.	1
Williams, Clarence, Music Pub. Co.	16
Williams Ernest S.	0
Williams, Harry. Muc. Co.	0
Willis Music Co	32
Willis-Woodward Mus. Co.	574
Witmark, M., & Sons	135
Wood, B. F., Music Co.	0
Words & Music, Inc.	0
World Music Co.	0
Worth, Geo. T., & Co.	0
Wulschner Music Co.	0
Yellen, Jack, Inc.	0
York Music Co., The	0
York & King Music Co.	0
Youmans, Vincent, Inc.	2

Total copyrights = 1995
WSR

1584

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DEFENDANTS' TRIAL EXHIBIT A-4

Tabulation prepared by William Burton Richardson showing number of mucical compositions copyrighted in the United States during the year 1922 by each publisher member of foreign societies having affiliation contracts with the Society. The total number of compositions thus copyrighted is 5274. The total number of publishers listed 3513 .

DEFENDANTS' TRIAL EXHIBIT A-5

COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

WASHINGTON, D. C.

I hereby certify that the following list shows the number of original and renewal registrations of copyright for musical compositions made from January 1, 1912 to December 31, 1939, inclusive by years:

Copyright Registrations of Music List

Year	Published(1)	Unpublished	Total	Renewals
1912	25729	932	26661	656
1913	25894	1396	27289	586
1914	24720	1532	26252	624
1915	18684	2382	21066	686
1916	16315	3658	19973	877
1917	15612	5376	20988	920
1918	18438	6362	24800	1031
1919	19333	7959	27292	853
1920	22849	8765	31614	1006
1921	21459	7472	28931	1244
1922	20084	7104	27188	1443
1923	18133	7339	25472	1769
1924	18639	8270	26909	1658
1925	18407	7746	26153	2235
1926	15829	8816	24645	2483
1927	18425	8022	26447	3185
1928	16778	12642	29420	3654
1930	17272	16148	33420	4236
1931	14311	16596	30907	3455
1932	12411	15992	28403	3827
1933	11196	14796	25992	3958
1934	11213	16640	27853	5047
1935	11490	18192	29682	4943
1936	12317	21587	33904	5849
1937	11877	20574	32451	5793
1938	12758	25104	37862	7624
1939	11995	27508	39503	6693
Total	480655	307804	788459	80422

Note:

(1) Includes an indeterminate number of published musical compositions also registered as unpublished under section 11 of the Copyright Act, as well as new arrangements of copyrighted works.

In Witness thereof the seal of the Copyright Office has been affixed this 26th day of March, 1940.

A. R. Davis
Register of Copyrights

DEFENDANTS' TRIAL EXHIBIT A-5. 1586

965

IV. GENERAL.

(1) You will submit to NBC daily in writing reports for all network programs broadcast by your station, upon forms provided by us for that purpose.

(2) You agree to maintain for your station such performing right licenses as now are, or hereafter may be, in general use at broadcasting stations.

(3) Your failure to broadcast a scheduled network program or our failure to deliver it to you, due to failure of facilities, will subject neither of us to liability to the other

(4) In the event that the transmitter location, power, frequency or hours or manner of operation of your station, are changed at any time so that your station is less valuable to NBC as a network outlet then it is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon thirty days' written notice to you.

(5) The effective date of this arrangement will be the 1st day of March, 1935. It will continue until 12 months after written notice from either of us to the other, of a desire to discontinue it.

(6) If any questions arise under this arrangement they will be determined in accordance with the laws of the State of New York.

(7) A similar plan is being submitted to each of our regular Associated Stations, but any arrangement with your stations relates only to NBC and your stations and is not related to any arrangement that exists or may later be made between NBC and any other station. Existing contracts, both yours and ours, may, of course, be carried out, although we are hopeful that insofar as they deviate from the plan herein proposed, they can be brought into conformity therewith by mutual consent. It is the policy of the National Broadcasting Company, however, to place its relations with its other regular network stations on the general basis outlined in this letter as far as practicable.

If after examination you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours,

NATIONAL BROADCASTING COMPANY, Inc.

By _____

Accepted _____, 1935.

Florida West Coast Broadcasting Co., Inc. (Advertising Agents for Licensees, for the purpose of this contract)

By _____ President.

_____ Exec V.P.

APPROVED

Clearwater Chamber of Commerce. Licensee of Radio Station WFLA

By _____

St. Petersburg Chamber of Commerce. Licensee of Radio Station WSUN

By _____

IAL EXHIBIT A-6

NATIONAL BROADCASTING COMPANY, INC. 966

New York, N. Y., February 20, 1935.

CLEARWATER CHAMBER OF COMMERCE &
ST PETERSBURG CHAMBER OF COMMERCE
LICENSEES

Radio Station WELA WSUN and
Florida West Coast Broadcasting Co., Inc.
Advertising Agents for the licensees, for the
Gentlemen: purpose of this contract.

We are proposing in this letter the following plan of network cooperation between this Company and your Station WELA-WSUN.

I. NETWORK AFFILIATION AND PROGRAM SERVICE.

In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will continue to offer your station network programs of wide variety delivered at our expense to your control board at your main studios, including musical, educational, religious, sports, public affairs, international, and special events programs. Except when due to failure of facilities, we will offer to furnish your station a minimum of 200 unit hours* of our network sustaining and commercial programs combined during each 28 day period, or if we fail to do so we will pay you at the hourly rate of compensation set forth later in this letter for network commercial programs at the new rate to advertisers for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we will offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship nor used for any other purpose.

In return for the NBC network affiliation, including sustaining program service, you will waive compensation for 16 unit hours of our network commercial programs broadcast by your station during each 28 day period.

* Unit hours are computed according to the following table:

LOCAL TIME	1 Hour	½ Hour	⅓ Hour	¼ Hour
	Unit Hour Credit	Unit Hour Credit	Unit Hour Credit	Unit Hour Credit
WEEKDAYS:				
12:00 Mid. to 8:00 A.M.	.333	.250	.167	.083
8:00 A.M. to 6:00 P.M.	.500	.375	.250	.125
6:00 P.M. to 11:00 P.M.	1.000	.750	.500	.250
11:00 P.M. to 12:00 Mid.	.500	.375	.250	.167
SUNDAYS:				
12:00 Mid. to 8:00 A.M.	.333	.250	.167	.083
8:00 A.M. to 12:00 Noon	.500	.375	.250	.125
12:00 Noon to 6:00 P.M.	.750	.563	.375	.188
6:00 P.M. to 11:00 P.M.	1.000	.750	.500	.250
11:00 P.M. to 12:00 Mid.	.500	.375	.250	.125

II. STATION COMPENSATION

(1) The new basis of station compensation described below and the new basis of payment by your stations for NBC service, including sustaining programs, will not be put in force until the effective date of this new arrangement.

(2) Beginning February 4, 1936, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day period by dividing the total value at the network rate for your stations of the network commercial programs broadcast from your stations by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 50% of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30% of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 27½% of your average unit hour rate for the 28-day period.

The network station rate for your stations on which its compensation will be figured as provided above, will be $120.00 per full evening hour. This rate will apply between 6:00 P.M. and 11:00 P.M. local time at your stations. Rates for other hours and for shorter periods will be as follows:

LOCAL TIME AT STATION	1 Hour	¾ Hour	½ Hour	¼ Hour
	Network Station Rate	Network Station Rate	Network Station Rate	Network Station Rate
DAILY EXCEPT SUNDAY:				
12:00 Mid. to 8:00 A.M.	$40.00	$32.00	$24.00	$16.00
8:00 A.M. to 6:00 P.M.	60.00	48.00	36.00	24.00
6:00 P.M. to 11:00 P.M.	120.00	96.00	72.00	48.00
11:00 P.M. to 12:00 Mid.	60.00	48.00	36.00	24.00
SUNDAY:				
12:00 Mid. to 8:00 A.M.	40.00	32.00	24.00	16.00
8:00 A.M. to 12:00 Noon	60.00	48.00	36.00	24.00
12:00 Noon to 6:00 P.M.	90.00	72.00	54.00	36.00
6:00 P.M. to 11:00 P.M.	120.00	96.00	72.00	48.00
11:00 P.M. to 12:00 Mid.	60.00	48.00	36.00	24.00

Rates for periods longer than one hour will be in exact proportion to the corresponding one-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. New network rates to advertisers are being announced, effective February 4, 1935. These rates to advertisers are subject to change from time to time by NBC but the rate of compensation for your station as set forth herein will not be affected by such changes.

(3) Under our policies and commitments with our network advertisers some of the network commercial programs which we will supply to your station prior to February 4, 1936, will be paid for

by our network advertisers at the old rate in effect prior to February 4, 1935. Therefore, your compensation between the effective date of this letter and February 4, 1936, will be computed for each twenty-eight day period as follows:

(a) The total amount of time of network commercial programs broadcast by your stations will be computed in unit hours and the number of such unit hours at the old rate to advertisers and at the new rate to advertisers, respectively, will be determined.

(b) For all network commercial programs broadcast at the old rate to advertisers, NBC will pay your station at your station's present rate of compensation.

(c) For all network commercial programs broadcast at the new rate to advertisers, NBC will pay your station at the rates of compensation set forth in (a), (b), and (c) of Paragraph II—E, above, provided however, that the number of unit hours specified in each of those compensation brackets will be reduced to the proportionate number of such unit hours that the number of unit hours of network commercial programs broadcast at the new rate to advertisers bears to the total number of unit hours of network commercial programs broadcast by your station.

(d) Your stations will pay NBC the proportionate part of $1,284.62 (the present sustaining fee pro-rated for a 28-day period) that the number of unit hours of network commercial programs broadcast at the old rate to advertisers bears to the total number of unit hours of network commercial programs broadcast by your station.

(e) Your stations will waive compensation for the proportionate part of 14 unit hours that the number of unit hours of network commercial programs broadcast at the new rate to advertisers bears to the total number of unit hours of network commercial programs broadcast by your stations.

III. NETWORK OPTIONAL TIME

(a) Upon 28 days' notice, your stations will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your stations may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

Network optional time will be as follows:

Weekdays (New York City Time)	Sundays
10:00 A.M. - 12:00 Noon	1:00 - 4:00 P.M.
3:00 P.M. - 6:00 P.M.	5:00 - 6:00 P.M.
7:00 P.M. - 7:30 P.M.	7:00 - 11:00 P.M.
8:00 P.M. - 11:00 P.M.	

(b) You will maintain and operate the broadcasting equipment of your stations in such manner as to keep pace with the broadcasting art and will keep the operation of such equipment entirely under your control.

(c) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued programs for which we substitute another network commercial program.

(d) Because of the public responsibility of the network and its Associated Stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public interest or importance. No compensation will be paid for the cancelled program nor for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

DEFENDANTS' TRIAL EXHIBIT A-7

AGREEMENT

between

COLUMBIA BROADCASTING SYSTEM, *Inc.*

485 Madison Avenue, New York, New York *and*

TAMPA TIMES COMPANY

Radio Station WDAE, Tampa, Florida

licensed to operate

radio station WDAE at Tampa, Florida

full time on a frequency of 1220 kilocycles

with a power of 5,000 watts day-time and 1,000 watts night-time

Columbia is engaged in operating a radio broadcasting network and in furnishing programs to radio stations on the network over program circuits [illegible] leased by Columbia or otherwise. Some of such programs, herein called "sponsored programs", are sold by Columbia for sponsorship by its clients or advertisers. All non-sponsored programs are herein called "sustaining programs". The Station and Columbia recognize that the millions regularly listening to the Station will be interested, to their mutual benefit, if Columbia provides the Station with programs not otherwise locally available, including broadcasts from the scenes of national and international events, presentations of music, drama and other entertainment from the principal centers of talent, information, educational and cultural broadcasts of general interest and other programs of public importance and value.

Accordingly, it is mutually agreed as follows:

1. Columbia will furnish to the Station for broadcasting by the Station all available network sustaining programs, without charge, and Columbia network sponsored programs for which clients may request broadcasting by the Station and which are consistent with Columbia's rules and program policies. Columbia agrees that it will make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Network sustaining programs made available by Columbia are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the consent of Columbia in specific instances.

2. The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with exceptional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totalling more than fifty "sponsored hours" (as defined below, but for this purpose computed during the entire term of

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this agreement on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23). The Station may require Columbia to give not less than twenty-eight days' prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will not make commercial spot announcements in the "break" occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, refrain from making commercial spot announcements in the "break" occurring before or after

3. Columbia will pay the Station for broadcasting network sponsored programs furnished by Columbia at the rates for "converted hours" specified in Schedule A attached hereto and hereby in all respects made a part hereof. A "converted hour" means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the Station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its day-time card rate, shall be the equivalent of the same fraction of a "converted hour". Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day.

Payment to the Station will be made by Columbia for network sponsored programs broadcast over the Station within twenty days following the termination of Columbia's four or five week fiscal period, as the case may be, during which such sponsored programs were broadcast.

4. The Station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will have such license or other agreements as shall be necessary to entitle the Station to broadcast copyrighted material included in programs to be furnished by Columbia.

5. If the power, frequency, time or manner of operation of the Station is changed, resulting in a substantial lessening of the value of the Station as an outlet for Columbia network programs, Columbia may at any time thereafter terminate this agreement on at least sixty days' notice to the Station.

6. Columbia will whenever practicable provide in advance notices of the programs to be furnished to the Station. In the event of any change of programs, Columbia will notify the Station as soon as possible and the Station will make every effort immediately to conform with the substituted programs.

7. Neither party shall be liable to the other for [illegible] or for failure to operate facilities or supply programs for broadcasting if such failure is due to failure of equipment or action or claims by network clients, labor disputes or any cause or reason beyond the party's control.

8. Columbia will continue the Station as the exclusive Columbia outlet in the present standard broadcast band in the city in which the Station is located and will so publicize the Station, and will not furnish its exclusive network programs to any other station in the present standard broadcast band in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in the present standard broadcast band in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, state-wide or regional hook-ups to broadcast special events of public importance.

9. The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and

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regulations of the Federal Communications Commission.

10. If the Station applies to the Federal Communications Commission for consent to a transfer of its license or proposes to transfer all or any of its assets without which it would be unable to perform this agreement, it will procure the agreement of the proposed transferee that, upon the consummation of the transfer, the transferee will assume and perform this agreement, unless Columbia shall waive this condition in writing.

11. If either the Station or Columbia fails to insist upon strict performance of any of the covenants or conditions of this agreement, such failure shall not be construed as an election or as a waiver or condonation of any breach, or as a waiver or relinquishment for the future of any such covenants or conditions.

12. Any notice hereunder shall be sent to the parties at their respective addresses hereinbefore set forth.

13. This agreement has been made in the State of New York and shall be governed by the laws of that State applicable to contracts fully to be performed therein, and this agreement is not subject to oral modification.

14. As of the beginning of the term hereof, this agreement takes the place of and is substituted for any and all agreements heretofore existing between the parties hereto, subject only to the fulfillment of any accrued obligations thereunder.

The term of this agreement shall begin on the date hereof and shall continue to and including January 10, 1945.

[redacted]

IN WITNESS WHEREOF, this agreement

11th day of January, 19 40

COLUMBIA BROADCASTING SYSTEM, INC.

By A Haberbergh V.P.

TAMPA TIMES COMPANY

By Joseph Nicholson V.P.

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[fol. 1591] DEFENDANTS' TRIAL EXHIBIT A-8

Regular Meeting, Board of Directors
Friday, June 3rd, 1932

Present

Louis Bernstein	Jerome Kern
E. F. Bitner	Edgar Leslie
S. H. Bornstein	Fred H. Martens
Gene Buck	Edwin H. Morris
Robert Crawford	Gustave Schirmer
Walter Douglas	Oley Speaks
Max Dreyfus	Will Von Tilzer
Walter Fischer	Joseph Young
Otto Harbach	Nathan Burkan, Counsel
Raymond Hubbell	E. C. Mills, General Manager

Absent

Irving Caesar	Sigmund Romberg
George Fischer	Harry Warren
Jack Mills	

The President called the meeting to order, declared a quorum present, and directed that the Minutes of the previous meeting be read. Minutes of the regular meeting, May 26th, were read and upon motion duly made, seconded and carried, were approved.

Mr. Saul Bornstein stated that the Treasurer had no report.

Chairmen of the following Committees, respectively, stated that each of them had no report:

Finance Committee,
Membership Committee
Foreign Relations Committee
Relief Committee
Song Sheet and "Cut-in" Committee
Complaint Committee

Mr. Bitner, Chairman, presented the report of the Administrative Committee regarding negotiations had with the Special Copyright Committee representing the National

Association of Broadcasters. He stated that the Committee at a conference held June 2nd, had proposed a postponement of the effective date of any increase in license fees to May 1st, 1933 such postponement however to be wholly dependent upon an increase over the amounts presently being paid of 25% in rates effective May 1st, 1933; and an increase of 50% over present rates effective May 1st, 1934 and thereafter.

[fol. 1592] Furthermore, that if this proposal be accepted, the Broadcasters Committee suggests a complete truce as to legislative, publicity, propaganda and similar matters. He stated that after various discussions, the Broadcasters Committee agreed to change the effective date upon which increases shall become effective until January 1st, 1933 and they agree in principle that six months prior to December 31st, 1933 they will agree or disagree as to the adoption of a percentage formula to govern rates for 1934 and thereafter. He stated that the Broadcasters Committee was not unanimous in the opposition to adopting a percentage plan.

He thereupon reported the recommendation of the Administrative Committee to the Board that the General Manager be authorized to quote the Broadcasters Committee upon the following basis:

$1,250,000 in all for the year 1933.

A readjusted sustaining fee plus 3% of the amounts charged by the stations for the use of their facilities to commercial sponsors during the year 1934.

4% plus the same consideration during the year 1935.

5% plus the same consideration during 1936 and thereafter.

Mr. Bernstein inquired as to what reasoning supported the recommendation of the Administrative Committee. Mr. Bitner and others responded.

Mr. Bornstein addressed the Board at length urging that it do not consider any proposition other than the one set out in our circular letter to stations under date of April 12th, to wit: A readjusted sustaining fee plus 5% of gross charges for the use of facilities with the effective date of putting these rates into effect as of September 1st, 1932.

Mr. Dreyfus inquired as to whether the Administrative Committee felt that we could succeed if we held out for 5% for the above terms. Mr. Bitner, Chairman of the Ad-

ministrative Committee, replied that he felt that it was not in the cards, that the broadcasting industry as a whole was in the red, that the future of the Society was at stake, that in view of the current depression, existing contracts between broadcasters and advertisers, the ill will and antagonism that would be engendered, the litigation that would be involved and the effects thereof in decreased dividends, were all factors which made it seem inadvisable to demand higher rates at this time than those proposed by the Administrative Committee.

[fol. 1593] Mr. Dreyfus stated that it was well known that all Publishers were in the same desperate situation as had been described by Mr. Bornstein but urged that we should not adopt a hard and fast rule today; that he is sympathetic toward the proposal of the Administrative Committee or some form of compromise as this is not time for a fight. He urged the Board to authorize a compromise.

Mr. Kern stated that he was very definitely opposed to a fight at this time and was followed by Mr. Bernstein who endorsed Mr. Bornstein's remarks. He thought we should make a test,—suggested that our Reserve Fund had been established and built up for the very purpose of meeting this sort of a situation. He denied that the Broadcasters were losing money, stated that he was in favor of demanding a discontinuance of the use of all music on radio, and suggested that a General Meeting be called for the purpose of submitting the matter to the entire membership. He suggested that we should quote a rate of 25% to be effective at once unless the Broadcasters would accept the principle of paying 5% plus a sustaining fee one year from now. He stated that the Publishers have their backs against the wall and that regardless of the consequences of a battle, he thought we ought to die fighting.

Mr. Douglas endorsed the remarks of Messrs. Bornstein and Bernstein, not as a matter of expediency, but of plain necessity, and said that unless higher rates can be put into effect at once, the Publishers cannot continue to exist. Mr. Burkan discussed the subject and stated that he was in favor of a compromise. Mr. Bornstein stated that he had listened carefully to all that had been said but that he had heard nothing to change his mind, and again suggested that the Board should authorize a rate of 5% plus a sustaining fee effective as of September 1st.

The Board thereupon adjourned for lunch.

Upon reconvening, it was moved, seconded and unanimously carried that the Society do not accept the proposition tendered by the Committee representing the National Association of Broadcasters.

It was moved and seconded that the recommendations of the Administrative Committee be rejected. The motion was lost,—7 ayes, 9 nos—Edwin Morris not voting.

It was moved and seconded that the recommendation of the Administrative Committee be adopted. The motion was lost,—7 ayes, 8 nos—Edgar Leslie not voting.

It was moved, seconded and carried that the General Manager and the Administrative Committee negotiate with the Broadcasters' Committee upon the following basis:

Commencing January 1st, 1933 a readjusted sustaining fee plus 3% of amounts charged for facilities.
[fol. 1594] Effective January 1st, 1934 the same plus 4%.
Effective January 1st, 1935 the same plus 5%.

Messrs. Kern and Speaks voting No, Bornstein not voting.

It was moved, seconded and carried that Joseph Young be elected a Director to fill the unexpired term of Walter Donaldson.

It was moved, seconded and carried that George W. Meyer be elected to fill the unexpired term as Director of Joseph Young.

There being so much unfinished business before the Board, it was suggested that another meeting be held next week. Motion to adjourn was unanimously carried.

(Signed) Joseph Young, Secretary.

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[fol. 1595] DEFENDANTS' TRIAL EXHIBIT a-9

Memorandum of Agreement between American Society of Composers, Authors & Publishers (hereinafter styled "Society") and National Broadcasting Company, Inc. (hereinafter styled "Licensee"), as follows:

1. Society grants to Licensee, its successors and assigns, and Licensee accepts for a period of three years from September 1st, 1932 a license to publicly perform by radio broadcasting from its station now known as WEAF located at New York, New York, together with its synchronized

auxiliary units and any short wave experimental stations it may operate in connection therewith and/or by television broadcasting non-dramatic renditions of the separate musical compositions, heretofore or hereafter during the term hereof copyrighted or composed by members of Society of or which Society has the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition of any of the said compositions to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The Society acknowledges, however, its understanding that the radio station herein mentioned is a part of the radio chains or networks of the National Broadcasting Company, Inc. and that while many of the programs broadcast over such chains or networks originate at such station many other of the network programs are originated at other stations. Society agrees, and it is a condition of this Memorandum of Agreement, that so long as Licensee hereunder shall fully perform each and all of its obligations hereunder, National Broadcasting Company, Inc. may continue to carry on its business of maintaining and operating a radio broadcasting chain or network and may do and cause to be done any and all things necessary or proper in the conduct of such business without the payment of any license or other fee to Society.

5. Except as specifically provided in Article "4" hereof, the within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society, or of which Society has the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by So-

ciety to perform such works (unless the performance originates at a place or from a source which the Society does not customarily license) from which place rendition of such works is transmitted to said radio station for the purpose of being broadcast from said station. It is understood, however, that Licensee shall only be guilty of a breach under this Article "5" in the event that it continues to broadcast a program rendered at such place other than Station WEAF after Licensee has received information from Society that such other place is unlicensed by Society to perform.

6. The within license is granted upon the express condition:

A. That should the power in-put and wave length as at present authorized by the Federal Radio Commission for the said station (power—fifty thousand (50,000) watts, and wave length assignment—454.5 meters, 660 k. c.) be changed during the term hereof, the basic fee as provided in the first paragraph of Article "9" hereof shall be adjusted.

B. That in the event that the license of said station from the Federal Radio Commission is terminated, cancelled, re- [fol. 1596] voked or suspended, or in the event that radio broadcasting is supported from other sources, or operated by other than private interests, as now prevails, Licensee shall promptly notify Society thereof and either Society or Licensee may then terminate this Agreement and in that event Licensee shall be under no further liability to Society for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is only suspended for a period less than the term of the within license from Society, then in such event Licensee shall be relieved from the payment of the license fee hereunder only during such period of suspension.

7. Licensee agrees to furnish to Society during the term of the within license a list of all musical compositions (or, at the option of Licensee, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society has the right to license the performing rights hereinbefore granted) broadcast from or through the said station showing the title of each composition and the composer and/or author thereof; provided that Licensee shall not be obli-

gated under this Article "7" to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by Licensee to Society shall be strictly confidential and Society covenants that it will make no disclosure thereof or of the contents thereof.

8. Society agrees during the term hereof to maintain for the service of Licensee substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of Society. Society reserves the right however, at any time and from time to time to withdraw from its repertory and from operation or the within license any musical composition or compositions; and upon any such withdrawal, Licensee may immediately cancel the within Agreement by giving written notice to Society of its election so to do.

In the event of any such cancellation by Licensee or in the event of a termination of this Agreement and the within license pursuant to the provisions of Article "6" hereof, or otherwise, Society shall refund to Licensee pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

9. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Society, as compensation for the within license, the sum of thirty-seven thousand five hundred dollars ($37,500.) per annum, payable in equal monthly instalments on or about the 25th of each month during the term hereof plus

(a) for the first year of the term hereof a sum equal to three per cent. (3%) of the net receipts (as hereinafter defined) of the said station from the sale of its broadcasting facilities; and

(b) for the second year of the term hereof a sum equal to four per cent. (4%) of the net receipts (as hereinafter defined) of the said station from the sale of its broadcasting facilities; and

(c) for the third year of the term hereof a sum equal to five per cent. (5%) of the net receipts (as hereinafter defined) of the said station from the sale of its broadcasting facilities.

(d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to said station for the use of its broad- [fol. 1597] casting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen per cent. (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by Licensee.

Licensee shall render monthly statements to Society on or about the 25th of each month covering the period of the preceding calendar month on forms supplied gratis by Society, and shall include in such statements all items, without exception, charged during the said month for the use of the broadcasting facilities of the said station which said statement shall be rendered under oath and accompanied by the remittance due Society under the terms hereof. Any such statement may also include a deduction by or credit to the said station for any amount reported by it as charged during a prior month for the use of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of said station on the monthly statement next succeeding the date of the actual collection.

10. Society shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of Licensee only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by Licensee.

11. Upon any breach or default of any terms herein contained, Society may give Licensee thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, Society may then forthwith cancel said license.

12. Society agrees to indemnify, save and hold Licensee harmless, and defend Licensee from and against any claim,

mands or suits that may be made or brought against the censee with respect to renditions given during the term reof in accordance with this License of musical composi-ns contained in Society's repertory heretofore or here-er during the term hereof copyrighted or composed by mbers of Society.

In the event of the service upon Licensee of any notice, ocess, paper or pleading, under which a claim, demand action is made or begun against Licensee on account of such matter as is hereinabove referred to, Licensee ll forthwith give Society written notice thereof and ultaneously therewith deliver to Society any such notice, ocess, paper or pleading, or a copy thereof, and Society ll have sole and complete charge of the defense of any ion or proceeding in which any such notice, process, er or pleading is served. Licensee, however, shall have right to engage counsel of its own, at its own expense, may participate in the defense of any such action or ceeding and with whom counsel for Society shall co-rate. Licensee shall co-operate with Society in every in the defense of any such action or proceeding, and in appeals that may be taken from any judgments or ers entered therein, and shall execute all pleadings, ds or other instruments, but at the sole expense of iety, that may be required in order properly to defend resist any such action or proceeding, and properly to ecute any appeals taken therein.

the event of the service upon Licensee of any notice, ess, paper or pleading, under which a claim, demand ction is made or begun against Licensee on account of rendition of any musical composition contained in the ety's repertory but not heretofore or hereafter during 1598] the term hereof copyrighted or composed by hers of Society, Society agrees at the request of Li-ee to co-operate with and assist Licensee in the defense ny such action or proceeding, and in any appeals that be taken from any judgments or orders entered ein.

All notices required or permitted to be given by r of the parties to the other hereunder shall be duly properly given if mailed to such other party by regis-

tered United States mail addressed to such other party at its main office for the transaction of business.

In Witness Whereof this Agreement has been duly subscribed by Society and Licensee this 31st day of August, 1932.

American Society of Composers, Authors and Publishers, by E. C. Mills. National Broadcasting Company, Inc., by (Signature Illegible).

[fol. 1599] DEFENDANTS' TRIAL EXHIBIT A-10

Memorandum of Agreement between American Society of Composers, Authors & Publishers (hereinafter styled "Society") and Atlantic Broadcasting Corporation (hereinafter styled "Licensee"), as follows:

1. Society grants to Licensee, its successors and assigns, and Licensee accepts for a period of three years from September 1st, 1932 a license to publicly perform by radio broadcasting from its station now known as WABC located at New York, New York, together with its synchronized auxiliary units and any short wave experimental stations it may operate in connection therewith and/or by television broadcasting from station now known as W2XAB located at New York, New York, non dramatic renditions of the separate musical compositions, heretofore or hereafter during the term hereof copyrighted or composed by members of Society or of which Society has the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such in whole or in part.

3. Nothing herein contained shall be construed as authorizing Licensee to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition of any of the said compositions to pub-

icly perform or reproduce the same for profit by any neans, method or process whatsoever.

4. Society acknowledges its understanding that the radio tation known as WABC is part of the radio chain or net- ork of the Columbia Broadcasting System, Inc., and that hile many of the programs broadcast for such chain or etwork originate at said station, many other of the net- ork programs are originated at other stations. Society grees, and it is a condition of this Memorandum of Agree- ent, that so long as Licensee hereunder shall fully per- orm each and all of its obligations hereunder, Columbia roadcasting System, Inc. may continue to carry on its usiness of maintaining and operating a radio broadcasting hain or network and may do and cause to be done any nd all things necessary or proper in the conduct of such usiness without the payment of any license or other fee o Society.

5. Except as specifically provided in Article "4" hereof, he within license is limited to the separate musical com- ositions heretofore or hereafter during the term hereof opyrighted or composed by members of Society, or of hich Society has the right to license the performing rights ereinbefore granted, in programs rendered at or from said adio station now known as Station WABC, or at or from ny other place duly licensed by Society to perform such orks (unless the performance originates at a place or [ol. 1600] from a source which the Society does not cus- omarily license) from which place rendition of such works transmitted to said radio station for the purpose of being roadcast from said station. It is understood, however, at Licensee shall only be guilty of a breach under this rticle "5" in the event that it continues to broadcast a rogram rendered at such place other than Station WABC fter Licensee has received information from Society that uch other place is unlicensed by Society to perform.

6. The within license is granted upon the express condi- on:

A. That should the power in-put and wave length as at resent authorized by the Federal Radio Commission for e said station now known as WABC (power—fifty thou- nd (50,000) watts, and wave length assignment—348.6 eters, 860 k. c.) be changed during the term hereof, the

basic fee as provided in the first paragraph of Article "
hereof shall be adjusted.

B. That in the event that the license of said station fr
the Federal Radio Commission is terminated, cancell
revoked or suspended, or in the event that radio broadca
ing is supported from other sources, or operated by ot
than private interests, as now prevails, Licensee sh
promptly notify Society thereof and either Society or
censee may then terminate this Agreement and in that ev
Licensee shall be under no further liability to Society
the payment of any license fee hereunder; provided, ho
ever, that if the license of said station now known
WABC to broadcast is only suspended for a period l
than the term of the within license from Society, then
such event Licensee shall be relieved from the payment
the license fee hereunder only during such period of s
pension.

7. Licensee agrees to furnish to Society during the te
of the within License a list of all musical compositions (
at the option of Licensee, a list of all musical compositio
heretofore or hereafter during the term hereof copyright
or composed by members of Society or of which Society h
the right to license the performing rights hereinbefo
granted) broadcast from or through the said station n
known as WABC, showing the title of each composition a
the composer and/or author thereof; provided that Licens
shall not be obligated unde- this Article "7" to furnish su
a list covering a period or periods in the aggregate duri
any one calendar year in excess of three months. The li
so furnished by Licensee to Society shall be strictly co
fidential and Society covenants that it will make no disc
sure thereof or of the contents thereof.

8. Society agrees during the term hereof to maintain f
the service of Licensee substantially its present catalog
of compositions heretofore or hereafter during the ter
hereof copyrighted or composed by members of Societ
[fol. 1601] Society reserves the right however, at any tim
and from time to time to withdraw from its repertory a
from operation of the within license any musical compo
tion or compositions; and upon any such withdrawal, L
censee may immediately cancel the within Agreement
giving written notice to Society of its election so to do.

In the event of any such cancellation by Licensee or in the event of a termination of this Agreement and the within license pursuant to the provisions of Article "6" hereof, or otherwise, Society shall refund to Licensee pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

9. Under the terms and conditions hereinabove set forth, Licensee agrees to pay to Society, as compensation for the within license, the sum of thirty thousand dollars ($30,000) per annum, payable in equal monthly instalments on or before the 10th of each month during the term hereof plus

(a) for the first year of the term hereof a sum equal to three per cent (3%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities; and

(b) for the second year of the term hereof a sum equal to four per cent (4%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities; and

(c) for the third year of the term hereof a sum equal to five per cent (5%) of the net receipts (as hereinafter defined) of the Licensee from the sale of its broadcasting facilities.

(d) The term "net receipts" from the sale of its broadcasting facilities shall refer to the full amount charged by and actually paid to Licensee for the use of its broadcasting facilities (sometimes known as "time on the air"), after deducting commissions not exceeding fifteen per cent (15%), if any, paid to the advertising agent or agency (not employed or owned in whole or in part by Licensee).

Licensee shall render monthly statements to Society on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by Society, and shall include in such statements all items, without exception, charged during the said month for the use of the broadcasting facilities of the said station now known as WABC, which said statement shall be rendered under oath and accompanied by the remittance due Society under the terms hereof. Any such statement may also include a deduction by or credit to the Licensee for any amount reported by it as charged during a prior month for the use

of its broadcasting facilities but which it has been compelled to refund as a "time discount". In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of Licensee on the monthly statement next succeeding the date of the actual collection.

[fol. 1602] 10. Society shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of Licensee only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by Licensee.

11. Upon any breach or default of any terms herein contained, Society may give Licensee thirty (30) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said thirty (30) days, Society may then forthwith cancel said license.

12. Society agrees to indemnify, save and hold Licensee harmless, and defend Licensee from and against any claim, demands or suits that may be made or brought against the Licensee with respect to renditions given during the term hereof in accordance with this License of musical compositions contained in Society's repertory heretofore or hereafter during the term hereof copyrighted or composed by members of Society.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee on account of any such matter as is hereinabove referred to, Licensee shall forthwith give Society written notice thereof and simultaneously therewith deliver to Society any such notice, process, paper or pleading, or a copy thereof, and Society shall have sole and complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. Licensee, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for Society shall cooperate. Licensee shall cooperate with Society in every

way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of Society, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon Licensee of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against Licensee on account of the rendition of any musical composition contained in the Society's repertory but not heretofore or hereafter during the term hereof copyrighted or composed by members of Society, Society agrees at the request of Licensee to cooperate with and assist Licensee in every way possible in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by regis-
[fol. 1603] tered United States mail addressed to such other party at its main office for the transaction of business.

In Witness Whereof this Agreement has been duly subscribed by Society and Licensee this 31st day of August, 1932.

American Society of Composers, Authors and Publishers. By E. C. Mills. Atlantic Broadcasting Corporation. By William S. Carey, Pres.

[fol. 1604] PLAINTIFFS' DEPOSITION EXHIBIT 1

This exhibit contains a list of approximately 400 copyrighted compositions, of which the words or music were written by Irving Caesar. Such compositions were copyrighted at various dates between 1919 and 1939. Specimen compositions giving the collaborator, the publisher, the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Remarks
Adored One	Sigmund Romberg	Harms Inc.	9/21/31	Nina Rosa
Crazy Rhythm	Joseph Meyer, Roger Wolfe Cahn	Harms Inc.	4/14/28	Here's Howe
I Want to be Happy	Vincent Youmans	Harms Inc.	6/19/24	No, No, Nanette
Is It True What They Say About Dixie	Gerald Marks, Sammy Lerner	Irving Caesar Inc.	1/22/36	
Just A Gigolo	L. Casucci	DeSylva, Brown & Henderson	12/26/30	
Longing (Triste Ricordo)	Adolfo Geniso, Ernesto DeCurtis	Harms Inc.	6/13/21	
No, No, Nanette	Otto Harbach, Vincent Youmans, Frank Mandel	Harms Inc.	6/ 3/25	No, No, Nanette
Sing A Song of Safety	Gerald Marks	Irving Caesar Inc.	5/ 7/37	
Sometime I'm Happy	Vincent Youmans	Harms Inc.	4/21/27	Hit the Deck
Swanee	Geo. Gershwin	Harms Inc.	11/ 1/19	
Tea for Two	Vincent Youmans	Harms Inc.	6/19/24	No, No, Nanette
There's Something Spanish in Your Eyes	Cliff Friend	Remick & Co	12/ 9/27	
What a Perfect Combination	Bert Kalmer, Harry Ruby, Harry Akst	Harms Inc.	10/28/32	

PLAINTIFFS' DEPOSITION EXHIBIT 2

Agreement between Irving Caesar and American Society of Composers, Authors and Publishers. (Hereinafter referred to as "Society"). This exhibit is identical with Exhibit "C" to the Bill of Complaint except for names and dates.

[fol. 1605]

PLAINTIFFS' DEPOSITION EXHIBIT 3

This exhibit contains a list of approximately 129 copyrighted compositions, of which the music was composed by Deems Taylor. Such compositions were copyrighted at various dates between 1909 and 1937. Specimen compositions giving the collaborator, if any, the publisher, and the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Remarks
Ballet Miniature		J. Fischer & Bro.	3/ 4/18	
Ballet Music		J. Fischer & Bro.	/37	Casanova
Chambered Nautilus	O. W. Holmes	Oliver Ditson Co.	10/26/14	
Concordi Laetitia (Hymn to the Virgin)	B. Hooker	J. Fischer & Bro.	12/ 3/19	
King's Henchman	E. St. V. Millay	J. Fischer & Bro.	12/31/26	
Peter Ibbetson	G. Du Maurier, C. Collier	J. Fischer & Bro.	12/20/30	
Prelude		J. Fischer & Bro.	5/ 8/18	Two Studies in Rhythm
Spinnerliedchen (Spinning Song)		J. Fischer & Bro.	10/ 4/17	
Through the Looking Glass	L. Carroll	J. Fischer & Bro.	10/22/23	
Valse Ariette (Humming Chorus)		J. Fischer & Bro.	/18	

PLAINTIFFS' DEPOSITION EXHIBIT 4

Agreement between Deems Taylor and Society. This exhibit is identical with Exhibit "C" to the Bill of Complaint except for names and dates.

[fol. 1606] PLAINTIFFS' DEPOSITION EXHIBIT 5

This exhibit contains a list of approximately 125 copyrighted compositions, of which the words or music were written by Edgar Leslie. Specimen compositions giving the collaborator, the publisher, the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Remarks
A Little Bit Independent But Easy on the Eyes	Joe Burke	Bregman, Vocco & Conn	10/22/35		
America I Love You	Archie Gottler	Kalmar Puck & Abrahams Consolidated	9/ 3/15		
Among My Souvenirs	Horatio Nicholls	DeSylva, Brown & Henderson	10/ 5/27		
At A Perfume Counter	Joe Burke	Bregman, Vocco & Conn	1/27/38		Casa Manana
California and You	Harry Puck	Kalmar Puck & Abrahams. Consolidated	4/18/14		
For Me and My Gal	E. Ray Goetz, George W. Meyer	Waterson Berlin & Snyder.	1/24/17		
Good Luck Mary	A. Bryan–A. Piantadosi	Dora Cooper	12/16/09	1/26/37-Edgar Leslie 12/13/37–Al. Piantadosi 12/14/37–Edgar Leslie	
In A Little Gypsy Tea Room	Joe Burke	Joe Morris Music Co.	5/ 8/35		
It Looks Like Rain in Cherry Blossom Lane	Joe Burke	Joe Morris Music Co.	5/10/37		
Me and the Man in the Moon	Jimmie Monaco	Bregman Vocco & Conn	11/ 5/28		
Moon over Miami	Joe Burke	Irving Berlin Inc.	12/17/35		
Oh What A Pal Was Mary	Bert Kalmar, Pete Wendling	Waterson Berlin & Snyder.	7/ 8/19		
On Treasure Island	Joe Burke	Joe Morris Music Co.	10/ 4/35		
Robins and Roses	Joe Burke	Irving Berlin, Inc.	4/ 3/36		
Romance	Walter Donaldson	Bregman, Vocco & Conn	12/31/29		Cameo Kirby
When the Grown Up Ladies Act Like Babies	Joe Young, Maurice Abrahams	Maurice Abrahams Music Co.	10/17/14		
I'm A Yiddish Cowboy	Al Piantadosi, Halsey K. Mohr	Shapiro Bernstein & Co.	4/ 8/08	1/31/36–Al Piantadosi 2/6/36–Edgar Leslie	
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

[fol. 1607] PLAINTIFFS' DEPOSITION EXHIBIT 6

This exhibit contains a list of approximately 196 copyrighted compositions, of which the music was written by Fred E. Ahlert. These compositions were copyrighted at various dates between 1909 and 1939. Specimen compositions giving the collaborator, if any, the publisher, and the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Remarks
Blue Roses	Edgar Leslie	Irving Berlin, Inc.	6/26/33	
Evening Star	Roy Turk	Leo Feist, Inc.	5/14/28	
Hinky Dinky Dee	Van Loan & Robinson	Waterson, Berlin & Snyder	/23	
I'd Love to Fall Asleep and Wake Up in My Mammy's Arms	S. Lewis & J. Young	Waterson, Berlin & Snyder	4/14/20	
I'm Gonna Sit Right Down and Write Myself a Letter	Joe Young	Crawford Music Corp.	5/ 9/35	
Mean to Me	Roy Turk	DeSylva, Brown & Henderson	2/ 1/29	
Moon Was Yellow, and The Night Was Young	Edgar Leslie	Don., Doug. & Gumble, Inc.	6/30/34	
Oh, What A Pal Was Mary	Edgar Leslie, Bert Kalmar & P. Wendling	Waterson, Berlin & Snyder	7/ 8/19	
There's A Shadow in the Sunshine of Your Smile	J. Young & C. Lombardo	Leo Feist, Inc.	8/28/35	
Where the Blue of the Night	Roy Turk/Bing Crosby	DeSylva, Brown & Henderson	10/27/31	

Tightly Bound

(Here follow 2 photolithographs, side folios 1608-1608a)

PLAINTIFFS DEPOSITION EXHIBIT 7

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PLAINTIFFS DEPOSITION EXHIBIT 7

Copyright 1934, by ... Society of Composers, Authors and Publishers.

EXHIBIT

FEB - 7 1940

STANDARD UNIFORM POPULAR SONGWRITERS CONTRACT

AGREEMENT made this 27th day of April, 1934, between BROADWAY MUSIC CORPORATION, 1600 Broadway, New York, N. Y. (hereinafter called "Publisher"), and JACK EGAN AND ALLAN FLYNN jointly and/or severally, (hereinafter called "Writer(s)"):

WITNESSETH:

1. The Writer(s) hereby sells, assigns, transfers and delivers to the Publisher, its successors and assigns, a certain hereto-fore unpublished original musical composition, written and/or composed by the above named Writer(s) now entitled "BE STILL MY HEART" including the title, words and music thereof, and the right to secure copyright therein throughout the entire world, and to have and to hold the said copyright and all rights of whatsoever nature thereunder existing.

2. In all respects this contract shall be subject to any existing agreements between all of the parties hereto and the American Society of Composers, Authors and Publishers.

3. The Writer(s) hereby warrants that the said composition is his sole, exclusive and original work, and that he has full right and power to make the within agreement, and that there exists no adverse claim to or in the said composition, except as aforesaid in Clause 2 hereof.

4. In consideration of this assignment, the Publisher agrees to pay the Writer(s) as follows:

(a) An advance of $1.00 in hand paid, receipt of which is hereby acknowledged, which sum shall be deductible from any payments hereafter becoming due the Writer(s) under this agreement.

(b) In respect of regular piano copies sold and paid for at wholesale in the United States of America, royalties per copy as follows:

Wholesale price 24 cents — — — royalty 5 cents per copy.

Wholesale price 21 cents — — — royalty 4 cents per copy.

Wholesale price 18 cents — — — royalty 3 cents per copy.

Wholesale price 16½ cents (or less) — royalty 2 cents per copy.

(c) A royalty of 33 1/3 % (in no case however less than 33-1/3% jointly) of all net sums received by the Publisher in respect of regular piano copies and/or orchestrations thereof sold and paid for in any foreign country.

(d) A royalty of three cents per copy of orchestrations thereof in any form sold and paid for in the United States of America.

(e) The sum of $5.00 as and when the said composition is published in any folio or composite work in the United States of America, and $5.00 when and if published in such form in any foreign country, regardless of the number of copies published, provided however, that the said composition shall in no case be published in such form until one year——— after publication thereof in regular piano copies.

(f) Folios and/or composite works as referred to in the next preceding paragraph shall be deemed to include any publication of a collection of at least ten or more works contained within the same volume and/or binding.

(g) For purposes of royalty statements, if a composition is printed and published in the United States of America, as to copies and rights sold in the Dominion of Canada, revenue therefrom shall be considered as of domestic origin. If however, the composition is printed by a party other than the Publisher in the Dominion of Canada, revenue from sales of copies and rights in Canada shall be considered as originated in a foreign country.

(h) As to "professional material"—not sold or resold, no royalty shall be payable.

(i) An amount equal to 33 1/3% % (in no case, however, less than 33-1/3% jointly) of:—

5 All receipts of the Publisher in respect of any licenses issued authorizing the manufacture of the parts of instruments serving to mechanically reproduce the said composition, or to use the said composition in synchronization with sound motion pictures, or to reproduce it upon so-called "electrical transcriptions" for broadcasting purposes; and of any and all receipts of the Publisher from any other source or right now known or which may hereafter come into existence, all such sums to be divided amongst the Writer(s) of the said composition, as provided in the next following paragraph hereof.

5. It is understood and agreed by and between all of the parties hereto that all sums hereunder payable jointly to the Writer(s) shall be divided amongst them respectively as follows:

Name:	Share:
JACK EGAN	FIFTY PERCENT
ALLAN FLYNN	FIFTY PERCENT

(Continued Over)

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6. The Publisher shall render the Writer(s) as above on or before each May 15th covering the 6 months ending March 31st next preceding, each August 15th covering the 3 months ending June 30th next preceding, each November 15th covering the 3 months ending September 30th next preceding, each February 15th covering the 3 months ending December 31st next preceding, on forms as the said statements shall be at the discretion of any rights in the said compositions, royalty statements in the form approved jointly by ASCAP, BMI & SPA and dated December 1966, accompanied by remittances of the amounts then payable hereunder, after if it shall have been made from the option of the Publisher to render royalty statements accompanied by remittances semi-annually, such option may be exercised.

7. The Publisher agrees to publish in printed form the said musical composition within six months from the date hereof. Should he fail so to do the Writer(s) shall have the right in writing to demand the return of said composition, whereupon the Publisher must within one (1) month after receipt of such notice either publish the said composition, in which event this agreement remains in full force and effect, or upon failure so to publish, all rights of any and every nature, and the right to secure copyright and/or any copyright secured by the Publisher before publication, in and to the said composition, shall revert to and become the property of the Writer(s) and shall be reassigned to him.

8. If foreign publication rights in the said composition are separately conveyed, otherwise than as a part of the Publisher's current and/or future catalog, any advance received in respect thereof shall be divided in accordance with Section 4, sub-division (1) hereof and credited to the accounts of the respective Writer(s).

9. The Writer(s) or his representative may appoint a certified public accountant who shall at any time during usual business hours have access to all records of the Publisher relating to the said composition for the purpose of verifying royalty statements rendered or which are delinquent under the terms hereof.

10. Any legal action brought by the Publisher against any alleged infringer of the said composition, shall be initiated and prosecuted at his sole expense, and of any recovery made by him as a result thereof, after deduction of the expenses of the litigation, a sum equal to fifty per cent. shall be divided as agreed among the Writer(s) of the said composition.

(a) If a claim is presented against the Publisher alleging that the said composition is an infringement upon some other, and because thereof the Publisher is jeopardized, he shall thereupon serve written notice upon the Writer(s), containing the full details of such claim and thereafter until the claim has been adjudicated or settled shall pay any monies coming due the Writer(s) hereunder in escrow to any bank or trust company to be held pending the outcome of such claim; provided however, if no suit be filed within twelve months, after written notice to the Writer(s) by the Publisher of the adverse claim, the said bank or trust company shall release and pay to the Writer(s) all sums held in escrow, plus any interest which may have been earned thereupon. Such payment shall be without prejudice to the rights of the Publisher in event of a subsequent adverse adjudication.

(b) From and after the service of summons in a suit for infringement filed against the Publisher in respect of the said composition, any and all payments hereunder thereafter falling due the Writer(s) shall be paid by the Publisher in trust to any bank or trust company until the suit has been finally adjudicated and then be disbursed accordingly, unless the Writer(s) shall elect to file an acceptable bond in the sum of such payments, in which event the sums due shall be paid to him.

11. The parties hereto hereby agree to submit to arbitration under the rules of the American Arbitration Association, and pursuant to the New York Arbitration Law any differences arising in relation to the payment of royalties due or in default hereunder, and hereby agree individually and jointly to abide by and perform any award rendered by the arbitration; and that a judgment of the Supreme Court of the State of New York may be entered upon such award.

12. This agreement is binding upon the parties hereto and their respective successors in interest.

13. Three identical copies hereof are executed by the parties, the original copy of which shall remain in possession of the Publisher, the duplicate in possession of the Writer(s), and the triplicate thereof be forwarded by mail by the Publisher to the Songwriters' Protective Association.

Witness: Blanche Faeder

Writer (Signed) Jack Egan (L.S.)

Address 351 East 188th St.

Witness: Blanche Faeder

Writer (Signed) Allan Flynn (L.S.)

Address 205 East 176th St, Bx

Witness:

Writer (L.S.)

Address

Witness:

Writer (L.S.)

Address

Witness: Blanche Faeder

Publisher BROADWAY MUSIC CORPORATION

By Will Von Tilzer President

Address 1650 Broadway, New York, N. Y.

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[fol. 1609] PLAINTIFFS' DEPOSITION EXHIBITS 8-A TO 8-K

Exhibits 8-A to 8-K consist of eleven printed catalogues of various kinds of music currently published by Carl Fischer, Inc. as follows:

Secular choral music consisting of 84 pages.
Catalogue of sacred choral music consisting of 58 pages.
Catalogue of music for organ consisting of 22 pages.
Catalogue of piano music consisting of 80 pages.
Woodwind ensemble and chamber music consisting of 13 pages.
Catalogue of books on music consisting of 68 pages.
Catalogue of music for brass instruments and instruments of percussion consisting of 47 pages.
Catalogue of music for the violin and other string instruments consisting of 100 pages.
Catalogue of vocal music consisting of 48 pages.
Band music catalogue consisting of 102 pages.
Orchestra music catalogue consisting of 142 pages.

In each case the catalogue shows the title of the composition, the name of the author and the price at which the copy of music is sold.

[fol. 1610] PLAINTIFFS' DEPOSITION EXHIBIT 9

This exhibit contains a list of approximately 258 copyrighted compositions, of which the lyrics or words were written by Oscar Hammerstein 2nd. Such compositions were copyrighted at various dates between 1920 and 1939. Specimen compositions, giving the collaborator, the publisher, the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Remarks
Can't Help Lovin' Dat Man	Jerome Kern	T. B. Harms Co.	11/30/27	Show Boat
All The Things You Are Are Mine	Jerome Kern	Chappell & Co., Inc.	1939	Very Warm for May
Desert Song	Sigmund Romberg, Otto Harbach & Frank Mandel	Harms Inc.	5/20/27	
Indian Love Call	Rudolf Friml, Otto Harbach	Harms Inc.	9/ 2/24	Rose Marie
Ol' Man River	Jerome Kern	T. B. Harms Co.	11/27/27	Show Boat
One Alone	Sigmund Romberg, Otto Harbach	Harms Inc.	11/20/26	Desert Song
Romance	Sigmund Romberg, Otto Harbach	Harms Inc.	11/ 5/26	Lady Fair
Rose Marie	Rudolf Friml, Otto Harbach, Herbert Stothart	Harms Inc.	2/18/25	
Viennese Nights	Sigmund Romberg	Harms Inc.	7/14/30	

This exhibit contains a list of approximately 410 copyrighted compositions, of which the words or music were written by George W. Meyer. Such compositions were copyrighted at various dates between 1907 and 1938. Specimen compositions giving the collaborator, the publisher, and the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Remarks
Anything Is Nice If It Comes from Dixieland	Grant Clarke & Milton Ager	Leo Feist Inc.	2/ 8/19		
Black-Birds		Aschерberg, Hopwood & Crew	10/20/26		Black-Birds
Bring Back My Daddy to Me	William Tracey & Howard Johnson	Leo Feist Inc.	11/26/17		
Brown Eyes Why Are You Blue	Al Bryan	Henry Waterson, Inc.	9/ 9/25		
Come On and Baby Me	Sam M. Lewis/Joe Young	Waterson, Berlin & Snyder Co.	9/ 6/16		
Down Among the Sleepy Hills of Tennessee	Sam M. Lewis/Joe Young	Irving Berlin Inc.	2/28/23		
Everything Is Peaches Down in Georgia	Grant Clarke & Milton Ager	Leo Feist Inc.	7/19/18		
For Baby and Me		B. Feldman & Co.	11/22/26		
For Me and My Gal	Edgar Leslie & E. Ray Goetz	Waterson, Berlin & Snyder Co.	1/24/17		
Girl I Left Behind Me	Edgar Leslie/Billy Rose	Famous Music Corp.	7/29/35		
Here Comes the Bride	E. Ray Goetz	Leo Feist Inc.	6/21/19		
I Believe in Miracles	Pete Wendling	Leo Feist Inc.	12/27/34		
If He Can Fight Like He Can Love Good-Night Germany	Grant Clark & Howard E. Rogers	Leo Feist Inc.	4/30/18		
Just A Girl of Yesterday		Maurice Richmond Mus. Co.	4/ 1/16		
Just Like Washington Crossed the Delaware	Howard Johnson	Leo Feist Inc.			3/29/18
Let's All Be American Now	Irving Berlin & Edgar Leslie	ABC Standard Music.	2/17/17		
Lonesome		F. A. Mills	1/ 2/09	Famous Music 1/4/36	
My Tucky Home	Sam M. Lewis/Joe Young	Irving Berlin Inc.	11/14/23		
Sittin' in a Corner	Gus Kahn	Irving Berlin Inc.	8/16/23		
Tuck Me to Sleep in My Old Kentucky Home	Sam M. Lewis/Joe Young	Irving Berlin Inc.	8/ 6/21		
When You're a Long Way from Home	Sam M. Lewis	Broadway Music Corp.	7/17/14		

Tightly Bound

[fol. 1612] PLAINTIFFS' DEPOSITION EXHIBIT 11

Articles of Association of the Society. This exhibit is identical with Exhibit "D" to the Bill of Complaint.

[fol. 1613] PLAINTIFFS' DEPOSITION EXHIBIT 12

Laws of New York.—By Authority

Chapter 609

An Act to amend the general associations law, in relation to proceeding to mortgage, lease or sell real estate, and action or proceeding by unincorporated association

Became a law April 2, 1932, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section eight of chapter thirty-four of the laws of nineteen hundred nine, re-entitled by chapter nine hundred and fifteen of the laws of nineteen hundred twenty, "An act in relation to associations, constituting chapter twenty-nine of the consolidated laws," is hereby amended to read as follows:

§ 8. Proceeding to mortgage, lease or sell real estate. Whenever any unincorporated association is required by law to make application to the court for leave to mortgage, lease or sell its real estate, the proceeding therefor shall be had as prescribed for corporations in article five of the general corporation law.

§ 2. Section twelve of such chapter as added by chapter nine hundred and fifteen of the laws of nineteen hundred twenty is hereby amended to read as follows:

§ 12. Action or proceeding by unincorporated association. An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may

likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members.

§ 3. This act shall take effect immediately.

[fol. 1614] PLAINTIFFS' DEPOSITION EXHIBIT 13

List of members of the Society and affiliated foreign societies. Same as exhibit "Q" to the Further Supplemental Bill of Complaint.

[fol. 1615] PLAINTIFFS' DEPOSITION EXHIBIT 14

American Society of Composers, Authors and Publishers
Thirty Rockefeller Plaza
New York City

May 17, 1939.

I, the undersigned, do hereby certify that at a regular meeting of the Board of Directors of the American Society of Composers, Authors and Publishers, a voluntary association organized and existing under the laws of the State of New York, held on January 26th, 1939, a quorum being present, the following resolutions were adopted and that the said resolutions have been entered upon the regular Minute Book of the said Society and in accordance with the Articles of Association which are now in full force and effect.

Resolved, that Gene Buck, as President of this Society, be and he hereby is authorized and empowered to institute in any court in the United States for and on behalf of this Society any and all actions or proceedings upon any cause of action, for or upon which this Society may maintain such an action or proceeding, including all actions or proceedings to recover damages and/or profits arising out of and/or to enjoin the infringement by means of public performances for profit of musical compositions composed or copyrighted by members of this Society, and any and all actions or proceedings to enforce any and all contracts between this Society and third parties and to collect royalties or any other amounts that may be due to this Society

thereunder, and he hereby is authorized and empowered to verify for and on behalf of this Society any and all petitions, complaints and other process where such verifications are necessary or proper with reference to all such actions or causes of action.

Further Resolved, that this Board of Directors does hereby ratify, confirm and approve the institution, commencement, and prosecution of all actions, suits and proceedings now pending in any court in the United States on behalf of this Society wherever such actions, suits and proceedings have been instituted in the name of "Gene Buck, as President of the American Society of Composers, Authors and Publishers" for whatsoever cause.

In Witness Whereof I have hereunto set my hand as Secretary, and affixed the seal of the Society this 17th day of May, 1939.

George W. Meyer, Secretary.

Attest: ——, President.

[fol. 1615a] PLAINTIFFS' DEPOSITION EXHIBIT 15-M.

AGREEMENT

BETWEEN

THE PERFORMING RIGHT SOCIETY LIMITED

AND

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

January 6th, 1933.

[fol. 1616] AGREEMENT made the sixth day of April, 1933, between

THE PERFORMING RIGHT SOCIETY LIMITED, of Chatham House, 13 George Street, London, England, hereinafter designated as "PRS", and

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, of 1501 Broadway, New York, N. Y., United States of America, hereinafter designated as "ASCAP", as follows:

I

PRS hereby grants to ASCAP the exclusive right to license in the United States of America, Alaska, Porto Rico,

Philippine Islands, Virgin Islands, Hawaii, and its Colonies and Possessions, the non-dramatic public performance for profit, of musical works the performing rights of which are now or may during the term hereof be vested in or controlled by PRS. Symphonic and similar concert works are, however, expressly excluded, and it is understood that PRS or its members concerned are at liberty to collect independently fees for the performance of such works in the beforementioned territory.

[fol. 1617]

II

ASCAP hereby grants to PRS the exclusive right to license in Great Britain, Northern Ireland, selfgoverning British Dominions (exclusive of Canada, Newfoundland, Australia and New Zealand) and Colonies, Dependencies, Protectorates and mandated territories, the non-dramatic public performances of musical works the performing rights of which are now or may during the term hereof be vested in or controlled by ASCAP.

III

The terms "public performance for profit" and "public performance" hereinbefore used, shall be construed to mean vocal, instrumental and/or mechanical performances and representations in any manner or by any method whatsoever, including performance by radio broadcasting stations, by telephony and/or "Wired Wireless"; and/or reproductions of non-dramatic performances by means of devices for reproducing sound recorded in synchronisation or timed relation with motion pictures, provided however, that in the case of dramatic-musical works, musical plays, operas, operettas, musical comedies and works of a similar character, such performances shall be limited to the separate numbers, fragments or arrangements, melodies or selections forming a part or parts thereof, and shall not [fol. 1618] include the right of public performance of such works in their entirety or of any part thereof as stage plays, or as a part of stage plays, all of which rights, including all other rights not in this agreement expressly enumerated, are hereby reserved and retained to their members by ASCAP and PRS respectively, and by the respective composers, authors and publishers of such musical works.

IV

Each of the parties hereto agrees to require of and collect from its licensees, for the public performance of the musical works referred to in Clauses I and II hereof, payment therefor upon the same basis and in the same manner as is now in force and effect between each Society and its respective licensees with respect to the musical works referred to in Clauses I and II hereof, and that each Society will account for and pay over to the other such monies in respect of the public performance of such musical works as is hereinafter provided.

V

Each of the parties hereto shall account to the other for each calendar year during the term hereof on or before each 30th September succeeding the close thereof.

[fol. 1619]

VI

A. The net sum allocable by PRS in respect of the musical wo-ks referred to in Clause II hereof shall be ascertained in accordance with the present practice of PRS or any modification thereof which may be made from time to time, and shall be divided and paid in the following manner:

B. One-half of the sum in respect of each work shall be the share of the writers thereof, (composers and authors). Such share shall be divided between the writers, and the shares of such writers as are members of ASCAP shall be paid by PRS to ASCAP is accordance with the present practice of PRS. The remaining half of the sum in respect of each work shall be the share of the publisher thereof and shall be paid to the publisher member of PRS who represents in Great Britain the American publisher of the work. In the case of ASCAP publisher-members who are not so represented the share shall be paid to ASCAP for credit of such ASCAP publishers. The payments by PRS under this agreement shall be accompanied by a list of the works performed according to the returns received from PRS licensees, showing the amount allocated in respect of each work, and shall be subject to deduction therefrom of such [fol. 1620] amount as may be assessed against them on account of taxes payable to the Government.

VII

A. ASCAP agrees during the term hereof to use its best endeavors to gather daily data covering completely the musical programs as rendered by the two principal broadcasting networks in the U. S. A. (National Broadcasting Company and Columbia Broadcasting System respectively, or their successors), together with similar data regarding the musical programs rendered by a selected number of independent broadcasting stations not affiliated with either of said networks but located in various sections throughout the entire country.

B. From such program data, as rendered by the said networks and stations, ASCAP undertakes to prepare annually and furnish to PRS a summary which shall show the total number of broadcast performances of works identifiable in such programs as from the entire repertoire of PRS.

C. Identifiable copyrighted works listed on the programs gathered in accordance with paragraph A hereof shall be given one point credit for each performance. Points in respect of works (other than those referred to in sub-paragraph E hereof) shall be credited to the respective ac- [fol. 1621] counts of:

1. The repertoire of ASCAP.

2. The repertoire of each foreign performing right Society with which ASCAP may have reciprocal relations, or act for it as agent.

3. The repertoire of each foreign country with which ASCAP may have no relationship.

4. Works not identifiable with any of the above mentioned repertoires.

5. Works of United States origin copyrights of which are owned by non-members of ASCAP.

Points in respect of works referred to in Paragraph E hereof shall be divided equally between the repertoires of ASCAP and PRS.

D. From the total number of points so credited under headings one (1.) and two (2.) above there shall be computed the proportion thereof contributed by the repertoire of PRS, and the amount due to PRS from ASCAP each

year during the term hereof shall be exactly in proportion as the number of its points in relation to the total number of points credited under headings one (1.) and two (2.) above bears to the distributable net revenue of ASCAP during the same period.

E. Where a member of PRS has assigned the United States copyright in a work to a publisher member of ASCAP without any reservation of an interest in performing rights no credit shall be entered to the account of the publisher member of PRS in respect of performances [fol. 1622] thereof but in such case and under all circumstances the share of one half for writer members of PRS (composers, authors and arrangers) in respect of such works, when identifiable, shall be paid to PRS for credit of such writer members. If however the assignment of copyright is subject to the reservation by the member of PRS of any interest in the performing rights in the work, in such event ASCAP shall credit performances thereof to the PRS repertoire exclusively and PRS shall after making its final analysis of the summary and data to be furnished by ASCAP under sub-paragraphs A and B hereof, remit to ASCAP for the account of its publisher member such share in the fees credited to each such work as shall be due to him, accompanied by a detailed statement of all such items.

F. PRS undertakes within sixty days from the execution of this agreement to furnish to ASCAP a complete list, and subsequently during the term hereof to make thereto such additions as may be from time to time necessary, showing the title, name of composer and/or author and publisher of each work the United States copyright of which has been by a member of PRS assigned to a member of ASCAP subject to the reservation of an interest in the performing rights in the work.

[fol. 1623] G. If at any time during the term of this agreement ASCAP shall be unable to secure such daily data as is described in Paragraph A hereof, it shall promptly notify PRS to that effect whereupon at its option PRS may terminate this agreement at the termination of the then current year, and at its option for such year shall be paid either in accordance with the formula provided in sub-paragraphs C and D hereof to the extent that such data

has been obtained, or the sum of $25,000.00 in full settlement.

H. On or before the 30th day of September following the close of each year of the term hereof ASCAP shall furnish to PRS the statements provided for in sub-paragraph B hereof, accompanied by remittance of such amount as shall under the formula (provided in sub-paragraphs C and D hereof) be shown as due to PRS after deducting therefrom only such amount as may be assessed against it on account of taxes payable to the Federal, State or Municipal Government.

I. Supplemental to and in support of the data prepared in accordance with sub-paragraphs A, B and C hereof, and the statements in accordance with sub-paragraph H to be furnished by ASCAP to PRS, there shall also be despatched at the same time all the original programs from which the [fol. 1624] data contained in the statements was compiled. PRS shall be entitled to retain possession of such original programs for a period of not less than sixty days from the receipt thereof, and upon request of ASCAP shall then forward the same complete as received, carrying charges prepaid, as may be directed by ASCAP.

J. Inasmuch as ASCAP will receive such original programs in strict confidence from the sources, and will covenant that no disclosure of the contents thereof shall be made to any copyright owner whose works are not embraced under the licenses issued by ASCAP, it is of the essence of this agreement, and PRS agrees, that it will not divulge or expose the contents of such original programs to any but its members and then permit only a personal inspection, and that under no circumstances will it permit any copies thereof or of any of the particulars thereof to be made and removed from its files and premises.

VIII

Each of the parties hereto grants to the other the rights and licenses set forth in Clauses I and II hereof, subject always, however, to any right of the author, composer or publisher of any musical work to remove any musical work from the repertory of such respective party and/or to revoke, modify or limit any performing right which he or it

may have granted to such party, to the extent to which any [fol. 1625] such composer, author or publisher may have the right so to do, and in the event of any such removal, revocation, modification or limitation each of the parties hereto shall give to the other immediate notice thereof.

IX

This contract is declared to be personal with respect to each of the parties hereto and neither party shall assign the same or any rights therein granted or arising therefrom, without the written consent of the other party first had and obtained, except insofar as each party shall have the right to issue licenses for the giving of public performances of the musical works contained in the repertoire of the other party. Nor shall this contract be deemed to be assignable by operation of law, devolution or legal proceedings.

X

Each of the parties hereto hereby irrevocably during the term of this contract authorizes, empowers and vests in the other party the right, in the name of the granter or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work coming within the purview of this agreement to institute and prosecute actions to retain and recover damages for the infringement [fol. 1626] or violation of the rights granted to the grantee under this contract, and to release, compromise or refer to arbitration, in the grantee's discretion, any and all actions in the same manner and to the same extent and to all intents and purposes as the grantor and/or the owners of the copyright of such musical work might or could do. And each of the parties hereto hereby makes, constitutes and appoints the other party its true and lawful attorney irrevocably during the term of this agreement, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work to do all acts, take all proceedings and execute, acknowledge and deliver any and all instruments and documents that may be necessary, proper or expedient and recover damages, under the copyright of such musical works or otherwise, for the infringement or other violation of the rights hereby granted in such works, and to release, com-

promise and refer to arbitration any such proceedings or actions or to make any other dispositions of differences in relation to the premises.

[fol. 1627]

XI

Each party hereto shall supply the other as far as possible with any particulars relating to the musical works in their respective repertoires which may be necessary in their mutual interests.

XII

Each of the parties hereto agrees, during the term hereof, to execute, acknowledge and deliver to the other party such assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient by such party to enable it to exercise and enforce its own name, or otherwise, all the rights, remedies and privileges granted to it under this contract.

XIII

Each of the parties hereto agrees that it will not accept into membership any composer, author or publisher, who is a member of the other Society at the time when this agreement is made or who shall become a member of the other Society during the term hereof, and who has granted as to ASCAP his rights also for the territory named in Clause II hereof, and as to PRS the territory named in Clause I hereof, unless the other Society shall consent thereto in writing. That it will not represent in any manner during the [fol. 1628] term hereof, any other organization or Society resident in the said territories respectively having purposes or objects similar to those of either of the parties hereto.

XIV

Each of the parties hereto shall have the right to appoint in writing a representative, to take up in its behalf and examine into, during customary business hours, any matter arising in respect of the relations covered by this agreement.

XV

This agreement shall be effective as of the 1st ——, 1933, and shall continue indefinitely thereafter subject to the right of either party by written notice served upon the other

before 30th September of any year to terminate the agreement as at the end of the then current year. In the event of any such termination by either party hereto, the parties shall account each to the other in full and according to the terms hereof covering all operations for that year.

[fol. 1629] In Witness Whereof the parties hereto have caused these presents to be signed by their respective duly authorized officers and their respective seals hereunto affixed the day and year first above written.

American Society of Composers, Authors and Publishers, by Gene Buck, President.

Attest: Joseph Young, Secretary.

The Performing Right Society Limited, by Leslie A. Booey, John Abbott, Directors; C. H. Hatchman, Secretary.

[fol. 1630] PLAINTIFFS' DEPOSITION EXHIBITS 15-A TO 15-T, EXCLUSIVE OF 15-M

These are copies of contracts between the Society and the societies of the following countries:

Yugoslavia	France
Switzerland	Finland
Sweden	Denmark
Spain	Czechoslovakia
Rumania	Bulgaria
Portugal	Belgium
Norway	Brazil
Italy	Austria
Hungary	Argentina
Germany	

and the terms and provisions of these contracts are substantially the same as set out in plaintiffs' Exhibit 15-M.

[fol. 1631] PLAINTIFFS' DEPOSITION EXHIBIT 16

List of Broadcasting Stations Operated by Non-Commercial Establishments

Licensed to Perform Music Copyrighted by Members of American Society of Composers, Authors and Publishers

Call		City
KFGQ	Boone Biblical College	Boone, Iowa
KFKU	University of Kansas	Lawrence, Kansas
KOAC	State Agricultural College	Corvallis, Ore.
KPPC	Pasadena Presbyterian Church	Pasadena, Calif.
KSAC	State Agricultural College	Manhattan, Kansas
KTW	First Presbyterian Church	Seattle, Wash.
KUSD	University of South Dakota	Vermilion, S. D.
KWLC	Luther College	Decorah, Iowa.
WBAA	Purdue University	Lafayette, Ind.
WBBR	Peoples Pulpit Association	Brooklyn, N. Y.
WCAD	St. Lawrence University	Canton, N. Y.
WCAL	St. Olaf College	Northfield, Minn.
WCAT	State School of Mines	Rapid City, S. D.
WHA	University of Wisconsin	Madison, Wisc.
WILL	University of Illinois	Urbana, Ill.
WKAR	Michigan State College	E. Lansing, Mich.
WLB	University of Minnesota	Minneapolis, Minn.
WLBL	State of Wisconsin Dept. of Agriculture	Stevens Point, Wis.
WMBI	Moody Bible Institute	Chicago, Ill.
WNAD	University of Oklahoma	Norman, Okla.
WNYC	City of New York	New York City
WOI	State College of Agriculture	Ames, Iowa
WOSU	Ohio State University	Columbus, Ohio
WSAJ	Grove City College	Grove City, Pa.
WSUI	University of Iowa	Iowa City, Iowa
WSVS	Seneca Vocational High School	Buffalo, N. Y.
WCNY	The Board of Education of the City of N. Y.	New York, N. Y.
KFDY	South Dakota State College of Agriculture and Mechanic Arts	Brookings, S. D.

[fol. 1632] PLAINTIFFS' DEPOSITION EXHIBITS 17-A TO 17-P.

These exhibits consist of 16 contracts of the Society with various Florida Radio Stations, one of which is the contract with Isle of Dreams Station at Miami, Florida, copied as Exhibit "F" to the Bill of Complaint. Except as noted below these contracts are all identical in form with Exhibit "F" of the Bill of Complaint.

17-B—The contract with Municipal Broadcasting Station WJAX, owned by the city of Jacksonville, differs from Exhibit "F" to the Bill of Complaint in that this municipal station is not required to pay any sustaining fee.

(Here follows 3 Photolithographs, side folios 1633, 1634, 1634-a)

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COLUMBUS 5-7468

PLAINTIFFS' DEPOSTION EXHIBIT 17-L

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

THIRTY ROCKEFELLER PLAZA

NEW YORK CITY

January 15, 1936

Tampa Publishing Company
Radio Station W.D.A.E.
Tampa, Florida

Gentlemen:

It is mutually agreed that the certain license agreement between us, dated October 8, 1932, effective October 1, 1932, is hereby extended on the same terms and conditions as therein contained, from the date of its present expiration, up to and including December 31, 1940; except that Article 7 of such license is hereby amended so as to read:

[illegible] of musical numbers, the performing rights of which are licensed under this agreement, then the Licensee shall have the right to terminate this license upon three days' notice by registered mail, addressed to the Society, and this right shall be the sole and exclusive remedy.

The Society reserves the right, at any time, and from time to time, to withdraw from the operation of this license, any musical number or numbers. Upon any such withdrawal the Licensee may immediately terminate this license by giving written notice of its election so to do to the Society.

In the event of any such termination of this License, pursuant to Articles 5 and/or 7 hereof, the Society shall refund to the Licensee pro rata license fees, if any, paid for a period beyond the date of such termination."

Very truly yours,
AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS
By Herman Finkelstein

ACCEPTED:
Radio Station W. D.A.E.
By [illegible]
Title
Dated January 15, 1936

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...ATTER'S BROADCASTING LICENSE FOR
NEWSPAPER-OWNED STATION

a: FLA.-5
Call: W.D.A.E.

MEMORANDUM OF AGREEMENT

between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, (hereinafter styled "SOCIETY"), and

TAMPA PUBLISHING COMPANY

(hereinafter styled "LICENSEE"), conducting a radio broadcasting station 51% or more owned and operated by a daily newspaper, as follows:

1. SOCIETY grants to LICENSEE, and LICENSEE accepts for a period of three (3) years from October 1, 1932, a license to publicly perform by broadcasting from Radio Station W. D. A. E. located at Tampa, Florida

non-dramatic renditions of the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights.

2. The within license does not extend to or include the public performance by broadcasting or otherwise of any rendition or performance of any opera, operetta, musical comedy, play or like production, as such, in whole or in part.

3. Nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions coming within the purview of the within license performed pursuant hereto, or as authorizing any receiver of any such broadcast rendition to publicly perform or reproduce the same for profit by any means, method or process whatsoever.

4. The within license is limited to the separate musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, or of which SOCIETY shall have the right to license the performing rights hereinbefore granted, in programs rendered at or from said radio station, or at or from any other place duly licensed by SOCIETY to perform such works (unless the performance originates at a theatre which SOCIETY does not customarily license), from which place rendition of such works

It is understood, however, that LICENSEE shall be guilty of a breach under this Article (No. 4) only in the event that it continues to broadcast a program rendered at such places other than the said station after LICENSEE shall have received notice from SOCIETY that such other places are not licensed by SOCIETY to perform.

5. The within license is granted upon the express condition:

(a) That should the power input as at present authorized by the Federal Radio Commission for the said station (1,000 watts) be changed during the term hereof, the basic fee as provided in the first paragraph of Article No. 8 hereof shall be adjusted.

(b) That in event the license of said station from the Federal Radio Commission is terminated, cancelled, revoked or suspended, or in the event that radio broadcasting is supported from other sources or operated by other than private interests, than as now prevails, LICENSEE shall promptly notify SOCIETY thereof, and either SOCIETY or LICENSEE may then terminate this agreement; and in such event, LICENSEE shall be under no further liability to SOCIETY for the payment of any license fee hereunder; provided, however, that if the license of said station to broadcast is suspended for a period less than the term of the within license, then in such event LICENSEE shall be relieved from payment of the license fee hereunder only during such period of suspension.

6. LICENSEE agrees upon request to furnish to SOCIETY during the term of the within license a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY or of which SOCIETY shall have the right to license the performing rights hereinbefore granted) broadcast from or through the said station, showing the title of each composition and the composer and/or author thereof; provided that LICENSEE shall not be obligated under this Article No. 6 to furnish such a list covering a period or periods in the aggregate during any one calendar year in excess of three months. The lists so furnished by LICENSEE to SOCIETY shall be strictly confidential and SOCIETY covenants that it will make no disclosure thereof or of the contents thereof.

7. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially its present catalogue of compositions heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY. SOCIETY reserves the right, however, at any time and from time to time to withdraw from its repertory and from operation of the within license any musical composition or compositions; and upon any such withdrawal, LICENSEE may immediately cancel the within agreement by giving written notice to SOCIETY of its election so to do.

In the event of any such cancellation by LICENSEE, or in the event of a termination of this agreement and the within license pursuant to the provisions of Article No. 5 hereof, or otherwise, SOCIETY shall refund to LICENSEE pro rata license fees, if any, paid for a period beyond the date of such cancellation or termination.

8. Under the terms and conditions hereinabove set forth, LICENSEE agrees to pay to SOCIETY, as compensation for the within license, the sum of FIVE HUNDRED and 00/100 . . . . . Dollars ($ 500.00) per annum, payable in equal monthly installments on or before the 10th of each month during the term hereof, plus, during each year of the term hereof, a sum equal to three percent (3%) of the gross amount of receipts of Licensee from the sale of broadcasting facilities for programs in which music copyrighted or composed by members of Society is rendered, until such receipts shall have reached the total sum of TWENTY-FIVE THOUSAND and 00/100 . . . . . ($25,000.00) Dollars; and five percent (5%) of all such receipts in excess of the foregoing amount.

It is, however, understood and agreed that in no event shall the total aggregate sum payable by Licensee to Society during any single year of the term hereof be less than TWO THOUSAND and 00/100 . . . . . ($2,000.) Dollars, and the deficit, if any, of such total aggregate sum in respect of any single year to the last stated amount shall be paid within thirty days of the receipt by Licensee from Society of a bill covering such deficit.

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Provided, however, that gross receipts of the Licensee in respect of all commercial ("spot") announcements either interpolated between or preceding or following programs containing music copyrighted or composed by members of Society shall be subject to percentage payments as aforesaid. Public service announcements such as time announcements, weather and market reports, etc., shall be exempt from such percentage payments, as shall also be broadcasts of political conventions, civic gatherings, parades, public functions and sports events, such as football and baseball games, as to music played thereat by bands attendant at such events. Nor shall any percentages be payable to Society in respect of service charges connected with the transmission of a non-commercial program from a remote control point to the studio of Licensee.

LICENSEE shall render monthly statements to SOCIETY on or before the 10th of each month covering the period of the preceding calendar month on forms supplied gratis by SOCIETY, and shall include in such statement all gross receipts, without exception, during the said month from the sale of the broadcasting facilities ("time on the air") of the said station for programs wherein any music copyrighted or composed by members of SOCIETY shall have been included. Which said statement shall be rendered under oath and accompanied by the remittance due SOCIETY under the terms hereof. Any such statement may also include a deduction by or credit to the LICENSEE for any amount reported by it as received during a prior month from the sale of its broadcasting facilities but which it has been compelled to refund as a "time discount." In the event that any such item shall be collected after it has been credited or deducted as aforesaid, it shall then be included again in the net receipts of LICENSEE on the monthly statement next succeeding the date of the actual collection.

9. SOCIETY shall have the right, by its duly authorized representative, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any such monthly statement of accounting as may be rendered pursuant hereto; provided that such examination does not interfere with the usual conduct of business by LICENSEE.

It is understood and agreed that SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

10. Upon any breach or default of any terms herein contained, SOCIETY may give LICENSEE ten (10) days notice in writing to repair or correct such breach or default and in the event that such breach or default has not been repaired or corrected within said ten (10) days, SOCIETY may then forthwith cancel said license.

11. SOCIETY agrees to indemnify, save and hold LICENSEE harmless, and defend LICENSEE from and against any claim, demands or suits that may be made or brought against the LICENSEE with respect to rendition given during the term hereof in accordance with this license of musical compositions contained in SOCIETY'S repertoire heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove [illegible] SOCIETY written notice thereof and simultaneously therewith deliver complete charge of the defense of any action or proceeding in which any such notice, process, paper or pleading is served. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and properly to prosecute any appeals taken therein.

In the event of the service upon LICENSEE of any notice, process, paper or pleading, under which a claim, demand or action is made, or begun against LICENSEE on account of the rendition of any musical compositions contained in the SOCIETY'S repertory but NOT heretofore or hereafter during the term hereof copyrighted or composed by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein.

12. In the event of any change in the ownership or control of the said station whereby it becomes less than 51% directly owned and controlled by the LICENSEE, SOCIETY may, at its option, cancel and terminate this license upon 30 days' written notice.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

IN WITNESS WHEREOF, this agreement has been duly subscribed by SOCIETY and LICENSEE this 8th day of October, 42

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By [signature]

TAMPA PUBLISHING COMPANY
Licensee.

By D B McKay

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335] PLAINTIFFS' DEPOSITION EXHIBIT 18

Florida

Radio Contracts in Effect as of 6/9/37

Date of Contract	Licensee	Call	Location	Annual Sustaining Fee
9/20/32	Isle of Dreams Broadcasting Corp...	WIOD	Miami Beach	1,000.00
10/ 3/32	University of Florida.....	WRUF	Gainesville	—
9/16/32	Orlando Broadcasting Co. Inc.....	WDBO	Orlando	600.00
9/20/32	Miami Broadcasting Company.....	WQAM	Miami	1,000.00
10/ 8/32	Tampa Publishing Company.....	WDAE	Tampa	500.00
11/18/32	Clearwater Chamber of Commerce and St. Petersburg Chamber of Commerce.....	WFLA WSUN	Clearwater	—
4/20/33	Pensacola Broadcasting Co. Inc....	WCOA	Pensacola	400.00
8/ 8/34	Florida Broadcasting Company....	WMBR	Jacksonville	500.00
8/27/36	W. Wright Esch.....	WMFJ	Daytona Beach	100.00
8/20/35	Florida Capitol Broadcasters, Inc...	WTAL	Tallahassee	100.00
4/ 7/36	Mr. J. P. Marchant.....	WLAK	Lakeland	100.00
6/24/36	Haselwood, Incorporated.....	WJNO	W. Palm Beach	100.00
2/24/37	Fountain of Youth Properties, Inc...	WFOY	St. Augustine	100.00

336] PLAINTIFFS' DEPOSITION EXHIBIT 19

Florida

Radio Contracts in Effect as of 6/12/39

Date of Contract	Licensee	Call	Location	Annual Sustaining Fee
9/20/32	Isle of Dreams Broadcasting Corp..	WIOD	Miami Beach	1,000.00
10/ 3/32	University of Florida.....	WRUF	Gainesville	—
9/16/32	Orlando Broadcasting Co. Inc.....	WDBO	Orlando	600.00
9/20/32	Miami Broadcasting Company.....	WQAM	Miami	1,000.00
10/ 8/32	Tampa Publishing Company.....	WDAE	Tampa	500.00
11/18/32	St. Petersburg Chamber of Commerce.....	WSUN	St. Petersburg	—
6/30/38	Florida West Coast Broadcasting Co. Inc.....	WFLA	Tampa	500.00
4/20,33	Pensacola Broadcasting Co. Inc.....	WCOA	Pensacola	400.00
8/ 8/34	Florida Broadcasting Company....	WMBR	Jacksonville	500.00
4/ 7/36	Mr. J. P. Marchant.....	WLAK	Lakeland	100.00
6/24/36	WJNO Incorporated.....	WJNO	W. Palm Beach	100.00
2/24/37	Fountain of Youth Properties, Inc...	WFOY	St. Augustine	100.00
9/ 2/38	A. Frank Katzentine.....	WKAT	Miami Beach	300.00
9/ 6/38	City of Jacksonville, Florida.....	WJAX	Jacksonville	—

[fol. 1637]

PLAINTIFFS' DEPOSITION EXHIBIT 20

Florida

Motion Pictures in Effect as of 6/9/37

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-1	9/15/33	R. L. Bailey	Eagle	Blountstown	275	$ 27.50
1-2	5/ 1/36	Earl M. Fain	Bushnell	Bushnell	210	21.00
1-3	12/15/34	J. Carbonell & J. Fleitas	Monroe	Key West	540	54.00
1-4	1/10/34	A. Dobrow	Everglades	Belle Glade	403	40.30
1-6	6/ 5/35	Publix Saenger, Sparks Theatres, Inc	Ritz	Ocala	817	122.55
1-7	5/ 5/34	J. M. McKinney	Princess	Cross City	200	20.00
1-9	12/25/33	W. R. Drollinger	Park	S. Jacksonville	350	35.00
1-10	10/ 1/34	Melbourne Theas., Inc	Van Croix	Melbourne	680	68.00
1-12	8/18/35	Roy Martin	Columbia	Lake City	400	40.00
1-13	12/ 1/30	J. C. & C. F. Hancock	New Lyric	Stuart	600	60.00
1-14	1/ 1/35	Midland Theatres, Inc	Palace	Lakeland	1058	158.70
1-15	1/10/34	A. Dobrow	Prince	Pahokee	270	27.00
1-16	3/10/35	Paramount Enterprises, Inc	Coral Gables	Coral Gables	1102	165.30
1-17	11/26/36	Midland Theatres, Inc	Strand	Lakeland	508	50.80
1-18	10/14/36	Vee Bee Theatres, Inc	Florida	Vero Beach	808	121.20
1-19	11/30/33	Manatee Theatres, Inc	Palmetto (Formerly New)	Palmetto	245	24.50
1-20	1/10/34	Dick Scaglione	Plaza	Ybor City	400	40.00
1-21	5/12/34	Marty Hayes Davis	Dixie Crystal	Clewiston	260	26.00
1-22	7/16/35	Manatee Theatres, Inc	Palace	Bradenton	979	146.85
1-23	1/ 1/35	Paramount Enterprises, Inc	Rex	Miami	997	149.55
1-24	10/ 5/26	Wolfbon-Meyer Theatre Enterprises, Inc	Grand	W. Palm Beach	509	50.90
1-25	10/17/35	Clarence Manleg	Graceville	Graceville	275	27.50
1-26	1/ 1/35	Paramount Enterprises, Inc	Paramount	Miami	1491	223.65
1-27	10/ 6/34	Pinellas Theatres, Inc	Alcazar	St. Petersburg		71.40
1-28	11/25/34	Pinellas Theatres, Inc	La Plaza	St. Petersburg	1700	340.00
1-29	9/27/34	Tallahassee Enterprises, Inc	State	Tallahassee	1075	161.25
1-30	7/ 1/28	Jefferson Co	Jefferson	St. Augustine	799	79.90
1-31	1/ 1/33	Panama Theatre, Inc	Panama	Panama City	543	54.30
1-32	11/ 4/34	Ketspar Theatre, Inc	Florida (Formerly Kettler)	W. Palm Beach	1114	167.10
1-33	6/ 1/35	Hollywood Amusement, Inc	Ritz (Formerly Hollywood)	Hollywood	542	54.20
1-34	10/17/34	E. A. Crane	Ritz	Daytona Beach	400	20.00
1-35	2/24/35	Casino Enterprises, Inc	Ritz	Tampa	825	133.75

1-37	11/26/34	Edw. J. Freiwald	Fry-Wald	Niceville			10.00
1-38	5/ 1/31	Illegible	Dixie	Apalachicola			45.00
1-39	11/26/34	Halifac Theatres, Inc	Empire	Daytona Beach	1271		190.65
1-41	8/28/36	Midland Theatres, Inc	Ritz	Bartow	661		66.10
1-42	11/23/36	Marianna Theatres, Inc	Ritz	Panama City	810		121.50
1-43	7/ 1/28	Orlando Enterprises	Arcade	Ft. Myers	670		67.00
1-44	7/ 1/35	Publix Saenger, Sparks Theatres, Inc	Ritz (Formerly Milane)	Sanford	804		120.60
1-45	11/28/34	Orlando Enterprises, Inc	Grand	Orlando			72.30
1-46	11/24/34	Gulf Theatres, Inc	Roxy (Formerly Nebraska)	Sulphur Springs	479		47.90
1-47	11/24/34	Gulf Theatres, Inc	Garden	Tampa	872		130.80
1-48	4/ 1/28	Publix-Saenger-Sparks Theatres, Inc	Lyric	Gainesville	582		58.20
1-49	9/ 1/35	Roxy Theatre	Roxy	Greenville	177		17.70
1-50	12/25/34	Illegible	Arcade	Jacksonville	1134		170.10
1-51	11/ 1/30	Biltmore Theatres, Inc	Biltmore	Buena Vista (Now Miami)	649		64.90
1-52	1/ 1/35	Duval Amusements, Inc	Palace	Jacksonville	1850		370.00
1-53	8/18/35	Roy Martin	De Soto	Lake City	500		50.00
1-54	11/17/34	C. T. Nelson	Fay	Jasper	200		20.00
[fol. 1638]							
1-55	12/25/34	Palm Beach Theatre, Inc	Paramount	Palm Beach	1241		186.15
1-56	1/ 1/30	The Casino Corp	Casino	Jacksonville	600		60.00
1-57	8/ 1/35	F. O. Mullen	Fox	Fort Meade	300		30.00
1-58	12/19/31	Menendez & Carbrea Co	Palace	Key West	400		40.00
1-59	9/27/34	Ronald Smith	Regent	Crystal River	300		33.00
1-60	2/ 4/28	Ft. Lauderdale Theas., Inc	Sunset	Ft. Lauderdale	757		75.70
1-61	5/ 1/32	Tom Fleming	Alimar	Live Oak	400		40.00
1-62	1/ 1/35	Frank Attanasio	Tamiami	Everglades	196		19.60
1-63	12/ 1/35	United Theatres, Inc	Roxy	Jacksonville	545		54.50
1-64	1/ 1/35	Amusement Corp. of Lake Wales	Scenic	Lake Wales	388		38.80
1-65	12/19/34	W. H. Richardson	Princess (Formerly Mt. Dora)	Mt. Dora	400		40.00
1-66	1/25/35	Publix Saenger Sparks Theatres, Inc	Dixie	Ocala	420		42.00
1-67	1/13/35	Jefferson Co	Orpheum	St. Augustine	417		41.70
1-68	12/25/34	Saratee Theatre Co	Ritz	Sarasota	690		69.00
1-69	1/25/35	Talrog Theatres, Inc	Palace (Formerly Stanley)	W. Palm Beach	736		73.60
1-70	1/25/35	Paramount Enterprises, Inc	Colony	Miami Beach	865		129.75
1-71	1/28/35	Miami Dade Theatres, Inc	Flagler	Miami	876		131.40
1-72	3/ 8/35	Illegible	Kingston	Daytona Beach	400		20.00

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PLAINTIFFS' DEPOSITION EXHIBIT 20—Continued

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-73	2/ 9/35	Saenger Theatres, Inc	Isis	Pensacola	640	$ 64.00
1-74	4/24/35	Mrs. S. G. Owens	Swan (Formerly Ritz)	Madison	205	20.50
1-75	7/ 1/28	Deland Enterprises, Inc	Dreka	Deland	660	66.00
1-76	7/14/35	Edwards Theatre Co	Florida (Formerly Edwards)	Sarasota	1437	215.55
1-77	7/ 1/35	Orlando Amusement, Inc	Rialto	Orlando	829	124.35
1-78	12/16/35	Melbourne Theatres, Inc	Van Croix	Eau Gallie	400	40.00
1-79	10/ 4/34	Publix Saenger Sparks Theatres, Inc	Howell	Palatka	731	73.10
1-80	9/ 1/35	Gulf Theatres, Inc	Franklin	Tampa	865	129.75
1-81	9/ 1/35	Gulf Theatres, Inc	Tampa	Tampa	1554	233.10
1-82	12/21/34	Imperial Co	Imperial	Jacksonville	920	138.00
1-83	7/27/35	James R. Deland	Knights of Pythias Music Hall	Jasper	75	3.75
1-84	9/10/35	Publix-Saenger-Sparks Theatres, Inc	Florida	Gainesville	1160	174.00
1-85	7/ 1/28	Orlando Enterprises	Baby Grand	Winter Park	250	25.00
1-86	1/ 1/35	Ragland Amusement Corp	Hialeah	Hialeah	472	47.20
1-88	10/ 7/34	Beacham Theatre Co	Beacham	Orlando	1068	160.20
1-89	11/ 3/33	Erwin Reiss	Park	St. Petersburg		50.00
1-90	3/ 1/35	Paramount Enterprises, Inc	Olympia	Miami	2115	423.00
1-91	7/16/33	Star Theatre	Star	Arcadia	476	47.60
1-92	11/ 1/36	State Operating Co., Inc	State	Miami	879	131.85
1-93	1/15/36	Lincoln Operating Co	Lincoln	Miami Beach	971	145.65
1-94	1/15/33	Winter Haven Enterprises, Inc	Grand	Winter Haven	454	45.40
1-95	11/ 3/34	Biscayne Beach Theatre, Inc	Biscayne Beach	Miami Beach	1400	210.00
1-96	11/12/35	C. Dunn	Gibson	Chattahoochee	160	16.00
1-97	5/30/36	Little River Theatre Corp	Edison	Miami	1000	150.00
1-98	1/ 1/36	Rosetta Theatre, Inc	Rosetta	Miami	1017	152.55
1-99	1/ 1/37	Harbot Amusement Co	Lakeland	Lakeland	602	60.20
1-100	7/17/35	Mrs. Enid Biggers	Winter Garden	Winter Garden	250	25.00
1-102	11/ 1/28	Clearwater Enterprises Co	Capitol	Clearwater	848	84.80
1-101	3/16/30	Consolidated Theatres, Inc	Capitol	Jacksonville	623	62.30
1-103	2/13/32	Thomas S. Brandon	Magnolia	Titusville	400	40.00
1-104	2/ 1/32	Leesburg Enterprises, Inc	Palace	Leesburg	420	42.00
1-105	7/ 1/27	Pinellas Theatres, Inc	Pheil	St. Petersburg	750	75.00
1-106	10/ 1/34	Winter Haven Enterprises, Inc	Ritz	Winter Haven	972	145.80
1-107	11/11/33	Lackrey Theatres, Inc	Oakley	Lake Worth	529	52.90

[fol. 1639]

1-108	4/21/30	Wm. B. Small	Victoria	New Smyrna	532	53.20	
1-109	1/ 1/36	Earle M. Fain	Municipal	Apopka	400	40.00	
1-110	1/15/37	Paramount Enterprises, Inc.	Sheridan	Miami Beach	1332	199.80	
1-112	12/25/32	Mayfair Operating Corp.	Mayfair	Miami	409	40.90	
1-113	1/21/36	Leesburg Enterprises, Inc	Fain	Leesburg	465	46.50	
1-114	12/25/36	Miami Business Properties, Inc	Lyric	Miami	559	55.90	
1-115	12/25/36	Publix Saenger Sparks Theatres, Inc	Princess	Sanford	763	38.15	
1-116	3/20/37	George E. Porter	Foley	Foley	423	42.30	
1-117	11/10/30	Ritz Theatres, Inc	Ritz	Miami	513	51.30	
1-118	11/11/33	Lyric Operating Corp	Harlem	Miami	743	74.30	
1-119	1/13/35	Ft. Myers Thea. Ent., Inc.	Ritz	Ft. Myers	450	45.00	
1-120	12/23/34	West Palm Beach Theas., Inc	Rialto	W. Palm Beach	576	57.60	
1-121	8/ 1/36	Hensler Brothers	Park	Auburndale	202	20.20	
1-122	7/ 1/36	R. Smith	New	Green Cove Springs	150	15.00	
1-123	3/ 8/33	Crescent Theatre Co	Crescent	Dade City	500	50.00	
1-124	11/24/34	Pinella Theatres, Inc	Florida	St. Petersburg		463.60	
1-126	2/15/36	O. O. Watford	Bonifay	Bonifay	293	29.30	
1-127	1/13/36	Hollywood Amusements, Inc	Arcade	Hollywood	168	1.91	
1-128	1/18/35	Tivoli Theatre, Inc	Tivoli	Miami	925	138.75	
1-129	4/ 1/36	K. W. Hanson	Valerie	Inverness	300	30.00	
1-130	1/ 1/30	Herbert C. Wales	State (Formerly Eustis)	Eustis	499	49.90	
1-131	12/ 6/35	Roxy Theatre Co	Roxy	Lakeland	401	40.10	
1-132	1/14/33	Clearwater Enterprises, Inc	Ritz	Clearwater	572	57.20	
1-134	3/25/25	Delray Theatre Co., Inc	Delray	Delray		20 00	
1-135	1/19/35	Pinellas Theatres, Inc	Ninth Street	St. Petersburg	376	37.60	
1-136	11/ 7/33	R. H. Quellette	Dixie	Brooksville	306	30.60	
1-137	2/ 9/35	Saenger Theatres, Inc	Saenger	Pensacola	2016	403.20	
1-138	7/22/36	Beach Theatres, Inc	Beach	Jacksonville Bch	790	79.00	
1-139	2/15/33	Mina Manassa	Ritz	Starke	270	27.00	
1-140	8/ 1/36	R. F. Coady	Thimble	Lake Placid	150	15.00	
1-142	7/25/36	E. Ortte	Belmont	Pensacola	432	43.20	
1-143	8/30/31	A. J. Outlaw	Crestview	Crestview	214	10.70	
1-144	8/ 1/36	L. V. Desquin	New	Punta Gorda	300	30.00	
1-145	1/13/34	Ft. Lauderdale Theas. Inc	Queen	Ft. Lauderdale	528	52.80	
1-146	11/ 7/32	Panama Theatre, Inc	De Funiak	De Funiak Spgs	420	42.00	
1-147	1/ 1/29	Pinellas Theatres, Inc	Cameo	St. Petersburg	490	49.00	

PLAINTIFFS' DEPOSITION EXHIBIT 20—Continued

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-148	1/ 1/34	Katherine Johnson	Katherine	Monticello	205	$ 20.50
1-149	1/ 1/31	Tallahassee Enterprises, Inc	Ritz	Tallahassee	424	42.40
1-150	8/29/31	Daytona Beach Theas. Inc	Florida	Daytona Beach	888	88.80
1-151	12/24/34	Gulf Theatres, Inc	Park	Tampa	1200	180.00
1-152	1/ 1/37	Illegible	Suwannee	Live Oak	300	30.00
1-153	4/ 1/37	H. Everett	Lincoln	Orlando	600	60.00
1-154	1/23/37	Harlow Merryday	New	Palatka	350	35.00
1-155	4/ 1/37	Pierce Tampa Theas., Inc	Central	Tampa	600	60.00
1-156	3/10/37	Earl M. Fain	Corbett	Wildwood	240	24.00
1-157	9/ 1/32	Charles S. Morrison	New Circle	Sebring	485	48.50
1-158	2/29/36	Gulf Theatres, Inc	Victory	Tampa	1439	215.85
1-159	1/ 6/37	Pinellas Theatres, Inc	Roxy	St. Petersburg	936	140.40
1-160	6/25/35	Capitol Theatre Corp	Capitol	Miami	1220	183.00
1-165	7/20/35	R. Koblegart, Jr	Sunrise	Ft. Pierce	850	127.50
1-166	6/ 4/35	Duval Amusements, Inc	Florida	Jacksonville	2199	439.80
1-167	3/ 1/33	Elbotco Amusement Co. Inc	Granada	St. Cloud	270	27.00
1-168	1/ 1/37	J. L. Roulerson	Della Roba	Lake Wales	125	6.25
1-125	1/ 1/30	W. H. Russell	Gilbert (Formerly Park)	Okeechobee	232	14.60
[fol. 1640]						
1-169	3/ 1/35	Fred J. Case	La Belle	La Belle	198	9.90
1-170	3/18/37	Illegible	Baker	Mac Clenny	243	24.30
1-171	9/ 1/31	Gulf Theatres, Inc	Seminole	Tampa	752	75.20
1-173	4/ 1/37	Dixie Theatre Co	Dixie	W. Palm Beach	425	42.50
1-176	12/24/33	Sunrise Theatre, Inc	Ritz (Formerly Sample)	Fort Pierce	564	56.40
1-178	4/ 2/35	Midland Theatres, Inc	Polk	Lakeland	1790	358.00
1-182	12/ 1/26	Geo. E. Porter, Jr	Temple	Perry	400	40.00
1-185	6/15/33	D. K. Davidson	Strand	Orlando	400	40.00
1-190	4/ 1/31	Shaw Theatre, Inc	Shaw	Quincy	480	48.00
1-194	11/10/29	Casino Enterprises, Inc	Casino	Tampa	626	62.60
1-199	1/ 4/33	M. C. Moore	Arcade	Kissimmee	500	50.00
1-205	10/ 1/31	Tower Theatre, Inc	Tower	Miami	750	75.00
1-206	11/ 1/30	Illegible	Ritz	Jacksonville	685	68.50
1-208	11/ 1/30	Illegible	New Frolic	Jacksonville	700	35.00
1-209	11/ 1/29	B. S. Donnan	Reva (Formerly Manavista)	Chipley	250	25.00

1-215	12/ 1/32	J. J. Gillooly	Capitol	St. Petersburg	780	78.00
1-219	10/ 1/34	N. T. Ragland	Regent	Miami	1040	156.00
1-226	10/24/26	E. J. Sparks Enterprises, Inc	Empress	Jacksonville	538	53.80
1-230	12/25/32	United Theatres, Inc	Roxy	Miami	750	75.00
1-234	4/23/32	Volusia Amusement, Inc	Athens	Deland	659	65.90
1-235	1/ 1/32	Charles Walder	Seventh Avenue	Miami	700	70.00
1-237	8/15/31	Casino Enterprises, Inc	Royal	Tampa	500	50.00
1-240	10/29/32	Grove Theatre Inc	Coconut Grove	Miami	1146	114.60
1-245	1/ 1/34	Crescent City Amusmt. Co	V. I. A	Crescent City	300	20.00
1-246	10/ 1/32	Nick Marlemes	Royal	Tarpon Springs	355	35.50
1-254	7/16/33	Capitol Theatre	Capitol	Plant City	799	79 90
1-255	8/ 2/33	Palace Theatre	Palace	New Smyrna	343	34.30
1-261	9/ 7/33	Riverside Theatre, Inc	Riverside	Jacksonville	800	80.00
1-263	3/15/33	Bay Theatre Co	Bay	Panama City	300	30.00
1-267	9/16/33	Isis Theatre Co	Lyric	Daytona Beach	490	49.00
1-269	10/14/33	Arcspiar Theatre, Inc	Arcade	W. Palm Beach	800	80.00
1-272	1/ 1/30	G. E. Fleming	Imogene	Milton	200	10.00

[fol. 1641]

PLAINTIFFS' DEPOSITION EXHIBIT 21

Florida

Motion Pictures in Effect as of 6/12/39

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-1	9/15/33	R. L. Bailey	Eagle	Blountstown	275	$27.50
1-2	5/ 1/36	Earl M. Fain	Bushnell	Bushnell	210	21.00
1-3	12/15/34	J. Carbonell & J. Fleitas	Monroe	Key West	540	54.00
1-4	1/10/34	A. Dobrow	Everglades	Belle Glade	403	40.30
1-5	5/15/37	Gene Stone	Florida	Haines City	500	50.00
1-6	6/ 5/35	Publix Saenger, Sparks Theatres, Inc	Ritz	Ocala	817	122.55
1-7	5/ 5/34	J. M. McKinney	Princess	Cross City	200	20.00
1-8	1/ 1/39	C. E. Beach	Ritz	Fernandina	300	30.00
1-9	6/ 4/38	Duval Amusements, Inc	San Marco	Jacksonville	496	49.60
1-10	10/ 1/34	Melbourne Theatres, Inc	Van Croix	Melbourne	680	68.00
1-11	6/ 1/37	Mary Hayes Davis	Glades	Moore Haven	165	8.25
1-12	8/18/35	Roy Martin	Columbia	Lake City	400	40.00
1-13	10/ 1/37	Eastern Enterprises	Lyric	Stuart	747	74.70
1-14	1/ 1/35	Midland Theatres, Inc	Palace	Lakeland	1058	158.70
1-15	1/10/34	A. Dobrow	Prince	Pahokee	270	27.00
1-16	3/10/35	Paramount Enterprises, Inc	Coral Gables	Coral Gables	1102	165.30
1-17	11/26/36	Midland Theatres, Inc	Strand	Lakeland	508	50.80
1-18	10/14/36	Vee Bee Theatres, Inc	Florida	Vero Beach	808	121.20
1-19	11/30/33	Manatee Theatres, Inc	Palmetto (Formerly New)	Palmetto	245	24.50
1-20	10/10/38	Dick Scaglione	Plaza	Ybor City (Tampa)	400	40.00
1-21	5/12/34	Mary Hayes Davis	Dixie Crystal	Clewiston	260	26.00
1-22	7/16/35	Manatee Theatres, Inc	Palace	Bradenton	979	146.85
1-23	1/ 1/35	Paramount Enterprises, Inc	Rex	Miami	997	149.55
1-24	10/ 5/26	Wolfson-Meyer Theatre Enterprises, Inc	Grand	W. Palm Beach	509	50.90
1-25	1/ 1/39	J. J. Jones	Graceville	Graceville	250	25.00
1-26	1/ 1/35	Paramount Enterprises, Inc	Paramount	Miami	1491	223.65
1-27	1/ 1/39	H. A. Dale	Lake	Lake Butler	190	19.00
1-27	10/ 6/34	Pinellas Theatres, Inc	Alcazar	St. Petersburg	....	71.40
1-28	11/25/34	Pinellas Theatres, Inc	La Plaza	St. Petersburg	1700	340.00
1-29	9/27/34	Tallahassee Enterprises, Inc	State	Tallahassee	1075	161.25
1-30	7/ 1/28	Jefferson Co	Jefferson	St. Augustine	799	79.90

1-31	1/ 1/33	Panama Theatre Inc	Panama	Panama City	543	54.30
1-32	11/ 4/34	Ketspar Theatre, Inc	Florida (Formerly Kettler)	W. Palm Beach	1114	167.10
1-33	6/ 1/35	Hollywood Amusements, Inc	Ritz (Formerly Hollywood)	Hollywood	542	54.20
1-34	10/17/34	E. A. Crane	Ritz	Daytona Beach	400	20.00
1-35	2/24/35	Casino Enterprises, Inc	Ritz	Tampa	825	123.75
1-36	7/ 1/29	Seminole Circuit Theatres, Inc	Seminole	Homestead	350	35.00
1-37	11/26/34	Edw. J. Freiwald	Fry-Wald	Nice Ville	....	10.00
1-38	5/ 1/31	Illegible	Dixie	Apalachicola	....	45.00
1-39	11/26/34	Halifax Theatres, Inc	Empire	Daytona Beach	1271	190.65
1-41	8/28/36	Midland Theatres, Inc	Ritz	Bartow	661	66.10
1-42	11/23/36	Marianna Theatres, Inc	Ritz	Panama City	810	121.50
1-43	7/ 1/28	Orlando Enterprises	Arcade	Ft. Myers	670	67.00
1-44	7/ 1/35	Publix Saenger Sparks Theatres, Inc	Ritz (Formerly Milane)	Sanford	804	120.60
1-45	11/28/34	Orlando Enterprises, Inc	Grand	Orlando	.....	72.30
1-46	11/24/34	Gulf Theatres, Inc	Roxy (Formerly Nebraska)	Sulphur Springs	479	47.90
1-47	11/24/34	Gulf Theatres, Inc	Garden	Tampa	872	130.80
1-48	4/ 1/28	Publix-Saenger-Sparks Theatres, Inc	Lyric	Gainesville	582	58.20
1-49	9/ 1/35	Roxy Theatre	Roxy Theatre	Greenville	177	17.70
1-50	12/25/34	Illegible	Arcade	Jacksonville	1134	170.10
1-51	11/ 1/30	Biltmore Theatre, Inc	Biltmore	Buena Vista (Now Miami)	649	64.90
1-52	7/ 1/38	Duval Amusements, Inc	Palace	Jacksonville	1461	219.15
1-53	8/18/35	Roy Martin	De Soto	Lake City	500	50.00
[fol. 1642]						
1-54	5/28/38	J. M. McKinney	Fay	Jasper	260	26.00
1-55	12/25/34	Palm Beach Theatre, Inc	Paramount	Palm Beach	1241	186.15
1-56	1/ 1/30	The Casino Corp	Casino	Jacksonville	600	60.00
1-57	8/ 1/35	F. O. Mullen	Fox	Fort Mead	300	30.00
1-58	12/19/31	Menendes & Carbrea Co	Palace	Key West	400	40.00
1-59	9/27/34	Ronald Smith	Regent	Crystal River	330	33.00
1-60	2/ 4/28	Ft. Lauderdale Theas. Inc	Sunset	Ft. Lauderdale	757	75.70
1-61	5/ 1/32	Tom Fleming	Alimar	Live Oak	400	40.00
1-62	11/ 1/37	G. K. Stanford	Tamiami	Everglades	175	17.50
1-63	12/ 1/35	United Theatres, Inc	Roxy	Jacksonville	545	54.50
1-64	1/ 1/35	Amusement Corp. of Lake Wales	Scenic	Lake Wales	388	38.80
1-65	12/19/34	W. H. Richardson	Princess (Formerly Mt. Dora)	Mt. Dora	400	40.00
1-66	1/25/35	Publix Saenger Sparks Theatres, Inc	Dixie	Ocala	420	42.00
1-67	1/13/35	Jefferson Co	Orpheum	St. Augustine	417	41.70

PLAINTIFFS' DEPOSITION EXHIBIT 21—Continued

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-63	12/25/34	Saratee Theatre Co	Ritz	Sarasota	690	$ 69.00
1-69	1/25/35	Talrog Theatres, Inc	Palace (Formerly Stanley)	W. Palm Beach	736	73.60
1-70	1/25/35	Paramount Enterprises, Inc	Colony	Miami Beach	865	129.75
1-71	1/28/35	Miamidade Theatres, Inc	Flagler	Miami	876	131.40
1-72	3/ 8/35	Illegible	Kingston	Daytona Beach	400	20.00
1-73	2/ 9/35	Saenger Theatres, Inc	Isis	Pensacola	640	64.00
1-74	4/24/35	Mrs. S. G. Owens	Swan (Formerly Ritz)	Madison	205	20.50
1-75	7/ 1/28	Deland Enterprises, Inc	Dreka	Deland	660	66.00
1-76	7/14/35	Edwards Theatre Co	Florida (Formerly Edwards)	Sarasota	1437	215.55
1-77	7/ 1/35	Orlando Amusements, Inc	Rialto	Orlando	829	124.35
1-78	4/ 1/39	Russell Lord	Hazel	Plant City	460	46.00
1-79	10/ 4/34	Publix Saenger Sparks Theatres, Inc	Howell	Palatka	731	73.10
1-80	9/ 1/35	Gulf Theatres, Inc	Franklin	Tampa	865	129.75
1-81	9/ 1/35	Gulf Theatres, Inc	Tampa	Tampa	1554	233.10
1-82	12/21/34	Imperial Co	Imperial	Jacksonville	920	138.00
1-83	12/28/38	Brandon Warren	Mayo	Mayo	140	14.00
1-84	9/10/35	Publix Saenger Sparks Theatres, Inc	Florida	Gainesville	1160	174.00
1-85	7/ 1/28	Orlando Enterprises	Baby Grand	Winter Park	250	25.00
1-86	1/ 1/35	Ragland Amusement Corp	Hialeah	Hialeah	472	47.20
1-88	10/ 7/34	Beacham Theatre Co	Beacham	Orlando	1068	160.20
1-89	11/ 3/33	Erwin Reiss	Park	St. Petersburg	....	50.00
1-90	3/ 1/35	Paramount Enterprises, Inc	Olympia	Miami	2115	423.00
1-91	7/16/33	Star Theatre	Star	Arcadia	476	47.60
1-92	11/ 1/36	State Operating Co. Inc	State	Miami	879	131.85
1-93	1/15/36	Lincoln Operating Corp	Lincoln	Miami Beach	971	145.65
1-94	1/15/33	Winter Haven Enterprises, Inc	Grand	Winter Haven	454	45.40
1-95	11/ 3/34	Biscayne Beach Thea. Inc	Biscayne Beach	Miami Beach	1400	210.00
1-96	11/12/35	C. Dunn	Gibson	Chattahoochee	160	16.00
1-97	10/ 1/38	A. S. Sprigg	Dixie	Clearwater	200	10.00
1-98	1/ 1/36	Rosetta Theatre, Inc	Rosetta	Miami	1017	152.55
1-100	7/17/35	Mrs. Enid Biggers	Winter Garden	Winter Garden	250	25.00
1-101	3/16/30	Consolidated Theas. Inc	Capitol	Jacksonville	623	62.33
1-102	5/ 1/38	Clearwater Enterprises, Inc	Capitol	Clearwater	827	124.05
1-103	2/13/32	Thomas S. Brandon	Magnolia	Titusville	400	40.00

1-104	2/ 1/32	Leesburg Enterprises, Inc	Palace	Leesburg	420	42.00
1-105	7/ 1/27	Pinellas Theatres, Inc	Pheil	St. Petersburg	750	75.00
1-106	10/ 1/34	Winter Haven Enterprises, Inc	Ritz	Winter Haven	972	145.80
1-107	11/11/33	Lackrey Theatres, Inc	Oakley	Lake Worth	529	52.90
1-108	4/21/30	William B. Small	Victoria	New Smyrna	532	53.20
[fol. 1643]						
1-109	1/ 1/36	Earle M. Fain	Municipal	Apopka	400	40.00
1-110	1/15/37	Paramount Enterprises, Inc	Sheridan	Miami Beach	1332	199.80
1-111	6/ 1/38	Mrs. D. L. Morrison	Reliance	Clermont	235	23.50
1-112	12/25/32	Mayfair Operating Corp	Mayfair	Miami	409	40.90
1-113	1/21/36	Leesburg Enterprises, Inc	Fain	Leesburg	465	46.50
1-114	12/25/36	Miami Business Properties Inc	Lyric	Miami	559	55.90
1-115	9/ 1/38	Katherine Johnson	Katherine	Monticello	330	30.00
1-116	3/20/37	George E. Porter	Foley	Foley	423	42.30
1-117	11/10,30	Ritz Theatre, Inc	Ritz	Miami	513	51.30
1-118	11/11/33	Lyric Operating Corp	Harlem	Miami	743	74.30
1-119	1/13/35	Ft. Myers Theatre Ent. Inc	Ritz	Ft. Myers	450	45.00
1-120	12/28/34	West Palm Beach Theas., Inc	Rialto	W. Palm Beach	576	57.60
1-121	8/ 1/36	Hensler Brothers	Park	Auburndale	202	20.20
1-122	5/ 1/38	Gulf Coast Amusmt. Corp	Gulf	Pensacola	450	22.50
1-123	3/ 8/33	Crescent Theatre, Co	Crescent	Dade City	500	50.00
1-124	11/24/34	Pinellas Theas., Inc	Florida	St. Petersburg	....	463.60
1-125	1/ 1/30	W. H. Russell	Gilbert (Formerly Park)	Okeechobee	232	11.60
1-126	8/15/37	Saunders & Sheffield	Bonifay	Bonifay	200	20.00
1-127	1/13/36	Hollywood Amusmts. Inc	Arcade	Hollywood	168	1.91
1-128	1/18/35	Tivoli Theatre, Inc	Tivoli	Miami	925	138.75
1-129	4/ 1/36	K. W. Hanson	Valerie	Inverness	300	30.00
1-130	1/ 1/30	Herbert C. Wales	State (Formerly Eustis)	Eustis	499	49.90
1-131	12/ 6/35	Roxy Theatre Co	Roxy	Lakeland	401	40.10
1-132	7/25/38	Clearwater Enterprises, Inc	Ritz	Clearwater	553	55.30
1-133	6/20/38	A. E. Adams	Port	Port St. Joe	750	75.00
1-134	3/25/25	Delray Theatre Co. Inc	Delray	Delray	....	20.00
1-135	1/19/35	Pinellas Theatres, Inc	Ninth Street	St. Petersburg	376	37.60
1-136	11/ 7/33	R. H. Quellette	Dixie	Brooksville	306	30.60
1-137	2/ 9/35	Saenger Theatres, Inc	Saenger	Pensacola	2016	403.20
1-138	7/22/36	Beach Theatres, Inc	Beach	Jacksonville Bch	790	79.00
1-139	2/15/33	Mina Manassa	Ritz	Starke	270	27.00

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PLAINTIFFS' DEPOSITION EXHIBIT 21—Continued

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-140	8/ 1/36	R. F. Coady	Thimble	Lake Placid	150	$ 15.00
1-141	7/ 1/37	Cocoa Theatres, Inc	State	Cocoa	729	72.90
1-142	7/25/36	Ed. Ortte	Belmont	Pensacola	432	43.20
1-143	3/ 1/39	Mrs. B. A. Outlaw	Crestview	Crestview	290	29.00
1-144	8/ 1/36	L. V. Desquin	New	Punta Gorda	300	30.00
1-145	1/13/34	Ft. Lauderdale Theas. Inc	Queen	Ft. Lauderdale	528	52.80
1-146	7/ 1/38	Miami Theatre, Inc	Miami	Miami	444	44.40
1-147	12/25/37	Hollywood Amusmts., Inc	Florida	Hollywood	795	79.50
1-147	1/ 1/29	Pinellas Theatres, Inc	Cameo	St. Petersburg	490	49.00
1-148	7/ 1/38	The Culver Corp	Edison	Miami	600	60.00
1-149	1/ 1/31	Tallahassee Enterprises, Inc	Ritz	Tallahassee	424	42.40
1-150	8/26/31	Daytona Beach Theas. Inc	Florida	Daytona Beach	888	88.80
1-151	12/24/34	Gulf Theatres, Inc	Park	Tampa	1200	180.00
1-152	1/ 1/37	Illegible	Suwannee	Live Oak	300	30.00
1-153	4/ 1/37	H. Everett	Lincoln	Orlando	600	60.00
1-154	1/23/37	Harlow Merryday	New	Palatka	350	35.00
1-155	4/ 1/37	Pierce Tampa Theas. Inc	Central	Tampa	600	60.00
1-156	3/10/37	Earl M. Fain	Corbett	Wildwood	240	24.00
1-157	9/ 1/32	Chas. S. Morrison	New Circle	Sebring	485	48.50
1-158	1/ 1/39	Garden Operating Co	Surf	Miami Beach	600	60.00
1-159	1/ 6/37	Pinellas Theatres, Inc	Roxy	St. Petersburg	936	140.40
1-160	6/25/35	Capitol Theatre Corp	Capitol	Miami	1220	183.00
1-161	10/ 1/38	Parkway Theatre Corp	Parkway	Miami	600	60.00
1-162	11/ 9/38	A. Dobrow	Golden Nugget	Pahokee	215	21.50
1-163	11/ 4/38	Washington Operating Co	Cameo	Miami Beach	1060	159.00
[fol 1644]						
1-164	11/23/38	Strand Theatre, Inc	Strand	Miami	900	135.00
1-165	7/20/35	R. Koblegart, Jr	Sunrise	Fort Pierce	850	127.50
1-166	6/ 4/35	Duval Amusements, Inc	Florida	Jacksonville	2199	439.80
1-167	3/ 1/33	Elbotco Amusement Co., Inc	Granada	St. Cloud	270	27.00
1-168	1/ 1/37	J. L. Roulerson	Della Roba	Lake Wales	125	6.25
1-169	3/ 1/35	Fred J. Case	La Belle	La Belle	198	9.90
1-170	3/18/37	Illegible	Baker	MacClenny	243	24.30
1-171	9/ 1/31	Gulf Theatres, Inc	Seminole	Tampa	752	75.20

1-172	1/ 1/38	Delray Theatre	Delray	Delray	425	42.50	
1-174	12/ 1/37	C. S. Dunn	Havana	Havana	120	12.00	
1-175	11/20/37	Saenger Theas., Corp.	Rex	Pensacola	651	65.10	
1-177	7/22/37	Lincoln Theatres, Inc.	Lincoln	Gainesville	425	42.50	
1-178	4/ 2/35	Midland Theatres, Inc.	Polk	Lakeland	1790	358.00	
1-179	1/ 1/38	R. W. Edwards	Lincoln	Bradenton	375	18.75	
1-180	1/ 1/38	I. Tendrich	Ace	Coconut Grove	350	35.00	
1-181	1/ 1/38	Martin Theatres	Ritz	Defuniak Springs	400	40.00	
1-182	12/ 1/26	George E. Porter, Jr.	Temple	Perry	400	40.00	
1-183	8/ 1/37	Leesburg Enterprises, Inc.	Lyric	Dunnellon	275	27.50	
1-184	8/ 1/37	Leesburg Enterprises, Inc	Priest	High Springs	300	30.00	
1-185	12/24/38	Central Theatres, Inc.	Matanzas	St. Augustine	1096	164.40	
1-186	1/ 1/38	R. W. Edwards	Rex	Palmetto	250	12.50	
1-187	11/15/37	Fred J. Case	Pompano	Pompano	350	17.50	
1-188	2/28/37	Pinellas Theatres, Inc.	Harlem	St. Petersburg	438	43.80	
1-189	8/ 1/37	Leesburg Enterprises, Inc.	Arcade	Williston	250	25.00	
1-90	4/ 1/31	Shaw Theatre, Inc.	Shaw	Quincy	480	48.00	
1-192	12/25/37	Central Theatres, Inc.	Roxy	Orlando	1084	162.60	
1-193	5/ 6/38	D. G. Bradford	Harlem	Bartow	250	25.00	
1-194	11/10/29	Casino Enterprises, Inc.	Casino	Tampa	626	62.60	
1-195	5/ 1/38	Dixie Theatre Co.	Palace	Ft. Lauderdale	300	30.00	
1-196	11/15/37	Mrs. W. L. King	Grand	Fort Myers	100	5.00	
1-197	12/ 5/38	Lewis H. Cooper	Flagler	Bunnell	440	44.00	
1-198	5/ 1/38	M. A. Yellowhair	Capital	Tallahassee	402	40.20	
1-199	1/ 4/33	M. C. Moore	Arcade	Kissimmee	500	50.00	
1-200	5/20/38	Paramount Enterprises	Cinema Casino	Miami Beach	973	145.95	
1-201	1/ 9/38	Clearwater Enterprises, Inc.	Bellevue	Bellevue	150	3.36	
1-202	1/ 1/39	Gulf Theatre	Gulf	Venice	200	20.00	
1-205	10/ 1/31	Tower Theatre, Inc.	Tower	Miami	750	75.00	
1-206	11/ 1/30	Illegible	Ritz	Jacksonville	685	68.50	
1-207	1/12/39	R. C. Wagoner	Santa Rosa	Jay	300	15.00	
1-208	11/ 1/30	Illegible	New Frolic	Jacksonville	700	35.00	
1-209	11/ 1/29	B. S. Donnan	Reva (Formerly Manivista)	Chipley	250	25.00	
1-210	12/21/38	F. O. Mullen	Park	Avon Park	400	40.00	
1-211	1/15/39	L. V. Desguin	Royal	Wauchula	445	44.50	
1-215	12/ 1/32	J. J. Gillooly	Capitol	St. Petersburg	780	78.00	
1-219	10/ 1/34	N. T. Ragland	Regent	Miami	1040	156.00	

PLAINTIFFS' DEPOSITION EXHIBIT 21—Continued

Acct. No.	Date of Contract	Licensee	Name of Theatre	Location	Seating Capacity	Annual Fee
1-226	10/24/36	E. J. Sparks Enterprises, Inc	Empress	Jacksonville	538	$ 53.80
1-230	12/25/32	United Theatres, Inc	Roxy	Miami	750	75.00
1-234	4/23/32	Volusia Amusements, Inc	Athens	Deland	659	65.90
1-235	1/ 1/32	Charles Walder	Seventh Avenue	Miami	700	70.00
1-237	8/15/31	Casino Enterprises, Inc	Royal	Tampa	500	50.00
1-240	10/29/32	Grove Theatre, Inc	Coconut Grove	Miami	1146	114.60
1-245	1/ 1/34	Crescent City Amusement Co	V. I. A.	Crescent City	300	20.00
1-246	10/ 1/32	Nick Marlemes	Royal	Tarpon Springs	355	35.50
1-254	7/16/33	Capitol Theatre	Capitol	Plant City	799	79.90
1-255	8/ 2/33	Palace Theatre	Palace	New Smyrna	343	34.30
1-261	9/ 7/33	Riverside Theatre, Inc	Riverside	Jacksonville	800	80.00
1-267	9/16/33	Isis Theatre Co	Lyric	Daytona Beach	490	49.00
1-269	10/14/33	Arcspiar Theatres, Inc	Arcade	W. Palm Beach	800	80.00
1-272	3/15/38	Walter Brackin	Imogene	Milton	200	20.00

[fol. 1645]

PLAINTIFFS' DEPOSITION EXHIBIT 22.

Agreement between Society and R. L. Bailey for theatre license. This exhibit is identical in form with Exhibit "G" to the Bill of Complaint.

PLAINTIFFS' DEPOSITION EXHIBIT 23

Florida

Hotels in Effect as of 6/9/37

Acct. No.	Date of Contract	Licensee	Name of Hotel	Location	Annual Fee
3-1	1/18/35	W. N. Urmey	Urmey Hotel	Miami	$50.00
R3-1	12/ 1/36	Thirty One West Adams Street Corporation	Roosevelt Hotel (Formerly Carling)	Jacksonville	286.00
R3-2	1/ 1/35	J. F. Gough	Hotel Alcazar	Miami	220.00
3-2	1/ 1/35	A. L. Harvey & Son	Pheil Hotel	St. Petersburg	30.00
3-3	12/ 1/36	Thirty One West Adams Street Corporation	Roosevelt Hotel (Formerly Carling)	Jacksonville	240.00
3-4	4/ 1/35	Sterling B. Bottome	Vinoy Park Hotel	St. Petersburg	120.00
3-5	4/ 1/35	Roney Investment Co	Roney Plaza Hotel	Miami Beach	300.00
3-6	10/18/34	H. and C. Operating Co	Miami Biltmore Hotel	Coral Gables	450.00
3-7	12/20/34	Oscar Johnson	Hollywood Hotel	Hollywood	150.00
3-8	1/15/35	Mr. J. E. Shuey	Columbus Hotel	Miami	75.00
3-9	1/ 1/35	Walter Chandler	Everglades Hotel	Miami	90.00
3-10	1/ 1/35	Morton Meueher	Floridian Hotel	Miami Beach	100.00
3-11	1/ 1/35	A. B. Chase	Hotel Concord	St. Petersburg	25.00
3-12	12/15/35	Hotel Pancoast Co	Hotel Pancoast	Miami Beach	75.00
3-13	1/ 5/35	Bay Shore Corporation	Nautilus Hotel	Miami Beach	85.00
3-14	12/20/34	Barnes Operating Co	Huntington Hotel	St. Petersburg	100.00
3-15	1/10/35	Belleair Hotel Co	Belleview-Biltmore	Belleair	150.00
3-16	1/ 1/35	R. A. Bary	Floronton Hotel	St. Petersburg	45.00
3-17	1/ 2/35	Don Ce-Sar Beach Hotel	Don Ce-Sar Hotel	Pass-a-Grille	45.00
3-18	1/17/35	Illegible	Hotel Wyoming	Orlando	50.00
3-19	11/ 5/36	Floridan Hotel	Floridan Hotel	Tampa	30.00
3-20	12/ 1/36	Hillsboro Hotel, Inc	Hillsboro Hotel	Tampa	100.00
3-21	1/ 1/35	Hotel Blackstone	Hotel Blackstone	Miami Beach	125.00
3-22	1/31/35	Coleman Holding Co	Jungle Hotel	St. Petersburg	68.00
3-23	1/ 1/35	J. N. Brown	Suwannee Hotel	St. Petersburg	50.00
3-24	1/ 1/35	F. M. Haynes	Princess Issena Hotel	Daytona Beach	90.00
3-25	1/25/35	A. C. Croft	Hotel Deermont	St. Petersburg	10.00
3-26	1/ 1/35	D. R. Grady	Poinsettia Hotel	St. Petersburg	45.00
3-27	1/15/35	C. Krom	Flamingo Hotel	Miami Beach	75.00
3-28	1/16/35	Wofford Hotel Corp	Wofford Hotel	Miami Beach	60.00
3-29	1/ 1/35	Wm. Atkinson	Colonial Orange Court	Orlando	50.00

PLAINTIFFS' DEPOSITION EXHIBIT 23—Continued

Acct. No.	Date of Contract	Licensee	Name of Hotel	Location	Annual Fee
3-30	1/ 1/35	Mr. Edward C. Sweeny	Whitehall Hotel	Palm Beach	100.00
3-31	11/15/36	Florida Beach Hotel Co.	Hotel Geo. Washington	West Palm Beach	100.00
3-31	1/25/35	C. A. Westcott	Vineta Hotel	Palm Beach	30.00
3-33	1/ 1/36	A. W. Upham	Royal Palm Hotel	St. Petersburg	10.00
3-34	1/ 1/35	J. F. Gough	Hotel Alcazar	Miami	90.00
3-35	1/18/35	T. V. Bennett	Hotel Lincoln	Miami Beach	60.00
3-36	1/20/35	Mills Hotel Corp	Clarendon Hotel	Daytona Beach	90.00
3-37	1/20/35	Mills Hotel Corp	Coquina Hotel	Ormond Beach	90.00
3-38	1/ 1/35	College Arms Hotel Co	College Arms Hotel	Deland	75.00
3-39	1/ 1/36	C. T. Sconlon	Hotel Fenway	Dunedin	50.00
3-40	12/25/34	Princess Mary Hotel Co., Inc	Ponce de Leon Hotel	St. Petersburg	30.00
3-41	1/ 1/35	A. McMurray & Sons	Alexander Hotel	St. Petersburg	30.00
3-42	1/29/37	Mayflower Hotel	Mayflower Hotel	Palm Beach	37.00
3-43	12/31/35	T. A. Clarke Co	Palm Beach Hotel	Palm Beach	75.00
3-44	1/ 1/36	L. G. Davis	Ft. Harrison Hotel	Clearwater	75.00
3-45	2/15/36	L. E. Thomas	Amphitrite Hotel	Fort Lauderdale	20.00
3-46	1/15/36	New Alamac Hotel, Inc	Alamac Hotel	Miami Beach	45.00
3-48	1/10/36	Hotel Evans, Inc	Hotel Evans	Miami Beach	45.00
3-49	1/24/36	Illegible	Hotel Good	Miami Beach	37.50
3-50	2/ 1/36	F. F. Hamilton	Miramar Hotel	Miami	30.00
3-51	1/ 1/36	S. Robert Bigel	Strath-Haven Hotel	Miami Beach	45.00
3-52	1/10/36	A. Crawford	Surfside Hotel	Miami Beach	45.00
3-53	1/26/36	T. Whitman Co.	Hotel Whitman	Miami Beach	56.25
3-54	1/ 1/36	George H. Mason	Tampa Terrace Hotel	Tampa	225.00
3-55	2/ 1/36	K. J. Shelley	Hotel Embassy	Miami Beach	35.00
3-59	12/25/34	Leonard Thomson	McAllister Hotel	Miami	90.00
3-60	1/ 1/36	C. D. Sweat	Hotel Manatee River	Bradenton	50.00
3-62	1/15/35	R. V. Berry	Hotel Royal Worth	West Palm Beach	45.00
3-63	1/20/36	Atlantis Hotel	Atlantis Hotel	Miami Beach	75.00
[fol. 1647]					
3-64	1/ 1/36	Lakeside Inn Properties, Inc	Lakeside Inn	Mount Dora	50.00
3-65	1/ 7/36	Floridan Hotel	Floridan Hotel	Tampa	90.00

3-67	2/15/37	J. G. Croft	Governor's Club Hotel	Fort Lauderdale	15.00
3-68	12/24/34	F. Harris	Soreno Hotel	St. Petersburg	120.00
3-69	12/21/36	Charellen Corporation	Lauderdale Beach Hotel	Fort Lauderdale	30.00
3-70	1/ 6/36	I. Nasaweir	West Coast Inn	St. Petersburg	30.00
3-71	1/ 1/37	Dempsey-Vanderbilt Hotel Corporation	Dempsey-Vanderbilt	Miami Beach	150.00
3-72	1/16/37	Hotel Helene, Inc	Hotel Helene	Miami Beach	$ 35.00
3-73	12/22/36	Elliott Bishop	Brazilian Court Hotel	Palm Beach	100.00
3-74	1/ 1/37	Collier-Florida Coast Hotels	Hotel Sarasota Terrace	Sarasota	90.00
3-75	1/20/37	W. G. McMeehan	Shoremade Hotel	Miami Beach	56.00
3-76	1/ 1/37	Indian River Hotel	Indian River Hotel	Rockledge	20.00
3-77	1/ 1/37	Fleetwood Hotel	Fleetwood Hotel	Miami Beach	55.04
3-115	1/ 1/30	Princess Martha Hotel	Princess Martha Hotel	St. Petersburg	90.00
3-120	1/ 1/33	W. E. Allison	Allison Hotel	St. Petersburg	25.00
	(12/22/34		(Ponce de Leon	St. Augustine	75.00
NYC-	1/ 5/35	Florida East Coast Hotel Company	(Hotel Ormond	Ormond Beach	90.00
3-1510	(12/24/34		(The Breakers	Palm Beach	150.00
	(12/24/34		(Hotel Casa Marina	Key West	60.00
NYC-	1/ 2/37	Kenilworth Operating Corporation	Kenilworth Lodge	Sebring	75.00
3-1518					

[fol. 1648]

PLAINTIFFS' DEPOSITION EXHIBIT 24

Florida

Hotels in Effect as of 6/12/39

Acct. No.	Date of Contract	Licensee	Name of Hotel	Location	Annual Fee
3-1	1/18/35	W. N. Urmey	Urmey Hotel	Miami	$ 50.00
R3-2	1/ 1/35	J. F. Gough	Hotel Alcazar	Miami	220.00
3-2	1/ 1/35	A. L. Harvery & Son	Pheil Hotel	St. Petersburg	30.00
3-3	12/ 1/36	Thirty One West Adams	Roosevelt Hotel (Formerly Carling)	Jacksonville	240.00
R3-3	4/26/38	Cherokee Hotel Co., Inc	Cherokee Hotel	Tallahassee	90.00
3-4	4/ 1/35	Sterling B. Bottome	Vinoy Park Hotel	St. Petersburg	120.00
R3-4	7/ 1/38	Kloeppel Hotels, Inc	Mayflower Hotel	Jacksonville	200.00
3-5	4/ 1/35	Roney Investment Co	Roney Plaza Hotel	Miami Beach	300.00
R3-5	7/ 1/38	Kloeppel Hotels, Inc	George Washington	Jacksonville	260.00
3-6	10/18/34	H. and C. Operating Co	Miami Biltmore Hotel	Coral Gables	450.00
R3-6	1/15/39	Michael Ryecheck	Leona Hotel	Miami	17.00
3-7	12/20/34	Oscar Johnson	Hollywood Hotel	Hollywood	150.00
3-8	1/15/35	Mr. J. E. Shuey	Columbus Hotel	Miami	75.00
3-9	1/ 1/35	Walter Chandler	Everglades Hotel	Miami	90.00
3-10	1/ 1/39	Shelbourne-Grand Hotel Co	Floridian Hotel	Miami Beach	100.00
3-12	12/15/35	Hotel Pancoast Co	Hotel Pancoast	Miami Beach	75.00
3-13	1/ 5/35	Bay Shore Corporation	Nautilus Hotel	Miami Beach	85.00
3-14	12/20/34	Barnes Operating Co	Huntington Hotel	St. Petersburg	100.00
3-15	1/ 1/39	Belleview-Biltmore	Hotel Belleview-Biltmore	Belleair	100.00
3-16	1/ 1/35	R. A. Bary	Floronton Hotel	St. Petersburg	45.00
3-17	1/ 2/35	Don Ce-Sar Beach Hotel	Don Ce-Sar Hotel	Pass-a-Grille	45.00
3-18	1/17/35	Illegible	Hotel Wyoming	Orlando	50.00
3-19	11/ 5/36	Floridan Hotel	Floridan Hotel	Tampa	30.00
3-20	1/ 5/37	E. W. Croylon	Naples Hotel	Naples	82.00
3-21	1/ 1/39	Mr. Alfred Stone	Blackstone Hotel	Miami Beach	125.00
3-22	1/31/35	Coleman Holding Co	Jungle Hotel	St. Petersburg	68.00
3-23	1/ 1/35	J. N. Brown	Suwannee Hotel	St. Petersburg	50.00
3-24	1/ 1/35	E. M. Haynes	Princess Issena Hotel	Daytona Beach	90.00
3-25	1/25/35	A. C. Craft	Hotel Deermont	St. Petersburg	10.00
3-26	1/ 1/35	D. B. Grady	Poinsettia Hotel	St. Petersburg	45.00
3-27	1/15/35	C. Krom	Flamingo Hotel	Miami Beach	75.00

3-28	1/16/33	Wofford Hotel Corp	Wofford Hotel	Miami Beach	60.00
3-29	1/ 1/35	Wm. Atkinson	Colonial Orange Court Hotel	Orlando	50.00
3-30	1/ 1/35	Mr. Edward C. Sweeny	Whitehall Hotel	Palm Beach	100.00
3-31	11/15/36	Florida Beach Hotel Co	Hotel George Washington	West Palm Beach	100.00
3-32	1/25/35	C. A. Wesott	Vineta Hotel	Palm Beach	30.00
3-33	1/ 1/36	A. W. Upham	Royal Palm Hotel	St. Petersburg	10.00
3-34	1/ 1/35	J. F. Gough	Hotel Alcazar	Miami	90.00
3-35	1/18/35	T. W. Bennett	Hotel Lincoln	Miami Beach	60.00
3-36	1/20/35	Mills Hotel Corp	Clarendon Hotel	Daytona Beach	90.00
3-37	1/20/35	Mills Hotel Corp	Coquina Hotel	Ormond	90.00
3-38	1/ 1/35	College Arms Hotel Co	College Arms Hotel	Deland	75.00
3-39	1/ 1/36	C. T. Scanlon	Hotel Fenway	Dunedin	50.00
3-40	12/25/34	Princess Mary Hotel Co	Ponce de Leon Hotel	St. Petersburg	30.00
3-41	1/ 1/35	A. McMurray & Sons	Alexander Hotel	St. Petersburg	30.00
3-42	1/29/37	Mayflower Hotel	Mayflower Hotel	Palm Beach	37.00
3-43	12/31/35	T. A. Clarke Co	Palm Beach Hotel	Palm Beach	75.00
3-44	1/ 1/36	L. G. Davis	Ft. Harrison Hotel	Clearwater	75.00
3-45	2/15/36	L. E. Thomas	Amphitrite Hotel	Fort Lauderdale	20.00
3-46	1/15/36	New Alamac Hotel, Inc	Alamac Hotel	Miami Beach	45.00
3-47	7/ 1/38	Kloeppel Hotels, Inc	Mayflower Hotel	Jacksonville	212.50
3-48	1/ 1/39	Hotel Evans Operating	Hotel Evans	Miami Beach	45.00
3-49	1/24/36	Illegible	Hotel Good	Miami Beach	37.50
3-50	2/ 1/36	F. F. Hamilton	Miramar Hotel	Miami	30.00
3-51	7/ 1/38	Kloeppel Hotels, Inc	George Washington	Jacksonville	382.50
3-53	1/26/36	Whitman Co	Hotel Whitman	Miami Beach	56.25
3-54	1/ 1/39	Collier Florida Coast Hotels	Tampa Terrace Hotel	Tampa	360.00
3-55	2/ 1/36	K. J. Shelley	Hotel Embassy	Miami Beach	35.00
3-56	12/ 1/38	Thorne-Shaw, Inc	Oleanders Hotel	Eau Gaillie	20.00
3-57	12/15/38	Leroy Villas, Inc	Leroy Hotel	Miami Beach	45.00
3-58	1/15/39	Ringling Isles, Inc	John Ringling Hotel	Sarasota	75.00
3-59	12/25/34	Leonard Thomson	McAllister Hotel	Miami	90.00
[fol. 1649]					
3-60	1/ 1/36	C. D. Sweat	Hotel Manatee River	Bradenton	50.00
3-61	12/25/38	Illegible	Belmar Hotel	Miami Beach	25.00
3-62	12/15/35	R. V. Berry	Hotel Royal Worth	West Palm Beach	45.00
3-63	1/ 1/39	Atlantis Hotel Operating Corp	Atlantis Hotel	Miami Beach	75.00
3-64	1/ 1/36	Lakeside Inn Properties, Inc	Lakeside Inn	Mount Dora	50.00

PLAINTIFFS' DEPOSITION EXHIBIT 24—Continued

Acct. No.	Date of Contract	Licensee	Name of Hotel	Location	Annual Fee
3-65	1/ 7/36	Floridan Hotel	Floridan Hotel	Tampa	90.00
3-66	4/ 1/39	Hillsboro Hotel, Inc	Hillsboro Hotel	Tampa	60.00
3-67	1/21/39	Luther I. Smith	Tatem Hotel	Miami Beach	37.50
3-68	12/24/34	F. Harris	Soreno Hotel	St. Petersburg	120.00
3-69	12/21/36	Charellen Corp	Lauderdale Beach Hotel	Fort Lauderdale	30.00
3-70	1/ 6/36	I. Nasaweir	West Coast Inn	St. Petersburg	30.00
3-71	1/ 1/37	Dempsey-Vanderbilt Hotel Corp	Dempsey-Vanderbilt Hotel	Miami Beach	150.00
3-72	1/10/39	Hotel Helene, Inc	Helene Hotel	Miami Beach	25.00
3-73	12/22/36	Elliott Bishop	Brazilian Court Hotel	Palm Beach	100.00
3-75	1/20/37	W. G. McMeehin	Shoremade Hotel	Miami Beach	56.00
3-76	2/ 1/39	Shoreham Operating Co	Shoreham-Norman Hotel	Miami Beach	10.00
3-78	1/ 1/38	Henry L. Doherty Co., Inc	Palm Beach Biltmore Hotel	Palm Beach	100.00
3-79	10/ 1/37	Ponte Vedra Operating Co	The Inn	Ponte Bedra	40.00
3-81	2/ 1/39	N. Nash	Nash Hotel	Miami Beach	30.00
3-82	1/2[illegible]/39	Harder Hall, Inc	Harder Hall	Sebring	30.00
3-83	12/30/3[illegible]	Royal Park Inn, Inc	Royal Park Inn	Vero Beach	45.00
3-84	1/ 1/39	J. S. Foley	Seminole Hotel	Winter Park	10.00
3-85	1939 Seas.	Virginia Inn Co	Virginia Inn	Winter Park	10.00
3-86	12/25/38	1144 Ocean Drive, Inc	Victor Hotel	Miami Beach	50.00
3-87	12/25/38	Hubert Rutland	Hotel Detroit	St. Petersburg	25.00
3-115	1/ 1/30	Princess Martha Hotel	Princess Martha Hotel	St. Petersburg	90.00
3-119	12/21/38	Hygeia Hotel Co., Inc	Gulf Stream Hotel	Lake Worth	40.00
3-120	1/ 1/33	Chas. E. Allison	Allison Hotel	St. Petersburg	25.00
NYC-3-1502	1/ 1/37	H. Miller	McFadden-Deauville Hotel	Miami Beach	240.00
NYC-3-1510	(12/22/34 (1/ 5/35 (12/24/34 (12/24/34	Florida East Coast Hotel Company	(Ponce de Leon (Hotel Ormond (The Breakers (Hotel Casa Marina	St. Augustine Ormond Beach Palm Beach Key West	75.00 90.00 150.00 60.00
NYC-3-1518	1/ 2/37	Kenilworth Operating Corporation	Kenilworth Lodge	Sebring	75.00
NYC-3-1579 & R3-1579	1/ 1/39	Meyer Hotel Co	Roosevelt Hotel	Jacksonville	209.85

[fol. 1650]

PLAINTIFFS' DEPOSITION EXHIBIT 25.

Agreement between Society and W. N. Urmey for Urmey Hotel. This exhiblt is identical in form with Exhibit "H" of the Bill of Complaint.

[fol. 1661]

PLAINTIFFS' DEPOSITION EXHIBIT 26

Florida

Restaurants in Effect as of 6/9/37

Acct. No.	Date of Contract	Licensee	Name of Restaurant	Location	Annual Fee
2-1	1/ 1/36	Jack Broome	The Reef Grill	Miami	$45.00
2-2	11/ 1/34	W. V. Varney	Southern Cafeteria	Miami	300.00
2-3	10/ 1/36	Mrs. C. B. Savage	The Greyhound	Miami	60.00
2-4	7/ 1/36	Cecil T. Williams	Ole Swimming Hole	St. Petersburg	120.00
2-6	1/ 1/37	E. W. Sasser	Sasser's Grill & Bar	Clearwater	180.00
2-7	12/ 1/36	Manuel Garcia & Casimiro Hernandez	Columbia Restaurant	Tampa	125.00
2-9	12/ 1/31	Sam Warren	Flamingo Cafe	Orlando	67.50
2-11	11/ 1/36	Floridan Amusement Co	The Floridan Tavern	Jacksonville	180.00
2-13	1/18/36	Carter Catering Corp	Carter's Restaurant	Miami	62.50
2-14	1/ 1/36	Charley's Paddock Grille, Inc	Paddock Grille	Miami Beach	50.00
2-15	1/ 1/36	L. A. Wertheimer	Wert's, On the Ocean	Palm Beach	60.00
2-17	1/10/36	The Nunnally Co	Nunnally's	Miami Beach	50.00
2-19	2/15/36	Clara May Downey	Olney Inn	Miami Beach	30.00
2-20	2/ 1/36	Freddie Kelly	Pig & Sax Grill	Miami	15.00
2-21	2/ 1/36	Illegible	El Dorado Inn	Tampa	30.00
2-22	1/ 1/36	Celestine Landeira	Las Novedades Restaurant	Tampa	180.00
2-25	1/ 1/36	Palm Tavern Patio	Palm Tavern Patio	West Palm Beach	180.00
2-26	12/29/34	Don Dickerman	Pirates Den	Miami Beach	180.00
2-28	1/ 1/37	The 700, Inc	The 700	Fort Lauderdale	45.00

PLAINTIFFS' DEPOSITION EXHIBIT 26—Continued

Acct No.	Date of Contract	Licensee	Name of Restaurant	Location	Annual Fee
2-29	1/ 1/37	M. Chrest	The Chrest's Bar & Grill	Hollywood	45.00
2-30	12/ 1/36	Berney's Restaurant	Berney's Restaurant	Jacksonville	180.00
2-31	4/ 1/37	Silver Grill	Silver Grill	Lake Worth	180.00
2-32	2/ 1/37	E. Rosbey	The Circus Club	Miami Beach	50.00
2-33	1/15/37	Fan & Bill's, Inc	Fan & Bill's Cocktail Bar & Rest	Miami Beach	80.00
2-34	1/ 1/37	Fred W. Sommerfeld	The Hofbrau Restaurant	Miami	52.50
2-35	1/ 7/37	O. Brouna & M. Cavalieri	The Patio Moresque	Miami Beach	75.00
2-36	1/19/37	Roadside Rest. Co., Inc	The Roadside Restaurant	Miami Beach	300.00
2-37	1/ 1/37	J. Levine	The Southern Cafe	Miami Beach	180.00
2-38	1/20/37	Illegible	The Sunny Isles Club Casino	North Miami Beach	100.00
2-39	1/27/37	Samdon Catering Corp	The Colony Club	Palm Beach	96.00
2-40	12/ 1/36	Zell's, Inc	Club Madrid	Palm Beach	100.00
2-41	1/ 1/37	Tom's	Tom's	Pensacola	45.00
2-42	12/ 5/36	El Jorie, Inc	The Chatterbox	St. Petersburg	75.00
2-43	1/ 1/37	Joseph Spilzer	The Patio Grill	West Palm Beach	45.00
2-44	2/ 6/37	Vreeland Risden	Risden's Bar & Cafe Patio	Palm Beach	15.00
2-127	1/ 3/31	E. R. Wadley	Beach Club Restaurant	Palm Beach	90.00
2-202	1/ 1/34	Illegible	The Patio Restaurant	Palm Beach	100.00
2-204	1/ 1/33	N. L. Dennis	Park Cafeteria & Grill	St. Petersburg	45.00
2-1520 NYC	12/15/34	Childs Co. of Providence	Childs	Miami	175.00

PLAINTIFFS' DEPOSITION EXHIBIT 27
Florida
Restaurants in Effect as of 6/12/39

Acct. No.	Date of Contract	Licensee	Name of Restaurant	Location	Annual Fee
2-1	1/ 1/36	Jack Broome	The Reef Grill	Miami	$45.00
2-2	11/ 1/34	Mr. W. V. Varney	Southern Cafeteria	Miami	300.00
2-3	10/ 1/36	Mrs. C. B. Savage	The Greyhound	Miami	60.00
2-4	7/ 1/36	Cecil T. Williams	Ole Swimming Hole	St. Petersburg	120.00
2-5	4/16/38	Roney Plaza Hotel	Cafe de la Pais	Miami	75.00
2-6	1/ 1/37	E. W. Sasser	Sasser's Grill & Bar	Clearwater	180.00
2-7	12/ 1/38	Columbia Restaurant	Columbia Restaurant	Tampa	180.00
2-8	12/ 1/38	George Fassa's	Fassa's Restaurant	Miami Beach	45.00
2-9	12/ 1/31	Sam Warren	Flamingo Cafe	Orlando	67.50
2-12	1/ 1/39	Isador Gold	The Avenue Grill	Palm Beach	50.00
2-13	10/ 1/38	B & B Cafe, Inc.	B & B Cafe	Pensacola	120.00
2-14	1/ 1/36	Charley's Paddock Grille, Inc.	Paddock Grille	Miami Beach	50.00
2-15	1/ 1/36	L. A. Wertheimer	Wert's, On the Ocean	Palm Beach	60.00
2-16	11/ 1/38	Palm Tavern	Palm Tavern	West Palm Beach	75.00
2-18	4/14/39	Rubin Bros.	Rubin's Restaurant	Tampa	15.00
2-19	2/15/36	Clara May Downey	Olney Inn	Miami Beach	30.00
2-31	4/ 1/37	Silver Grill	Silver Grill	Lake Worth	180.00
2-33	1/ 1/39	Mrs. Fan Sherman	Fan & Bill's Restaurant	Miami Beach	60.00
2-34	1/ 1/37	Fred W. Sommerfeld	The Hofbrau Restaurant	Miami	52.50
2-36	1/19/37	Roadside Rest. Co., Inc.	The Roadside Restaurant	Miami Beach	300.00
2-37	1/ 1/37	J. Levine	Southern Cafeteria	Miami Beach	180.00
2-38	1/20/37	Illegible	The Sunny Isles Club Casino	Miami Beach	100.00
2-39	1/27/37	Samdon Catering Corp.	The Colony Club	Palm Beach	96.00
2-43	1/ 1/37	Joseph Spilzer	The Patio Grill	West Palm Beach	45.00
2-44	8/ 1/38	Fletcher's	Fletcher's	Miami	120.00
2-127	1/ 3/31	E. R. Wadley	Beach Club Restaurant	Palm Beach	90.00
2-202	1/ 1/34	Illegible	The Patio Restaurant	Palm Beach	100.00
2-204	1/ 1/33	N. L. Dennis	Park Cafeteria & Grill	St. Petersburg	45.00
2-1520 NYC	12/15/34	Childs Co. of Providence	Childs	Miami	175.00

PLAINTIFFS' DEPOSITION EXHIBIT 28

Agreement between Society and Jack Broome of Reef Grill. This exhibit is identical in form with Exhibit "H" to the Bill of Complaint.

[fol. 1653]

PLAINTIFFS' DEPOSITION EXHIBIT 29

Florida

Dance Halls in Effect as of 6/9/37

Acct. No.	Date of Contract	Licensee	Name of Dance Hall	Location	Annual Fee
4-1	12/ 1/34	Martin Schwarz	Bavarian Hall	Miami	$120.00
4-4	1/ 1/37	P. W. Vignaux	Anna Maria Pavilion	Anna Maria	60.00
4-5	1/ 2/35	John W. Booth	Gulfport Casino	Gulfport	120.00
4-6	1/ 1/36	T. B. Palmer	Carlouel Yacht Club	Clearwater	45.00
4-7	1/29/37	Fred A. Hancock	The Paradise	Jacksonville	180.00
4-8	12/ 2/35	John S. Taylor, Jr.	Clearwater Beach Trailer Park	Clearwater	180.00
4-10	1/ 1/36	Eddie Doolittle	Rainbow Tavern	Miami	15.00
4-11	1/ 3/37	Safety Harbor Sanatorium, Inc	Espititu Santo Springs Pavilion	Safety Harbor	37.50
4-12	1/ 1/37	A. E. Bagnall	Recreation Park	Tallahassee	60.00
4-13	5/ 5/34	Surfside Amusement Co	Jacksonville Beach Pier	Jacksonville Beach	125.00
4-14	1/15/37	Herbert R. Boomhower	Casa Madrid	Sarasota	37.50
4-16	5/15/36	H. B. Page	Wisteria Gardens	Floridatown	60.00
4-18	1/10/37	Clifford Phillips	The Barn	Miami	60.00
4-19	6/13/36	Thomas E. Brooks	Tower Beach Casino	Fort Walton	30.00
4-20	6/13/31	Pensacola Bridge Corp	Pensacola Beach Casino	Pensacola	120.00
4-22	9/ 1/36	L. B. Herdrin	Hardy's	Miami	100.00
4-24	1/ 1/37	J. O. Whitehurst	Oscar's Night Club	Panama City	60.00
4-25	1/ 1/37	C. L. Wilkins	Scenic Terrace	E. Pensacola Heights	120.00
4-26	3/13/33	The Deuces	The Deuces Dance Hall	Jacksonville	120.00
4-29	4/ 3/37	Chas. H. Deeb	Cotton Club	Tallahassee	180.00
4-53	10/ 2/28	Edward Bang	Pier Casino	Daytona Beach	156.00
4-221	7/ 4/33	Harry Winchell	St. Petersburg Coliseum	St. Petersburg	180.00

[fol. 1654]

PLAINTIFF'S DEPOSITION EXHIBIT 30

Florida

Dance Halls in Effect as of 6/12/39

Acct. No.	Date of Contract	Licensee	Name of Dance Hall	Location	Annual Fee
4-1	5/ 1/39	H. W. Diaz	Sulphur Springs Altus Ball Room	Tampa	$120.00
4-2	12/ 1/38	J. H. Elliott	Lake Worth Casino	Lake Worth	40.00
4-3	6/ 1/38	R. G. Green	Magnolia Inn	Fort Walton	30.00
4-4	1/ 1/37	P. W. Vignaux	Anna Maria Pavilion	Anna Maria	60.00
4-5	1/ 2/35	John W. Booth	Gulfport Casino	Gulfport	120.00
4-6	1/ 1/36	T. B. Palmer	Carouel Yacht Club	Clearwater	45.00
4-7	1/ 1/39	William Loomis	Harmony Inn	Plant City	45.00
4-11	2/10/39	L. D. Berry	L. D.'s Barn Tavern	Palm Bay	15.00
4-12	11/ 1/38	W. R. Stambaugh	Palais Royal Ballroom	St. Petersburg	60.00
4-15	6/25/38	Mrs. Eola A. Mack	Frolic Club	Orlando	60.00
4-16	5/15/36	H. B. Pace	Wisteria Gardens	Floridatown	60.00
4-20	6/13/31	Pensacola Bridge Corp	Pensacola Beach Casino	Pensacola	120.00
4-22	9/ 1/36	L. B. Herdrin	Hardy's	Miami	100.00
4-24	1/ 1/37	J. O. Whitehurst	Oscar's Night Club	Panama City	60.00
4-25	9/ 1/37	G. R. Jordan	Club Scenic Terrace	Pensacola	60.00
4-26	3/13/33	The Deuces	The Deuces Dance Hall	Jacksonville	120.00
4-53	10/ 2/28	Edward Bang	Pier Casino	Daytona Beach	156.00
4-221	7/ 4/33	Harry Winchell	St. Petersburg Coliseum	St. Petersburg	180.00

Plaintiffs' Deposition Exhibit 31

Agreement between Society and H. W. Diaz. This agreement is identical in form with Exhibit "H" to the Bill of Camplaint.

[fol. 1655]

Plaintiffs' Deposition Exhibit 32

Florida

Miscellaneous in Effect as of 6/9/37

Acct. No.	Date of Contract	Licensee	Name of Establishment	Location	Annual Fee
5-3	1/ 1/37	Geo. W. Sutcliffe	Morey's Bar	Miami Beach	$120.00
5-5	3/20/37	E. A. Stout	Rockywater Park	Eau Gallie	20.00
5-6	12/ 1/34	West Florida Racing & Athletic Assn. Inc	Sulphur Sprgs. Station	Tampa	180.00
5-7	3/ 3/34	P. B. Rupp	Lafayette Tourist Camp	Sarasota	120.00
5-9	6/ 1/34	Ringling Bros.-Barnum & Bailey Combined Shows, Inc	Ringling Bros	Sarasota	450.00
5-10	11/14/34	Thorne-Shaw, Inc	Midway Tourist Camp	Melbourne	80.00
5-11	10/ 1/36	Jimmie's Bar Liquor Store & Gilli	Jimmie's Bar	Miami	180.00
5-12	12/ 6/35	J. E. Brooks	St. Petersburg Kennel Club	St. Petersburg	180.00
5-13	12/22/34	Henry Mansfield, Treas	Bath Club	Miami Beach	87.50
5-14	12/ 1/34	Biscayne Kennel Club, Inc	Biscayne Kennel Club	Miami	198.00
5-15	2/16/35	Palm Yacht Club, Inc	Royal Palm Club	Miami	450.00
5-17	1/ 7/35	Jacksonville Kennel Club Inc	Jacksonville Kennel Club	Jacksonville	142.00
5-18	10/ 1/36	Tampa Fla. Brewery, Inc	Sound Truck	State of Florida	120.00
5-19	1/ 8/37	Will V. Duyr	Palm Island Club	Miami Beach	250.00
5-20	1936 sea.	Jesse Armstrong	Club Boheme	Hollywood	50.00
5-21	1/ 5/35	John E. Mack	Hollywood Yacht Club	Hollywood	75.00
5-22	12/29/34	Broward County Kennel Club Inc	Broward County Kennel Club	Hollywood	160.00
5-23	1/ 1/37	Mother Kelly's Inc	Mother Kelly's	Miami Beach	180.00
5-24	9/14/35	Angus Merritt	Sound Truck	State of Florida	30.00
5-25	9/ 2/36	Wagner Brewing Co	Sound Truck	State of Florida	120.00
5-26	4/ 1/35	Mighty Haag Show (H. A. Haag)	Mighty Haag Show	Itinerant	75.00
5-27	12/29/34	Hugh McKay	Frolics Club	Miami	150.00
5-28	5/15/36	A. T. Williams	Coliseum Skating Rink	Tampa	180.00

5-29	1/18/34	Bouche's Villa Venice, Inc.	Bouche's Villa Venice	Miami Beach		150.00
5-31	12/ 1/34	C. O. Lowe	Lowe's Camp	St. Petersburg	mo.	10.00
5-33	10/ 1/36	Tampa Fla. Brewery, Inc.	Sound Truck	State of Florida		120.00
5-34	1/ 1/36	Arena Bar, Inc.	Arena Bar	Miami		20.00
5-35	1/ 1/37	Five O'clock Club, Inc.	Five O'clock Club	Miami Beach		100.00
5-36	12/25/35	Gallagher's, Inc.	Gallagher's Bar	Miami Beach		40.00
5-37	1/ 1/36	G. A. McArthur, Jr.	McArthur's Hawaiian Hut	Miami Beach		60.00
5-38	1/ 1/36	Roy Edward Pushee	Roy's Bar	Miami Beach		60.00
5-39	2/16/36	Capt. Wm. A. Albury	Yacht 7 Seas	Miami		15.00
5-40	1/ 1/35	West Flagler Kennel Club	West Flagler Kennel Club	Miami		201.00
5-41	1/13/37	French Casino of Florida, Inc.	French Casino	Miami Beach		300.00
5-42	12/28/35	Myer Goldberg	Sanford Orlando Kennel Club	Longwood	a day	2.00
5-43	1/ 1/37	Yacht Machusla	Yacht Machusla	Miami		15.00
5-45	2/ 1/36	Gulf Bays Amusement Corp.	Pleasure Boat "Moonglo"	St. Petersburg		180.00
5-46	10/ 1/35	Tom Williams	Club Bagdad	Hialeah		240.00
5-48	2/15/36	Sydney Mander	Viking Club	Miami		15.00
5-49	4/26/34	Sanders Beach Co.	Sanders Beach Dance Pavilion	Pensacola		75.00
5-50	11/17/34	J. S. Brooks	Brooks Tourist Camp	Sarasota		120.00
5-51	1/ 1/37	Samuel J. Boyce	Hollywood Country Club	Hollywood		150.00
5-52	12/25/36	Piccadilly Club, Inc.	Piccadilly Club	Miami Beach		180.00
5-53	12/ 1/36	R. R. Ried	Reid's Marine Terrace	Miami		100.00
5-55	1/16/36	John Prete	Town Casino Club	Miami Beach		125.00
5-57	1/ 1/37	Park Inn, Inc.	Park Inn	Clearwater		180.00
[fol. 1656]						
5-58	1/ 1/37	Guy M. Helton	Log Cabin	Fort Lauderdale		37.50
5-59	1/30/37	Isadore Glick	Seminole Bar	Hialeah		45.00
5-60	1/ 1/37	Ajax Amusements, Inc.	Embassy Club	Jacksonville		300.00
5-61	2/ 6/37	J. M. Bean	Ball and Chain	Miami		40.00
5-62	1/ 1/37	Biscayne Bar, Inc.	Biscayne Bar	Miami		120.00
5-63	1/ 1/37	Blue Ribbon Spa, Inc.	Blue Ribbon Spa	Miami		50.00
5-65	12/15/36	Dominick La Sala	Empire Bar	Miami		52.50
5-66	12/ 1/36	Tom Heeney	Tom Heeney's Bar	Miami Beach		120.00
5-67	1/ 1/37	Jeff's Bar, Inc.	Jeff's Bar, Inc.	Miami		60.00
5-68	11/ 1/36	Mrs. Al Youst	La Paloma Club	Miami		90.00
5-69	12/18/36	Nathan Levine	Minsky's Burlesque	Miami Beach		73.00
5-70	11/17/36	Cabana Hotel Corp.	Riptide Club	Miami Beach		110.00
5-73	1/ 1/37	Bill Smith	White Horse Bar	Miami		40.00
5-74	1/ 1/36	Times Square Club	Times Square Club	Miami		140.00

PLAINTIFFS' DEPOSITION EXHIBIT 32—Continued

Acct. No.	Date of Contract	Licensee	Name of Establishment	Location	Annual Fee
5–75	1/ 1/37	Mac's Tavern	Mac's Tavern	Vero Beach	120.00
5–76	3/13/37	Fred W. Cullingford	Bayside Inn	Tampa	60.00
5–78	12/ 1/31	Peninsular & Occidental Steamship Company	Steamship Governor Cobb	Florida	50.00
5–93	5/ 1/30	City of St. Petersburg	St. Petersburg Casino	St. Petersburg	180.00
5–99	1/16/30	E. F. Killm	Miami Jockey Club	Hialeah	150.00
5–105	4/11/33	L. Otis Mote	Orlando Winter Visitors Club	Orlando	a day 7.50
5–135	12/26/32	O. M. Carmichael	Palm Beach Kennel Club	W. Palm Beach	100.00
5–158	1/ 1/30	Peninsular & Occidental Steamship Company	Steamship Cuba	Florida	100.00
5–502	12/30/33	Gables Racing Association, Inc	Tropical Park	Coral Gables	200.00
5–506	1/ 1/34	Hattie Killian	Oceanic Gardens	Miami Beach	75.00
5–510	1/15/34	H. Bennett	Miami Beach Kennel Club	Miami	165.00
5–514	11/ 1/33	Prof. F. W. Kehl	German Society of Miami, Inc	Miami	150.00

[fol. 1657]

PLAINTIFFS' DEPOSITION EXHIBIT 33

Florida

Miscellaneous in Effect as of 6/12/39

Acct. No.	Date of Contract	Licensee	Name of Establishment	Location	Annual Fee
5-1	6/30/38	Beach Bar, Inc	El Chico Bar & Restaurant	Miami Beach	$180.00
5-2	12/27/38	Richard Berenson	Biscayne Fronton	Hialeah	50.00
5-3	8/ 1/38	Hia Tolstoy	Marineland Studios, Inc	St. Augustine	180.00
5-4	4/ 1/38	Harry Warner	Davis Island Coliseum	Tampa	120.00
5-5	3/20/37	E. A. Stout	Rockwater Park	Eau Gallie	20.00
5-6	12/ 1/34	West Florida Racing & Athletic Association, Inc	Sulphur Springs Station	Tampa	180.00
5-7	12/ 1/38	Eagles Nest, Inc	Eagles Nest	Belleair	75.00
5-8	12/28/38	Don Lanning	Don Lenning's Tavern	Miami	35.00
5-9 NYC	6/ 1/34	Ringling Bros.-Barnum & Bailey Combined Shows, Inc	Ringling Bros	Sarasota	450.00
5-9	4/ 1/38	M. J. Waskow	Mike's	W. Palm Beach	180.00
5-10	11/14/34	Thorne-Shaw, Inc	Midway Tourist Camp	Melbourne	80.00
5-11	10/ 1/36	Jimmie's Bar, Liquor Store & Grill	Jimmie's Bar	Miami	180.00
5-12	12/ 6/35	J. E. Brooks	St. Petersburg Kennel Club	St. Petersburg	180.00
5-13	12/22/34	Henry Mansfield	Bath Club	Miami Beach	87.50
5-14	12/ 1/34	Biscayne Kennel Club, Inc	Biscayne Kennel Club	Miami	198.00
5-15	2/16/35	Palm Yacht Club, Inc	Royal Palm Club	Miami	450.00
5-16	4/15/38	D. A. Davis	Windmill	Jacksonville	180.00
5-17	1/ 7/35	Jacksonville Kennel Club, Inc	Jacksonville Kennel Club	Jacksonville	142.00
5-18	10/ 1/36	Tampa Florida Brewery, Inc	Sound Truck	State of Florida	120.00
5-19	3/ 1/39	Estate of Wallace A. Fuhrmann	Sundown Club (Formerly—Wally's Bar & Grill	St. Petersburg Beach	180.00
5-20	1936 season	Jesse Armstrong	Club Boheme	Hollywood	50.00
5-21	4/ 1/39	O. H. Nelms	Brass Rail	St. Petersburg	75.00
5-22	12/29/34	Broward County Kennel Club, Inc	Broward County Kennel Club	Hollywood	160.00
5-23	1/ 1/39	Norman Meisenhelter	Mother Kelly's	Miami	180.00
5-24	1/ 1/39	J. R. Brown	Metropolitan Grill	Miami	30.00
5-25	9/ 2/36	Wagner Brewing Company	Sound Truck	State of Florida	120.00
5-26	4/ 1/35	Mighty Haag Show (H. A. Haag)	Mighty Haag Show	Itinerant	75.00
5-28	12/ 1/38	Brooks Hurst	Sweepstakes Club	Miami	40.00
5-29	1/ 1/39	Brownie Robertson	Club Brownie	Ft. Lauderdale	30.00
5-30	1/ 1/38	Esquire Bar	Esquire Bar	Miami	50.00

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PLAINTIFFS' DEPOSITION EXHIBIT 33—Continued

Acct. No.	Date of Contract	Licensee	Name of Establishment	Location		Annual Fee
5-31	12/ 1/34	C. O. Lowe	Lowe's Camp	St. Petersburg	mo.	10.00
5-32	12/21/38	Coral Club, Inc	Coral Club	Ft. Lauderdale		52.50
5-33	10/ 1/36	Tampa Florida Brewery, Inc	Sound Truck	State of Florida		120.00
5-34	1/ 1/36	Arena Bar, Inc	Arena Bar	Miami		20.00
5-35	1/ 1/37	Five O'clock Club, Inc	Five O'clock Club	Miami Beach		100.00
5-36	1/ 1/39	Mrs. R. H. Rogers	Pony Club	Ft. Lauderdale		60.00
5-37	1/13/39	D. L. Seybert	Circle Bar & Grill	Hollywood		20.00
5-38	1/ 1/39	Samuel Barnett	Derby Bar	Miami Beach		30.00
5-39	2/16/36	Capt. Wm. A. Albury	Yacht 7 Seas	Miami		15.00
5-40	1/ 1/35	West Flagler Kennel Club	West Flagler Kennel Club	Miami		201.00
5-41	12/17/38	Illegible	Pelican Club	Palm Beach		60.00
5-43	1/ 1/37	Yacht Machusla	Yacht Machusla	Miami		15.00
5-45	1/ 1/39	El Chico, Inc	El Chico	Tampa		180.00
5-46	1/ 1/39	Mrs. E. Lesser	Red Wood Inn	Tampa		90.00
5-47	11/10/38	J. North	Dixie Inn	W. Palm Beach		85.00
5-48	2/15/36	Sydney Mander	Viking Club	Miami		15.00
5-49	3/24/39	Hippodrome Cigar Store, Inc	Hippodrome Bar	Miami		60.00
5-50	1/ 1/39	Lew Mercur	Nut Club	Miami		240.00
5-51	10/ 1/38	Oscar Germany	Tom's Night Club	Pensacola		120.00
5-53	12/ 1/38	Reid's Marine Terrace (Gregg E. Manning)	Reid's Marine Terrace	Miami		70.00
5-54	1/ 1/39	Vicks Bar, Inc	Vicks Bar	Miami		30.00
5-55	1/ 1/39	Eugene R. Jones	Venetian Skating Rink	Miami		60.00
[fol. 1657a]						
5-56	1/ 1/39	Capt. George M. Stevens	Boat New River	Miami		$ 75.00
5-57	1/ 1/37	Park Inn, Inc	Park Inn	Clearwater		180.00
5-58	1/ 1/39	Sam Friedman	Polo Club Bar	Miami Beach		45.00
5-59	1/ 1/39	Isidore Glick	Seminole Bar	Hialeah		30.00
5-60	4/ 1/39	Eddie Doolittle	Rainbow Tavern	Miami		60.00
5-61	2/ 6/37	J. M. Dean	Ball & Chain	Miami		40.00
5-62	12/30/38	Mrs. Claudia T. Hill	Biscaynebar	Miami		45.00
5-63	12/ 1/38	Belmont Bar & Package Store	Belmont Club	Miami Beach		90.00
5-64	1/ 1/39	D. J. Casey	Caseys Bar	Miami Beach		60.00
5-65	12/15/36	Dominick La Sala	Empire Bar	Miami		52.50
5-66	1/ 1/39	Mrs. Tom Heeney	Tom Heeney's Bar	Miami Beach		30.00
5-67	1/ 1/37	Jeff's Bar, Inc	Jeff's Bar, Inc	Miami		60.00

5-68	1/11/39	Gay Nineties, Inc	Gay Nineties	Miami Beach		80.00
5-69	12/18/36	Nathan Levine	Minsky's Burlesque	Miami Beach		73.00
5-70	1/ 1/39	Cabana Hotel Corporation	Riptide Club & Bar	Miami Beach		75.00
5-71	10/ 1/38	Swarts, Inc	Life Bar	Miami Beach		80.00
5-72	12/26/38	George Pomerantz	Oceanic Gardens	Miami Beach		40.00
5-73	12/25/38	Club Continentale (Thomas A. Cassava)	Club Continentale	Miami Beach		100.00
5-74	1/ 1/36	Times Square Club	Times Square Club	Miami		140.00
5-75	12/14/38	Mel Operating Company	The Drum	Miami		108.00
5-76	1/27/39	Brook Club, Inc	Brook Club	Miami Beach		30.00
5-77	1/15/37	K. R. Shipbaugh	Manhattan Cocktail Lounge	Sarasota		180.00
5-78	12/ 1/31	Peninsular & Occidental Steamship Company	Steamship Governor Cobb	Florida		50.00
5-79	10/ 1/38	C. H. Smith	Click Bar	Miami Beach		80.00
5-80	1/ 1/39	G. M. Austin	Midway Tavern	Pompano		45.00
5-81	12/ 2/38	Jordan Corp	Bill Jordan's Bar of Music	Miami Beach		160.00
5-82	1/ 1/39	C. S. Ward	Flag Recreation Center	Jacksonville Beach		60.00
5-83	1/ 1/39	Palm Lake Development, Inc	La Paloma Club	Miami		240.00
5-84	1/28/39	Nunnally Co	Nunnally's	Miami Beach		45.00
5-85	1/12/39	Mrs. O. Bruno	Patio Moresque	Miami Beach		75.00
5-86	1/15/39	M. V. Chrest	Chrest Bar & Grill	Hollywood		45.00
5-87	1/ 1/39	Mrs. Margaret White	Pig & Sax Grill	Miami		17.50
5-88	12/15/38	Governor's Club	Governor's Club	Lauderdale		60.00
5-89	12/14/38	George W. McGuire	Pastime Roller Rink	St. Petersburg		30.00
5-91	1/15/39	Lou Josephthal	Lous Bar	Miami Beach		30.00
5-92	2/ 1/39	A. P. Crooks	The Rendezvous	Ft. Lauderdale		22.50
5-93	5/ 1/30	City of St. Petersburg	St. Petersburg Casino	St. Petersburg		180.00
5-94	12/27/38	Richard Berenson	Biscayne Fronton	Miami		50.00
5-95	4/ 4/39	Capitol Gardens, Inc	Capitol Garden Club	Tallahassee		40.00
5-96	1/ 1/39	A. E. Bagnell	Recreation Rink Park	Tallahassee		60.00
5-97	1/ 1/39	Seven Hundred, Inc	Seven Hundred Club	Ft. Lauderdale		45.00
5-98	6/ 1/39	L. J. Ford	Larry Ford's Bar	Tampa		90.00
5-99	1/16/39	E. F. Killm	Miami Jockey Club	Hialeah		150.00
5-100	5/ 5/39	El Jorie, Inc	The Chatterbox	St. Petersburg		105.00
5-105	4/11/33	L. Otis Mote	Orlando Winter Visitors Club	Orlando	day	7.50
5-135	12/26/32	O. M. Carmichael	Palm Beach Kennel Club	W. Palm Beach		100.00
5-158	1/ 1/30	Peninsular & Occidental Steamship Company	Steamship Cuba	Florida		100.00
5-502	12/30/33	Gables Racing Association, Inc	Tropical Park	Coral Gables		200.00
5-510	1/15/34	H. Bennett	Miami Beach Kennel Club	Miami		165.00

[fol. 1658] PLAINTIFFS' DEPOSITION EXHIBIT 34

Memorandum of agreement between Society and Ringling Brothers and Barnum & Bailey Show Combined. This contract is identical in form with Exhibit "H" to the Bill of Complaint.

PLAINTIFFS' DEPOSITION EXHIBITS 35, 36 AND 37

These exhibits consist of three form letters used by the Society in warning persons using their music for profit without a license to cease using the music or secure license, and explaining the claimed advantages of operating under the Society's license.

(Here follows 1 Photolithograph, side folio 1659)

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PLAINTIFFS DEPOSITI EXHIBIT 38

SCHEDULE OF MANNER OF LAWS IN EFFECT

CLASSIFIED AS TO STATES FROM DEC. 1922 TO DEC. 31, 1939

STATES	1922 No.	1923 No.	1924 No.	1925 No.	1926 No.	1927 No.	1928 No.	1929 No.	1930 No.		1932 No.	1933 No.	1934 No.	1935 No.	1936 No.	1937 No.	1938 No.	1939 No.
ALABAMA	27	32	87	76	107	121	146	146	147		133	154	188	208	250	229	221	255
ALASKA						7	8	8	10		12	8	11	12	12	11	7	7
ARIZONA	14	13	13	29	48	50	58	58	64		53	55	63	76	92	89	103	117
ARKANSAS	25	15	15	84	110	116	136	147	133		90	100	123	155	159	172	188	220
CALIFORNIA	548	638	668	714	809	901	1012	981	1004		1081	1084	1615	2034	2135	2043	2120	2122
COLORADO	111	118	146	134	229	243	253	246	233		198	224	271	297	318	384	322	348
CONNECTICUT	91	138	155	186	212	212	199	186	184		194	189	190	288	372	416	375	415
CUBA											44	44	44	44	44	44	50	50
DELAWARE	10	15	24	23	28	25	37	41	40		37	37	41	47	58	58	62	59
DIST. COLUMBIA	30	81	63	102	96	97	86	85	85		77	85	90	93	99	108	114	122
FLORIDA	46	63	84	158	222	196	176	200	217		230	242	291	318	387	430	425	503
GEORGIA	80	82	90	112	156	177	199	211	197		192	196	246	262	269	281	291	331
HAWAII									1		48	48	49	54	51	55	55	55
IDAHO	17	31	52	55	61	72	84	87	84		105	99	134	141	150	148	153	171
ILLINOIS	447	514	589	745	911	1005	1099	1040	982		882	1004	1288	1546	1801	1743	2003	2171
INDIANA	483	446	559	571	583	588	575	552	591		508	580	713	738	830	864	909	955
IOWA	111	170	216	382	566	567	629	606	584		469	480	501	494	604	538	604	606
KANSAS	39	40	51	340	537	546	638	664	702		612	677	650	662	803	513	519	520
KENTUCKY	81	148	158	192	210	225	259	233	212		176	179	212	257	251	293	301	318
LOUISIANA	96	101	146	177	216	279	309	300	313		215	198	269	387	302	382	482	607
MAINE	137	189	188	228	219	203	211	204	197		157	126	113	117	137	141	130	128
MARYLAND	208	286	237	237	242	306	302	303	320		304	339	331	380	535	514	527	509
MASSACHUSETTS	488	467	502	560	531	540	563	552	535		532	501	521	455	502	542	779	974
MICHIGAN	211	199	382	437	584	666	786	531	949		799	1011	1231	1315	1378	1363	1433	1666
MINNESOTA	107	404	420	476	570	482	516	508	372		374	321	508	549	712	746	686	1043
MISSISSIPPI	27	31	33	46	72	109	130	141	140		81	61	69	85	92	101	158	182
MISSOURI	378	276	286	437	570	558	606	772	539		577	562	554	632	583	624	656	960	966
MONTANA	7	20	18	23	30	34	48	73	55		56	56	54	161	179	208	211	211	205
NEBRASKA	31	43	109	219	252	316	342	384	426		446	433	382	421	404	387	374	390	400
NEVADA	2	2	2	2	2	1	17	22	28		29	26	21	27	31	46	50	57	56
N. HAMPSHIRE	123	118	112	150	132	131	130	138	133		134	123	106	110	104	118	148	148	161
NEW JERSEY	118	156	259	465	484	484	630	570	554		544	552	541	483	644	619	697	1223	1446
NEW MEXICO			21	31	32	34	48	50	58		45	52	46	61	77	83	108	108	123
NEW YORK	1081	1219	1333	1865	1830	1725	1894	1958	2250		2210	2011	1943	2247	2666	2631	3113	3625	3828
N. CAROLINA	28	64	108	158	148	171	198	182	171		152	118	154	252	298	325	347	379	418
N. DAKOTA	1	10	52	68	102	111	114	100	101		76	66	64	93	91	87	94	92	96
OHIO	268	613	782	869	1088	1108	1128	1251	1308		1178	1158	1258	1330	1452	1580	1680	2237	2326
OKLAHOMA	47	25	30	52	255	228	254	259	310		287	322	217	288	287	308	358	362	368
OREGON	111	124	154	178	198	194	226	204	198		199	206	153	303	361	352	338	333	360
PENNSYLVANIA	678	865	1032	1045	1173	1217	1338	1360	1558		1573	1136	1129	1218	1446	1748	1822	2306	2547
PORTO RICO												1	1	2	2	2	101	128	137
RHODE ISLAND	64	69	69	74	81	81	78	80	73		73	73	85	68	80	70	104	137	143
S. CAROLINA	32	33	34	39	40	52	60	72	74		58	86	102	140	141	143	157	161	165
S. DAKOTA		8	42	103	143	167	171	157	160		134	125	116	131	144	141	160	178	205
TENNESSEE	32	54	63	89	134	148	164	160	153		155	159	167	188	197	214	217	220	300
TEXAS	258	159	177	484	560	550	550	758	971		855	530	582	722	894	1100	1187	1506	1823
UTAH		59	68	93	119	123	135	135	131		127	109	134	154	155	163	174	173	180
VERMONT	64	66	63	67	66	60	64	66	75		74	66	63	61	62	64	66	64	58

N.HAMPSHIRE	123	118	112	188	133	131	130	138	138	134	123	108	110	104	118	146	148	181
NEW JERSEY	118	166	298	425	484	484	530	570	564	544	552	541	483	644	819	887	1223	1446
NEW MEXICO			21	31	32	34	46	50	59	46	52	46	61	77	83	108	108	123
NEW YORK	1081	1217	1333	1566	1630	1768	1894	1956	2260	2210	2011	1943	2247	2686	2831	3113	3395	3828
N. CAROLINA	28	64	109	188	148	171	189	192	171	152	118	154	252	285	325	347	379	418
N.DAKOTA	1	10	52	68	102	111	114	100	101	78	68	64	93	91	87	94	92	96
OHIO	289	613	782	986	1086	1106	1138	1251	1300	1178	1159	1258	1330	1462	1660	1660	2237	2326
OKLAHOMA	47	26	30	52	226	228	254	289	310	287	222	217	258	287	308	359	362	369
OREGON	111	124	154	176	192	194	208	204	198	188	206	153	303	351	382	338	333	380
PENNSYLVANIA	679	689	1032	1046	1173	1217	1339	1360	1656	1673	1136	1129	1218	1446	1748	1822	2308	2647
PORTO RICO											1	1	2	2	2	101	126	137
RHODE ISLAND	64	69	69	74	81	81	79	80	73	73	73	68	68	80	76	104	137	143
S.CAROLINA	22	23	24	39	40	52	60	72	74	66	86	102	140	141	143	157	181	185
S.DAKOTA		8	42	103	140	167	171	197	160	134	125	116	131	144	141	160	178	205
TENNESSEE	30	54	83	89	134	146	184	180	183	166	168	167	188	197	214	217	280	300
TEXAS	298	180	177	484	580	680	680	764	671	659	630	682	782	884	1100	1187	1606	1823
UTAH		88	88	98	119	123	139	135	131	127	128	134	154	156	163	174	173	180
VERMONT	64	66	63	67	66	60	64	66	75	74	68	63	61	62	64	66	64	58
VIRGIN ISLE.																	1	2
VIRGINIA	12	21	105	126	146	163	186	171	174	174	126	143	229	260	294	347	388	413
WASHINGTON	187	521	648	658	696	692	324	683	698	696	255	643	511	525	585	585	585	663
W.VIRGINIA	58	103	124	112	114	141	803	104	172	138	123	111	127	139	187	202	228	337
WISCONSIN	118	175	180	808	310	640	882	810	848	891	666	686	847	806	807	846	941	987
WYOMING		8	17	18	89	86	34	41	80	86	63	63	68	66	76	78	77	92
TOTALS -	7007	8658	10880	13648	16316	16662	18823	19016	19606	18643	17006	17662	20723	22137	25053	26876	29617	32504

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[fol. 1660] PLAINTIFFS' DEPOSITION EXHIBIT 39

Florida

Year	Revenue	Expense	Net	
1935	$ 47,481.24	$12,371.16	$35,110.08	
1936	59,306.81	14,950.98	44,355.83	
1937	61,347.94	14,724.26	46,623.68	
1938	101,335.49	23,486.45	77,849.04	
1939	92,782.02	21,465.69	71,316.33	
1935	5,217.59	6,835.47	318.10	12,371.16
1936	6,728.58	7,672.33	550.07	14,950.98
1937	8,491.39	5,958.95	273.02	14,724.26
1938	14,612.34	8,774.71	99.40	23,486.45
1939	15,702.40	5,763.29	.....	21,465.69

[fol. 1661] PLAINTIFFS' DEPOSITION EXHIBIT 40

United States Bill for Radio*

Date	Time Sales	Talent Costs	Number of Sets Sold	Number of Tubes Sold
Jan. 1, 1936	$86,000,000	$25,000,000	5,700,000	39,000,000
Jan. 1, 1937	114,000,000	36,000,000	8,000,000	46,000,000
Jan. 1, 1938	125,000,000	40,000,000	7,700,000	40,000,000
Jan. 1, 1939	140,000,000	30,000,000	6,000,000	33,000,000
Jan. 1, 1940	170,000,000	35,000,000	9,000,000	45,000,000

*Taken from figures in Radio Today of January 1, 1936; January 1, 1937, page 14; January 1, 1938, Part 2; January 1, 1939, page 12. January 1, 1940, page 11.

[fol. 1662] PLAINTIFFS' DEPOSITION EXHIBIT 41

Radio Homes in the State of Florida*

	Date	Florida Total	U. S. Total	% of U. S. Total
(1)	April, 1930	58,128	12,048,762	.48
(2)	Jan. 1, 1934	151,328	17,948,162	.84
(3)	Jan. 1, 1935	200,674	21,455,799	.93
(4)	Jan. 1, 1936	216,500	22,501,670	.96
(5)	Jan. 1, 1937	250,000	24,500,000	1.02
(6)	Jan. 1, 1938	263,000	25,804,300	1.01
(7)	Jan. 1, 1939	308,900	27,500,000	1.12

*Figures taken from Radio Today, January issues; also Broadcasting Yearbook, 1935–1937.

(1) 1935 Broadcasting Yearbook, p. 98.
(2) 1935 Broadcasting Yearbook, p. 98.
(3) 1936 Broadcasting Yearbook, p. 14.
(4) 1937 Broadcasting Yearbook, p. 35.
(5) January, 1937, Radio Today, p. 14.
(6) January, 1938, Radio Today, Part 2.
(7) January, 1939, Radio Today, p. 13.

[fol. 1663]

PLAINTIFFS' DEPOSITION EXHIBIT 42

Retail Radio Sales in the United States, 1922–1937

	Total Sets		Total Tubes Sold		Motor Car Sets		Figures Taken from Broadcasting Yearbook, 1938			
	Number	Value	Number	Value	Number	Value	Grand Total; Sales of Radio Apparatus for Broadcast Reception Value	Homes with Radio Sets Number	Auto sets in Use Number	Total Radio Sets in Use in U. S.
1922	100,000	$5,000,000	1,000,000	$6,000,000	.....	.....	$60,000,000	60,000	.....	**400,000
1923	550,000	15,000,000	4,500,000	12,000,000	.....	.....	136,000,000	1,500,000	.....	**1,000,000
1924	1,500,000	100,000,000	12,000,000	36,000,000	.....	.....	358,000,000	3,000,000	.....	2,500,000
1925	2,000,000	165,000,000	20,000,000	48,000,000	.....	.....	430,000,000	4,000,000	.....	3,500,000
1926	1,750,000	200,000,000	30,000,000	58,000,000	.....	.....	506,000,000	5,000,000	.....	5,000,000
1927	1,350,000	168,000,000	41,000,000	67,300,000	.....	.....	425,000,000	6,500,000	.....	6,500,000
1928	3,281,000	400,000,000	50,200,000	110,250,000	.....	.....	690,550,000	7,500,000	.....	8,500,000
1929	4,428,000	600,000,000	69,000,000	172,500,000	.....	.....	842,548,000	9,000,000	.....	10,500,000
1930	3,827,300	300,000,000	52,000,000	110,600,000	34,000	$3,000,000	496,432,000	12,048,762	.....	13,500,000
1931	3,420,000	225,000,000	53,000,000	69,550,000	108,000	5,940,000	300,000,000	14,000,000	100,000	15,000,000
1932	3,000,000	140,000,000	44,300,000	48,730,000	143,000	7,150,000	200,000,000	16,809,562	250,000	18,000,000
1933	3,806,000	230,099,000	59,000,000	49,000,000	724,000	28,598,000	300,000,000	20,402,369	500,000	22,000,000
1934	4,084,000	270,000,000	58,000,000	36,000,000	780,000	28,000,000	350,000,000	21,456,000	1,250,000	28,000,000
1935*	6,026,800	330,192,480	71,000,000	50,000,000	1,125,000	54,562,500	370,000,000	22,869,000	2,000,000	28,500,000
1936*	8,248,000	450,000,000	98,000,000	69,000,000	1,412,000	69,188,000	500,000,000	24,600,000	3,500,000	33,000,000
1937*	7,700,000	450,000,000	101,000,000	85,000,000	1,750,000	87,500,000	537,000,000	26,000,000	5,000,000	37,000,000

* Figures for sets include value of tubes in receivers.

** Includes home-built sets.

[fol. 1664] PLAINTIFFS' DEPOSITION EXHIBIT 43.

34845

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

June 28, 1939.

The Federal Communications Commission today released a series of tables covering the economic status of broadcast licensees for the year 1938. The data was compiled by the Accounting, Statistical and Tariff Department of the Commission from information supplied by the licensees on Forms 705 and 706.

The tables show that there were 764 licenses and construction permits outstanding at the end of the year, classified as follows:

660 station reports used in the tabulations
40 construction permits
38 non-commercial stations
12 located in territories
14 not used because of defects in reporting

764 Total

The 660 stations reported in the tabulation include 240 stations from which not enough revenue was derived during the year to pay their actual expenses, including depreciation. Those 240 stations showed losses in the aggregate amounting to $2,223,195. The 419 stations reporting profits showed broadcast income of $16,728,533. One station reported neither a profit nor a loss for the year.

The tabulations include 175 stations each of whose time sales were less than $25,000. As a group these 175 stations showed a loss, their aggregate broadcast revenues being $2,520,026 and their aggregate expenses (inclusive of depreciation, taxes other than income taxes, etc.) $2,870,729. However, certain of these stations showed a profit.

Other compilations from the reports show that 658 of the stations and networks had a payroll for the year amounting to $45,663,757. Of this amount, $4,239,470 was paid to officers of the licensee companies. As of December 31, 1938 these stations and networks employed a total of 23,060 persons, including staff musicians and other artists on the regular payroll.

[fol. 1665] During the week beginning December 11, 1938, there were 18,359 full-time employees with a total payroll for the week amounting to $830,003. During the same week there were 4,377 part-time employees, drawing a total for the week in the amount of $103,134. The average compensation for the week beginning December 11 was $45.20 (18,359 employees), compared with $45.12 (17,085 employees) for the week beginning March 6, 1938. For part-time employees, the average compensation was $23.55 (4,377 employees) for the week beginning December 11, 1938, compared with $18.97 (5,820 employees) for the week beginning March 6, 1938.

The tables as released by the Commission are in summary form and represent generally the information included in the tables released on June 6, 1938 for the year 1937. Those tables include balance sheets for the major networks and for the industry as a whole.

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FEDERAL COMMUNICATIONS COMMISSION
Accounting, Statistical, and Tariff Dept.
Washington, D. C.

34737 - 1

Combined income statement

3 major networks and licensees of 660 standard broadcast stations
(including 1 major network not the licensee of any such station)
as at the end of the year
1938

Particulars		Amount
(a) Revenues		$
1. Network portion of network time sales		35,455,510
2. Time sales by stations	$82,669,401	
Less: payments to other stations	745,452	81,923,949
3. Total time sales by networks and stations		117,379,459
4. Deduct: Commission to agencies, representatives, and brokers		16,487,209
5. Net revenue received from sale of time		100,892,250
6. [illegible]		6,001,347
8. Miscellaneous sales and revenue services		3,278,836
9. Sustaining programs sold to stations		80,470
10. Total revenues of networks and stations		111,356,378
(b) Expenses		
1. Technical expenses		13,048,588
2. Program, talent, and communication line expense (including sustaining programs purchased, royalties, and similar items)		38,196,994
3. Advertising, promotional, and selling expenses		9,963,136
4. General and administrative expenses		15,088,718
5. Other direct broadcast expenses		5,209,099
6. Indirect broadcast expenses (depreciation, amortization, taxes, uncollectible revenue, and rents)		10,997,059
7. Total broadcast expenses		92,503,594
(c) Broadcast income ((a) minus (b))		18,852,784
(d) 1. Income from broadcast assets leased to others		277,155
2. Total income from others who use licensee stations for their own time sales		928,218
(e) Income from general services to licensees		92,958
(f) Total income derived from activities related to broadcasting		20,153,115
(g) Income from business or activities other than broadcasting		53,672,999
(h) Extraordinary income amounts for the year (net debits)		(79,035)
(i) Total income from all sources reported		73,747,079
(j) Contractual payments to others from income	$214,228	*
(k) State and Federal taxes on net income	11,522,636	11,736,864
(l) Net income from all sources for the year, after taxes		62,010,215

Dividends declared (and withdrawals by partners and proprietors) during the year were reported by licensees in the amount of $22,976,676.

1666

1043

FEDERAL COMMUNICATIONS COMMISSION

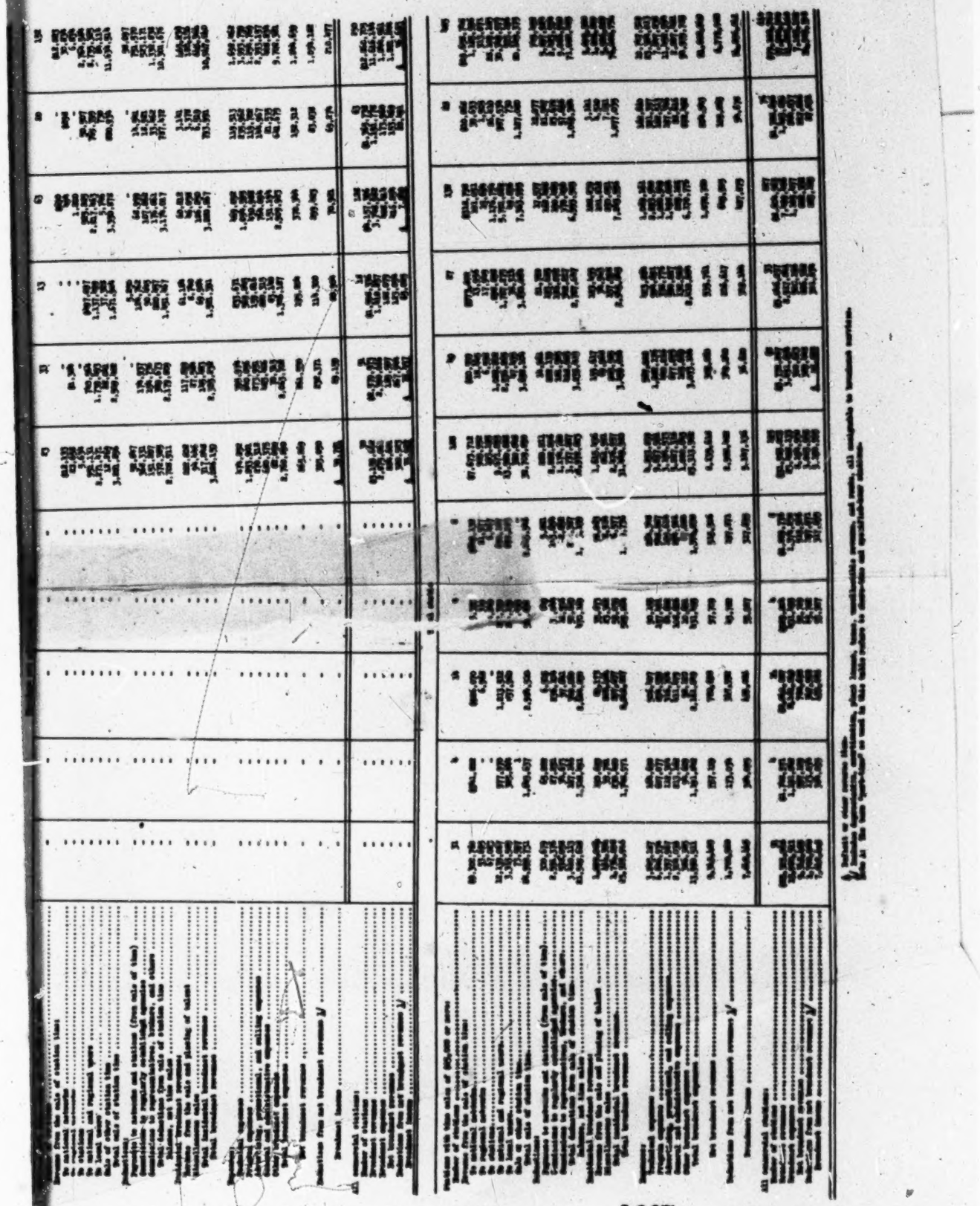
ACCOUNTING, STATISTICAL, AND TARIFF DEPT.

WASHINGTON, D.C.

Summary of responses by licensees of standard broadcast stations filed in accordance with section 15.11 (f, g, i, Rules of Practice and Procedure)

Broadcast income items of stations class and network affiliation

Item	Class channel				Regional		Local		Total		Grand total
	50,000 watts or more		1,000 to 49,999 watts		Exclusive	Other	Exclusive and day	Part-time	Exclusive	Day and part-time	
(Col. 1)	(Col. 2)	(Col. 3)	(Col. 4)	(Col. 5)	(Col. 6)	(Col. 7)	(Col. 8)	(Col. 9)	(Col. 10)	(Col. 11)	(Col. 12)
Stations affiliated with national networks											
Stations with time sales of $25,000 or more:											
Number of stations	31	4	34	4	2	10	11	14	64	5	116
Income from the sale of station time:											
To national networks	$9,332,710	$251,000	$805,470	$69,333	$83,130	$7,440,[illegible]	$89,[illegible]	$333,[illegible]	$[illegible]16,[illegible]	$[illegible]1,[illegible]	$19,[illegible]
To regional networks	21,[illegible]	-	6,[illegible]	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To stations	21,[illegible]	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To national and regional users	12,[illegible]7,[illegible]	277,[illegible]	1,[illegible]3,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To local users	3,[illegible]3,[illegible]	[illegible]5,[illegible]	[illegible]7,[illegible]	[illegible]	[illegible]	11,[illegible]5,[illegible]	[illegible]4,[illegible]	[illegible]9,[illegible]	2,[illegible]7,[illegible]	13[illegible]	[illegible]
Sale of other station time	73,[illegible]7	1	[illegible]	-	[illegible]	[illegible]4,[illegible]	[illegible]3,[illegible]	[illegible]	[illegible]	-	[illegible]
Total sale of station time	25,[illegible]3,[illegible]	1,[illegible]6,[illegible]7	2,[illegible]9,[illegible]0	[illegible]0,[illegible]	2,[illegible]1,[illegible]6	18,[illegible]3,[illegible]5	[illegible]3,[illegible]4	1,[illegible]8,[illegible]8	3,[illegible]7,[illegible]9	[illegible]0,[illegible]	[illegible]
Deductions:											
Payments to networks and stations (free sale of time)	[illegible]0,[illegible]9	[illegible]8,[illegible]0	[illegible]4,[illegible]1	[illegible]	[illegible]	[illegible]	[illegible]6,[illegible]4	[illegible]	[illegible]6,[illegible]	[illegible]4,[illegible]	[illegible]
Commissions to regularly established agencies	2,[illegible]1,[illegible]5	[illegible]7,[illegible]9	[illegible]7,[illegible]4	[illegible]	[illegible]	1,[illegible]3,[illegible]3	[illegible]5,[illegible]4	[illegible]	[illegible]	[illegible]	[illegible]
Commissions to representatives, brokers, and others	[illegible]1,[illegible]8	[illegible]6,[illegible]3	[illegible]5,[illegible]1	[illegible]	[illegible]	[illegible]	[illegible]6,[illegible]5	[illegible]	[illegible]	[illegible]	[illegible]
Total deductions from sale of station time	3,[illegible]0,[illegible]1	[illegible]7,[illegible]2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]5,[illegible]8	[illegible]	[illegible]	[illegible]	[illegible]
Balance, net time sales	21,[illegible]9,[illegible]9	1,[illegible]8,[illegible]1	2,[illegible]4,[illegible]9	[illegible]0,[illegible]0	1,[illegible]3,[illegible]9	[illegible]5,[illegible]0	[illegible]7,[illegible]0	1,[illegible]4,[illegible]8	3,[illegible]6,[illegible]9	[illegible]7,[illegible]	[illegible]
Incidental broadcast revenues:											
Revenue from the sale and placing of talent	[illegible]9,[illegible]6	[illegible]0,[illegible]9	[illegible]9,[illegible]3	[illegible]	[illegible]	1,[illegible]6,[illegible]3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Miscellaneous sales	[illegible]7,[illegible]4	[illegible]3,[illegible]8	[illegible]4,[illegible]3	[illegible]	[illegible]	[illegible]	[illegible]5,[illegible]7	[illegible]	[illegible]	[illegible]	[illegible]
Total incidental broadcast revenues	1,[illegible]8,[illegible]3	[illegible]4,[illegible]7	[illegible]3,[illegible]7	[illegible]	[illegible]	[illegible]	[illegible]1,[illegible]4	[illegible]	[illegible]	[illegible]	[illegible]
Total broadcast revenues	23,[illegible]3,[illegible]2	1,[illegible]4,[illegible]7	2,[illegible]4,[illegible]7	[illegible]0,[illegible]0	1,[illegible]3,[illegible]2	27,[illegible]5,[illegible]3	[illegible]3,[illegible]8	1,[illegible]5,[illegible]6	3,[illegible]6,[illegible]0	[illegible]7,[illegible]	[illegible]
Expenses:											
Technical expenses	1,[illegible]3,[illegible]7	[illegible]0,[illegible]9	[illegible]6,[illegible]7	[illegible]	[illegible]	1,[illegible]1,[illegible]7	[illegible]5,[illegible]6	[illegible]	1,[illegible]1,[illegible]0	[illegible]3,[illegible]	[illegible]
Program expenses	2,[illegible]2,[illegible]4	[illegible]1,[illegible]3	[illegible]5,[illegible]8	[illegible]	[illegible]	2,[illegible]3,[illegible]5	[illegible]1,[illegible]3	[illegible]	[illegible]	[illegible]	[illegible]
Advertising, promotional, and selling expenses	1,[illegible]7,[illegible]7	[illegible]3,[illegible]5	[illegible]1,[illegible]9	[illegible]	[illegible]	[illegible]1,[illegible]3	[illegible]1,[illegible]6	[illegible]	[illegible]	[illegible]	[illegible]
General and administrative expenses	2,[illegible]4,[illegible]8	[illegible]3,[illegible]2	[illegible]1,[illegible]9	[illegible]	[illegible]	[illegible]1,[illegible]1	[illegible]1,[illegible]5	[illegible]	[illegible]	[illegible]	[illegible]
Other broadcast expenses	[illegible]5,[illegible]9	[illegible]4,[illegible]9	[illegible]6,[illegible]0	[illegible]	[illegible]	[illegible]6,[illegible]8	[illegible]1,[illegible]6	[illegible]	[illegible]	[illegible]	[illegible]
Total broadcast expenses	13,[illegible]9,[illegible]1	1,[illegible]1,[illegible]2	2,[illegible]1,[illegible]9	[illegible]1,[illegible]0	1,[illegible]3,[illegible]0	19,[illegible]7,[illegible]9	[illegible]9,[illegible]9	1,[illegible]0,[illegible]5	3,[illegible]3,[illegible]9	[illegible]0,[illegible]	[illegible]
Net broadcast revenue	9,[illegible]3,[illegible]9	[illegible]7,[illegible]9	[illegible]9,[illegible]8	[illegible]7,[illegible]0	[illegible]3,[illegible]2	7,[illegible]8,[illegible]4	[illegible]5,[illegible]	[illegible]0,[illegible]7	[illegible]5,[illegible]8	[illegible]3,[illegible]	[illegible]
Deductions from net broadcast revenues 1/	1,[illegible]0,[illegible]0	[illegible]3,[illegible]4	[illegible]7,[illegible]9	[illegible]3,[illegible]0	[illegible]7,[illegible]2	4,[illegible]1,[illegible]9	[illegible]4,[illegible]0	[illegible]0,[illegible]7	[illegible]4,[illegible]1	[illegible]	[illegible]
Broadcast income	7,[illegible]6,[illegible]9	[illegible]0,[illegible]5	[illegible]1,[illegible]5	[illegible]3,[illegible]7	[illegible]1,[illegible]8	3,[illegible]0,[illegible]5	[illegible]9,[illegible]5	[illegible]6,[illegible]8	[illegible]6,[illegible]7	[illegible]5,[illegible]	[illegible]
All commercial stations:											
Number of stations	31	4	34	4	2	10	11	14	64	5	116
Broadcast revenues	$[illegible]3,[illegible]2	$1,[illegible]7,[illegible]7	$[illegible]2,[illegible]7	[illegible]	$[illegible]3,[illegible]2	$[illegible]7,[illegible]1	[illegible]	$1,[illegible]7,[illegible]2	$[illegible]3,[illegible]5	$[illegible]3,[illegible]	[illegible]
Broadcast expenses	13,[illegible]9,[illegible]1	1,[illegible]1,[illegible]2	2,[illegible]1,[illegible]9	[illegible]	1,[illegible]3,[illegible]0	19,[illegible]7,[illegible]9	[illegible]	1,[illegible]0,[illegible]5	3,[illegible]3,[illegible]9	[illegible]	[illegible]
Net broadcast revenues	9,[illegible]3,[illegible]9	[illegible]7,[illegible]9	[illegible]9,[illegible]8	[illegible]7,[illegible]0	[illegible]3,[illegible]2	7,[illegible]8,[illegible]4	[illegible]	[illegible]0,[illegible]7	[illegible]5,[illegible]8	[illegible]	[illegible]
Deductions from net broadcast revenues 1/	1,[illegible]0,[illegible]0	[illegible]3,[illegible]4	[illegible]7,[illegible]9	[illegible]3,[illegible]0	[illegible]7,[illegible]2	4,[illegible]1,[illegible]9	[illegible]	[illegible]0,[illegible]7	[illegible]4,[illegible]1	[illegible]	[illegible]
Broadcast income	7,[illegible]6,[illegible]9	[illegible]0,[illegible]5	[illegible]1,[illegible]5	[illegible]3,[illegible]7	[illegible]1,[illegible]8	3,[illegible]0,[illegible]5	[illegible]	[illegible]6,[illegible]8	[illegible]6,[illegible]7	[illegible]	[illegible]
Stations affiliated with [illegible] network only											
Stations with time sales of $25,000 or more:											
Number of stations	-	-	-	-	-	4	5	-	9	3	17
Income from sale of station time:											
To national networks	-	-	-	-	-	$[illegible]	-	-	-	-	$[illegible]
To regional networks	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To stations	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To national and regional users	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To local users	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sale of other station time	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total sale of station time	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Deductions:											
Payments to networks and stations (free sale of time)	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Commissions to regularly established agencies	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Commissions to representatives, brokers, and others	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total deductions from sale of station time	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Balance, net time sales	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Incidental broadcast revenues:											
Revenue from the sale and placing of talent	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Miscellaneous sales	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total incidental broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Expenses:											
Technical expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Program expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Advertising, promotional, and selling expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
General and administrative expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Other broadcast expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total broadcast expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Net broadcast revenue	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Deductions from net broadcast revenues 1/	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast income	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
All commercial stations:											
Number of stations	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Net broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Deductions from net broadcast revenues 1/	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast income	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Stations not affiliated with any											
Stations with time sales of $25,000 or more:											
Number of stations	-	-	-	-	-	15	31	13	63	8	136
Income from the sale of station time:											
To national networks	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To regional networks	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To stations	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To national and regional users	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
To local users	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sale of other station time	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total sale of station time	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Deductions:											
Payments to networks and stations (free sale of time)	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Commissions to regularly established agencies	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Commissions to representatives, brokers, and others	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total deductions from sale of station time	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Balance, net time sales	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Incidental broadcast revenues:											
Revenue from the sale and placing of talent	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Miscellaneous sales	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total incidental broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Expenses:											
Technical expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Program expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Advertising, promotional, and selling expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
General and administrative expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Other broadcast expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Total broadcast expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Net broadcast revenue	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Deductions from net broadcast revenues 1/	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast income	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
All commercial stations:											
Number of stations	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast expenses	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Net broadcast revenues	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Deductions from net broadcast revenues 1/	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Broadcast income	-	-	-	-	-	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
All stations											
Stations with time sales of $25,000 or more	31	4	34	4	2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Number of stations	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Income from the sale of station time:											
To national networks	$[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]



FEDERAL COMMUNICATIONS COMMISSION
Accounting, Statistical, and Tariff Dept.
Washington, D. C.

Income items of selected groups of standard broadcast stations
1938
(Including 23 M & O stations)

Particulars	Stations serving as outlets for national networks				
	In basic* networks	In regional groups required as a unit	Supplementary to groups and optional to advertisers	Special arrangements for network service	Total All stations in this group
Stations with net time sales of $25,000 or more:					
Number of stations	78	107	128	7	316
Revenues from the sale of station time:					
To national networks	$ 13,310,612	$ 4,359,494	$ 1,958,259	$ 21,082	$ 19,649,447
To regional networks	580,883	735,490	117,618	12,290	1,446,281
To stations	41,499	169,823	34,893	4,178	250,393
To national and regional users	15,647,320	5,885,814	3,887,487	388,283	25,808,904
To local users	7,751,588	5,749,888	4,729,448	638,393	18,869,317
Sale of other station time	17,885	87,185	32,881	30,081	168,032
Total sale of station time	37,349,787	16,987,694	10,760,587	894,307	65,992,375
Deductions:					
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Commissions to regularly established agencies	3,393,501	1,408,128	686,172	90,618	5,578,419
Commissions to representatives, brokers, and others	220,283	218,755	111,618	14,180	564,836
Total deductions from sale of station time	4,793,183	1,626,883	1,797,790	104,798	8,322,654
Balance, net sale of time	32,556,604	15,360,811	11,762,113	789,509	60,669,721
Incidental broadcast revenues:					
Revenues from the sale and placing of talent	2,096,738	292,072	807,983	89,675	3,186,468
Miscellaneous sales	922,241	289,688	311,128	30,087	1,553,144
Total incidental broadcast revenues	3,018,979	581,760	719,109	39,762	4,739,612
Total broadcast revenues	35,551,583	15,950,569	12,481,222	789,271	64,770,645
Expenses:					
Technical expenses	4,772,782	2,075,296	1,644,942	169,827	8,662,347
Program expenses	10,292,692	4,267,482	3,906,980	307,663	18,776,577
Advertising, promotional, and selling expenses	2,749,783	1,395,805	1,612,437	30,988	5,789,011
General and administrative expenses	4,319,116	2,858,210	2,133,108	182,582	8,873,016
Other broadcast expenses	861,533	574,670	353,646	19,112	1,748,961
Total broadcast expenses	22,995,906	10,571,503	9,840,613	710,630	44,117,652
Net broadcast revenues	12,555,677	5,078,762	2,643,609	78,636	20,352,684
Deductions from net broadcast revenues 1/	3,162,665	1,197,052	1,135,788	99,096	5,594,595
Broadcast income	9,392,812	3,881,710	1,507,887	(20,460)	14,757,989
All commercial stations:					
Number of stations	78	186	138	8	390
Broadcast revenues	$ 35,551,583	$ 15,951,606	$ 12,717,404	$ 792,884	$ 65,012,657
Broadcast expenses	22,995,906	10,572,503	10,088,581	733,067	44,390,057
Net broadcast revenues	12,555,677	5,082,876	2,627,823	59,777	20,622,600
Deductions from net broadcast revenues 1/	3,162,665	1,230,132	1,197,728	102,163	5,692,688
Broadcast income	9,392,812	3,852,746	1,430,173	(42,386)	14,929,912

*Includes Mountain and Pacific Coast Groups, required stations.
1/Includes depreciation, amortization, plant leases, taxes, miscellaneous revenues and rents, all chargeable to broadcast service.

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FEDERAL COMMUNICATIONS COMMISSION
Accounting, Statistical, and Tariff Dept.
Washington, D. C.

Condensed general balance sheet

3 major networks and licensees of 660 standard broadcast stations
(including 1 major network not the licensee of any such station)
as at the end of the year
1938

Particulars		Amount
		$
Asset side		
Current assets		408,133,556
Investment (at cost) in broadcast assets	$72,961,659	
Less: depreciation to date	26,183,672	46,777,987
Investment in assets other than broadcast plant (after depreciation and amortization)		561,274,054
Other asset side items		52,154,304
Total asset side		1,068,339,901
Liability side		$
Long-term debt		61,997,823
Current liabilities and accruals		80,784,658
Net worth		821,536,191
Other liability side items		104,021,229
Total liability side		1,068,339,901

Included in the amount of $46,777,987 shown above as the net amount of broadcast assets there were reported by licensees the following:

Goodwill	$11,526,179
Excess of purchase price of broadcast plant over its net book value in the hands of vendors	714,326
Total	$12,240,505

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FEDERAL COMMUNICATIONS COMMISSION
Accounting, Statistical, and Tariff Dept.
Washington, D. C.

Condensed general balance sheet
Major networks
As at the close of the year
1938

Line No.	Item (a)		Balance at close of year (b)
ASSET SIDE:			
1	Investments--broadcast (see next sheet)		$ 13,411,102
2	Investments--nonbroadcast		627,722
3	Total investments (net) (sum of lines 1 and 2) ...		14,038,824
4	Current assets (net)		13,048,668
5	Prepaid payrolls and other service charges		[illegible]
6	Deferred charges and unclassified debit balances		115,447
7	Assets not classified above		219,583
8	Total asset side		27,919,747
LIABILITY SIDE:			
9	Long-term debt		$ 1,959,200
10	Current and accrued liabilities		10,040,413
11	Provisions for deferred payments, deferred credits and unclassified credit balances		181,025
12	For a corporation		
	(a) Capital stock issued and outstanding	$ 6,997,697	
	(b) Capital surplus	43,462	
	(c) Earned surplus	8,697,950	15,739,109
13	Total liability side		27,919,747

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FEDERAL COMMUNICATIONS COMMISSION
Accounting, Statistical, and Tariff Dept.
Washington, D. C.

Investment assignable to broadcast service
Major networks
As at the close of the year
1938

Line No.	Item	Amount
1	Owned broadcast plant in service of licensee (depreciated value)	$
2	Allocated to network service	5,571,332
3	Allocated to M&O (key) stations service	862,912
4	Allocated to M&O (nonkey) stations service	628,572
5	Total	7,062,816
6	Improvements and replacements of broadcast plant leased from others (depreciated value)	
8	Allocated to M&O (key) stations service	
9	Allocated to M&O (nonkey) stations service	828,106
10	Total	1,639,563
11	Broadcast plant leased to others (depreciated value)	
12	Allocated to network service	89,921
13	Allocated to M&O (nonkey) stations service	2
14	Total	89,923
15	Other broadcast plant amounts	
16	Goodwill - allocated to network service	4,135,082
17	Plant under construction - allocated to network service	483,718
18	Total	4,618,800
19	Summary	
20	Network amount	11,062,712
21	M&O (key) station amount	901,710
22	M&O (nonkey) station amount	1,456,680
23	Total	13,411,102

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Aggregate cost to the present owners of all the foregoing items before depreciation $22,116,096.

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[fol. 1672] PLAINTIFFS' DEPOSITION EXHIBIT 44.

34977

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

July 6, 1939.

The Federal Communications Commission today released an additional tabulation of data compiled from reports of networks and licensees of standard broadcast stations for the year 1938.

The table covers the combined income statements of the Columbia Broadcasting System, Inc., the National Broadcasting Company, Inc., and the Mutual Broadcasting System, Inc. The table also includes data concerning 23 standard broadcast stations which are operated either by or for the Columbia Broadcasting System or the National Broadcasting Company. Of these 23 managed and operated stations, 9 have been designated by the networks as key stations and 14 as non-key stations.

The operating expenses of the networks and the 9 key stations, as reported by the networks, are not susceptible of direct allocation to network operations on the one hand and to station operations on the other. Therefore, the division of the expenses between network operations, the amounts for which are shown in column 2, and the 9 key stations, the amounts for which are shown in column 3, reflects an arbitrary determination in several instances.

(Here follow 4 Photolithographs, side folios 1673-1676)

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FEDERAL COMMUNICATIONS COMMISSION
Accounting, Statistical, and Tariff Dept.
Washington, D. C.

34951

Income Statement
3 major networks and 23 [illegible] (*) standard broadcast stations
(including 1 major network not employing any such station)
1938

July 1, 1939

Particulars	Network operations	M & O station operations			Grand total
		9 Key stations	14 Non-key stations	Total stations	
(Col. 1)	(Col. 2) $	(Col. 3) $	(Col. 4) $	(Col. 5) $	(Col. 6) $
(a) Revenues					
1. Net time sales to advertisers (after trade discounts)	54,938,879	-	-	-	54,938,879
a. Sale of station time to networks	-	2,804,948	2,542,440	5,347,388	5,347,388
b. Sale of station time to users	-	2,989,106	4,648,152	7,637,258	7,637,258
2. Received of other networks and stations for network broadcasting of their time sales to advertisers	-	-	-	-	-
3. Total time sales	54,938,879	5,794,054	7,390,592	13,184,646	68,123,525
4. Less-Portion of sales paid to other networks	496,858	-	-	-	496,858
a. Portion of sales paid to managed and operated key stations	2,804,948	-	-	-	2,804,948
b. Portion of sales paid to managed and operated nonkey stations	2,542,441	-	-	-	2,542,441
c. Portion of sales paid to independent stations	13,134,385	-	-	-	13,134,385
d. Portion of sales paid to foreign and territorial stations	504,737	-	-	-	504,737
Total payments to others for broadcast service	19,483,369	-	-	-	19,483,369
5. Balance: Net time sales to advertisers retained by networks	35,455,510	5,794,054	7,390,592	13,184,646	48,640,156
6. Sustaining program sales to stations	20,470	-	-	-	20,470
7. Sale of talent and booking commissions	2,381,964	-	388,818	388,818	2,770,782
8. Recoveries by networks from others on communication line charges	1,085,469	-	65,494	65,494	1,150,963
a. Other revenue incidental to broadcasting	1,451,947	-	96,477	96,477	1,548,424
9. Rent received from broadcast equipment and other fixed assets leased to others (included in (d) below)					
10. Total net time sales and other revenues of networks	40,395,360	5,794,054	7,941,381	13,735,435	54,130,795
11. Deduct: Commissions paid to agencies and brokers	8,165,742	437,208	665,278	1,102,486	9,268,228
12. Total revenues of networks and their M&O stations	32,229,618	5,356,846	7,276,103	12,632,949	44,862,567
(b) Expenses					
1. Technical expenses:					
a. Salaries and supervision	1,879,829	422,467	599,122	1,021,589	2,901,418
b. Cost of power	82,664	161,668	129,553	291,221	373,885
c. Other technical expenses	338,576	138,440	145,883	284,323	622,899
Total	2,301,069	722,575	874,558	1,597,133	3,898,202
2. Program expenses:					
a. Salaries and supervision (including expenses of announcers)	2,284,165	278,279	462,353	740,632	3,024,797
b. Rent for communication lines	5,902,770	-	98,104	98,104	6,000,874
c. Talent expense	5,217,897	624,739	923,532	1,548,291	6,766,188
d. Royalties and license fees paid, relating to program material	489,307	59,392	398,922	458,314	947,621
e. Other expenses directly related to programs	978,842	116,960	96,583	213,083	1,193,925
Total	14,872,981	1,078,990	1,981,434	3,060,424	17,933,405
3. Advertising, promotional, and selling expenses:					
a. Salaries and supervision	1,765,534	209,261	272,768	482,029	2,247,563
b. Other expenses related directly to advertising, promotional, and selling	949,764	112,906	311,729	424,635	1,374,399
Total	2,715,298	322,167	584,497	906,664	3,621,962
4. General and administrative expenses:					
a. Executive expenses	931,715	115,947	222,854	338,801	1,270,516
b. Legal services	294,571	32,030	12,626	44,656	299,227
c. Other general and administrative expenses	2,449,438	284,359	193,544	477,903	2,927,341
Total	3,635,724	432,336	429,024	861,360	4,497,084
5. Other broadcast expenses:					
a. Salaries	445,048	55,136	83,402	138,538	583,586
b. Office supplies and services not reported elsewhere above	36,115	4,102	-	4,102	40,217
Total	481,163	59,238	83,402	142,640	623,803
6. Total direct broadcast expenses	24,006,235	2,615,306	3,952,915	6,568,221	30,574,456

Total	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5. Other broadcast expenses:					
a. Salaries	445,048	55,136	83,402	138,538	583,586
b. Office supplies and services not reported elsewhere above	36,115	4,102	-	4,102	40,217
Total	481,163	59,238	83,402	142,640	623,803
6. Total direct broadcast expenses	24,006,235	2,615,306	3,952,915	6,568,221	30,574,456
7. Depreciation of assets devoted to broadcasting	729,884	85,092	865,094	350,186	1,080,070
8. Amortization of intangible assets applicable to broadcasting	-	-	-	-	-
9. Taxes assignable to broadcast service (other than taxes on net income)	890,034	65,651	120,265	185,916	1,075,950
10. Plant losses assignable to broadcast service	9,282	1,242	-	1,242	10,524
11. Uncollectible broadcast revenues	11,710	1,567	2,270	3,837	15,547
12. Rent for broadcast plant leased from others	2,233,027	38,001	527,257	565,258	2,798,285
13. Total indirect broadcast expenses	3,873,937	191,553	914,886	1,106,439	4,980,376
14. Total expenses of networks and their M&O stations	27,880,172	2,806,859	4,867,801	7,674,660	35,554,832
(c) Net revenue from broadcast services	4,349,446	2,549,987	2,408,302	4,958,289	9,307,735
(d) Other income					174,751
(e) Gross income					9,482,486
(f) Deductions from income					985,090
(g) Net income before income taxes					8,497,396
(h) Estimated income taxes					
1. Federal					1,473,796
2. State					19,900
(i) Net income for the period					7,003,700

* M & O stations are those from which net profit on sales of time inure to networks.

PLAINTIFFS' DEPOSITION EXHIBIT 45

STATISTICS OF RADIO

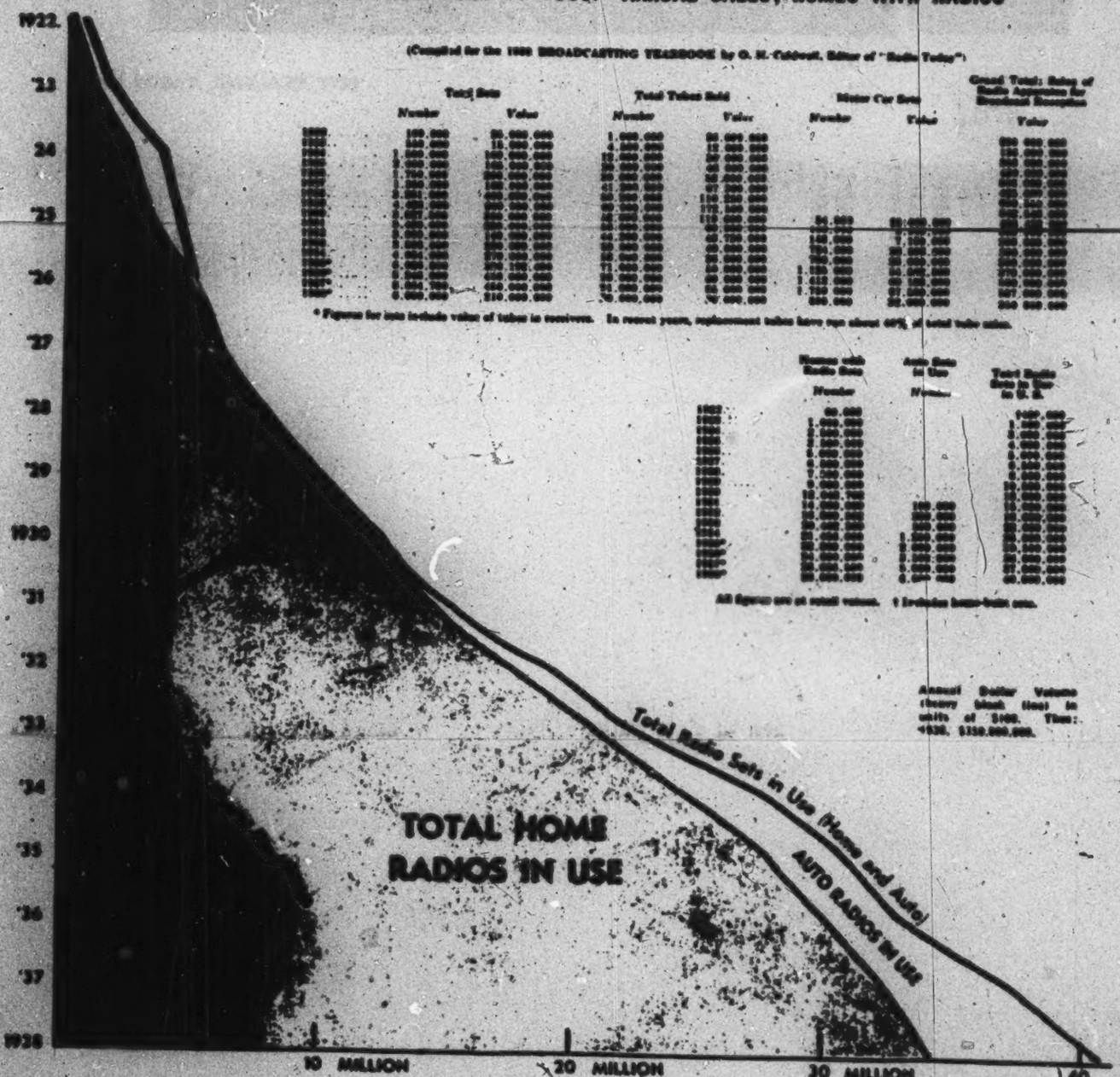
UNCLE SAM'S ANNUAL BILL FOR RADIO

Sale of time by broadcasters, 1938	$140,000,000
Talent costs, 1938	30,000,000
Electricity, batteries, etc., to operate 35,000,000 receivers	150,000,000
6,000,000 radio sets sold in 1938	210,000,000
33,000,000 replacement tubes	40,000,000
Radio parts, supplies, etc.	45,000,000
Servicing radio sets	60,000,000
U.S. Public paid for radio in 1938	$675,000,000

RADIO SETS IN USE

	Jan. 1, 1938	Jan. 1, 1939
U.S. homes with radios	26,666,500	27,500,000
Extra and "second" sets in above	6,000,000	7,500,000
Automobile radios in use	5,000,000	5,800,000
Total radio sets in use, U.S.	37,666,500	40,800,000
Total homes with autos	18,500,000	19,000,000
Total residence telephones	12,000,000	13,950,000
Total homes with electricity	22,500,000	24,000,000
Total homes in U.S.	32,000,000	32,250,000
Population U. S.	129,500,000	130,600,000

THE GROWTH OF RADIO FROM 1922 TO 1939. ANNUAL SALES; HOMES WITH RADIOS



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RADIO TODAY, JANUARY, 1939

1674

10501B

PLAINTIFFS' DEPOSITION EXHIBIT 45

TODAY

Radio Production, Sales, Utilization, as of Jan. 1, 1939. Industry Totals in Unit and Dollar Volume

RADIO-SET AND TUBE SALES, FOR YEAR 1938

	Number	Retail Value
Total radio sets sold during 1938	6,000,000	$210,000,000
Radio sets exported	600,000	
Automobile radios	800,000	32,000,000
Home radios sold in U.S.	4,600,000	160,000,000
Consoles	1,000,000	60,000,000
Table models	3,500,000	85,000,000
Combinations	200,000	13,000,000
Home sets sold as replacements	2,100,000	84,000,000
Home sets sold to homes previously without radios	1,000,000	40,000,000
Home radios sold as extra sets	1,500,000	36,000,000
Battery sets	800,000	32,000,000
Tube replacements	33,000,000	40,000,000
Tubes, initial equipment	35,000,000	43,000,000
Total tubes sold 1938 including exports	75,000,000	
Parts, supplies		45,000,000
Phonograph records	35,000,000	16,000,000

ROLL-CALL OF RADIO INDUSTRY, JAN. 1, 1939

Manufacturers of radio receivers	116
Manufacturers of radio tubes	12
Manufacturers of radio parts	705
Manufacturers of test equipment	60
Manufacturers of broadcast and amateur equipment	102
Manufacturers of sound equipment	98
Radio-set and parts distributors	2,021
Manufacturers' agents	239
Retail outlets selling radios	58,000
Dealers doing 85% of radio business	14,000
Servicemen, including dealers' servicemen	40,000
Radio amateurs and experimenters	81,000
Broadcasting stations, Jan. 1, 1939 (operating)	763

HOMES WITH RADIOS BY STATES

Ala.	387,700	Maine	210,100	Okla.	463,400
Ariz.	81,100	Md.	366,600	Ore.	290,900
Ark.	324,200	Mass.	1,038,900	Pa.	2,266,300
Calif.	1,771,000	Mich.	1,164,300	R. I.	158,500
Colo.	243,500	Minn.	577,900	S. C.	211,300
Conn.	419,900	Miss.	215,000	S. Dak.	125,600
Fla.	328,900	Neb.	394,000	Utah	113,000
Ga.	393,200	Nev.	29,900	Vt.	90,350
Idaho	100,200	N. H.	184,900	Va.	408,800
Ill.	1,912,100	N. J.	1,063,000	Wash.	452,300
Ind.	841,900	N. Mex.	63,800	W. Va.	355,900
Iowa	598,600	N. Y.	3,217,300	Wisc.	635,900
Kan.	380,300	N. C.	421,500	Wyo.	50,900
Ky.	514,900	N. Dak.	122,100	Total U.S.	27,500,000
La.	308,500	Ohio	1,693,000		

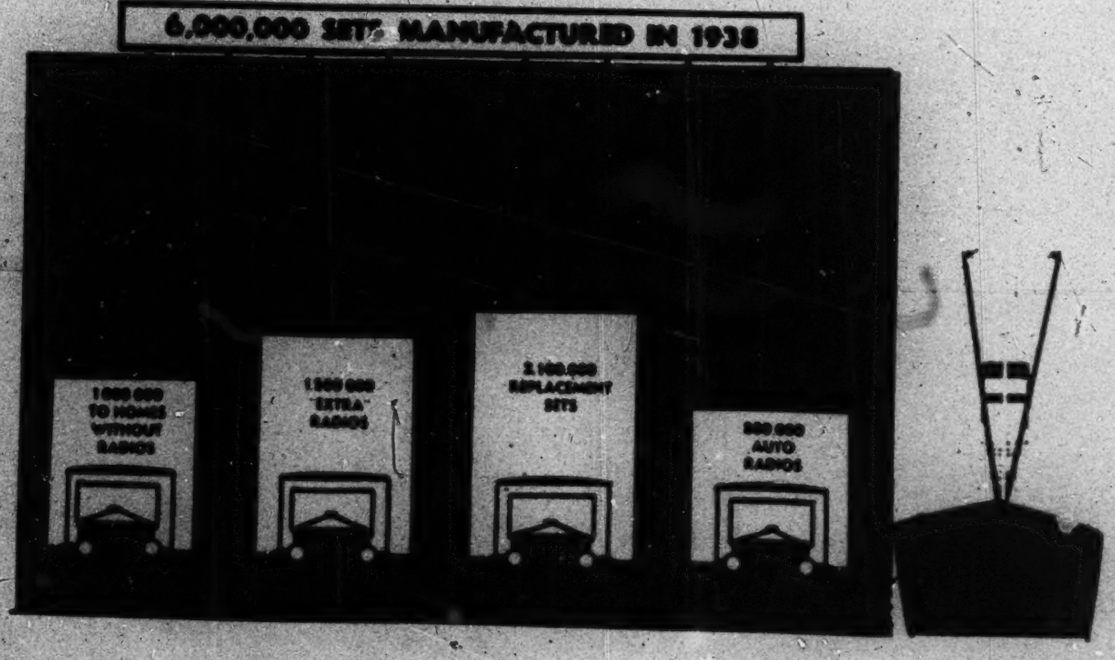
SALES OF REPLACEMENT PARTS, 1938

At manufacturers' selling prices

Transformers	$1,500,000
Condensers	$1,500,000
Vibrators	$750,000
Resistors	$600,000
Volume controls	$300,000
Speakers	$300,000

SOUND SALES, 1938

	Units	Retail Value
Sound systems (complete)	25,000	$5,000,000
Microphones	55,000	$1,000,000
Intercommunicators	15,000	$500,000



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PLAINTIFFS' DEPOSITION EXHIBIT 46

RADIO and Television TODAY

STATISTICS OF THE INDUSTRY

U. S. Annual Radio Bill

Sale of time by broadcasters, 1939	$170,000,000
Talent costs	35,000,000
Electricity, batteries, etc., to operate 38,400,000 receivers	165,000,000
9,000,000 radios sold in 1939 at retail	289,000,000
36,000,000 replacement tubes @ $1.25	45,000,000
Radio parts, supplies, etc.	50,000,000
Servicing radio sets	60,000,000
U.S. Public paid for radio in 1939	$814,000,000

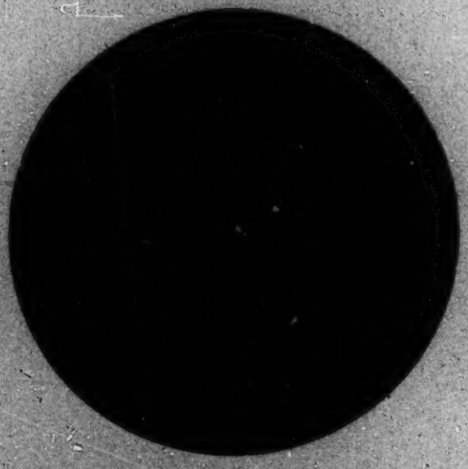
Radio Sets in Use

	Jan. 1, 1939	Jan. 1, 1940
U.S. homes with radios	27,500,000	28,700,000
"Secondary" sets in above homes	7,500,000	9,200,000
Battery Portables	200,000	900,000
Auto-radios	5,800,000	6,500,000
Total sets in use, U.S.	40,800,000	45,900,000
Total homes in U.S.	32,250,000	33,000,000
Total homes with autos	19,000,000	20,500,000
Total residence telephones	13,250,000	13,500,000
Total homes with electricity	24,000,000	24,450,000

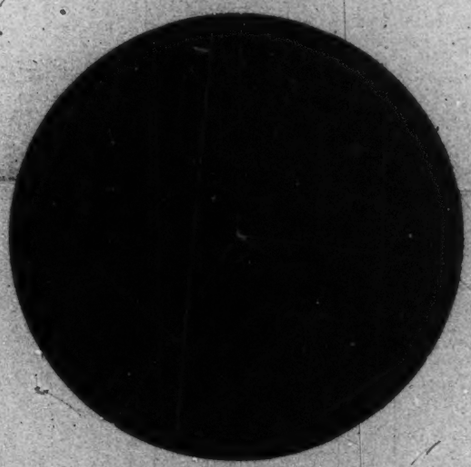
Radio Receivers—Sales and Volume in 1939

	Number	% of Total	Average Value (Retail)	Total Retail Value	% of Total
Radio Consoles	1,900,000	21.1	$61.00	$115,900,000	40.2
Radio Compacts	4,550,000	50.5	16.00	72,800,000	25.3
Table Combinations	250,000	2.8	30.00	7,500,000	2.6
Console Combinations	200,000	2.2	100.00	20,000,000	7.0
Total Combinations	450,000	5.0	61.00	27,500,000	9.6
Portables	900,000	10.0	24.00	21,600,000	7.5
Auto Radio	1,200,000	13.3	40.00	48,000,000	16.7
Total Radios	9,000,000	....	....	289,000,000	....
Total Tubes	91,000,000			Total Records	50,000,000

Nine Million Sets— **Sold for $289,000,000**



TOTALS ON THE 5 TYPES OF SETS



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Vol. 6, No. 1, January, 1940

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[fol. 1677] PLAINTIFFS' DEPOSITION EXHIBIT 47

Radio Stations in the State of Florida which are Members of the NAB*

Station	Location	Owner and Operator
WRUF	Gainesville	State and University of Florida
WMBR	Jacksonville	Florida Broadcasting Company
WIOD	Miami	Isle of Dream Broadcasting Corp.
WQAM	Miami	Miami Broadcasting Corp. Inc.
WDBO	Orlando	Orlando Broadcasting Co. Inc.
WSUN	St. Petersburg	Chamber of Commerce of St. Petersburg
WFLA	St. Petersburg	Florida West Coast Broadcasting Co. Inc.

* Taken from Radio Advertising Rates and Data, January Issue 1940, pp. 59–63.

[fol. 1678] PLAINTIFFS' DEPOSITION EXHIBIT 48

This exhibit contains a list of approximately 585 copyrighted compositions, of which the words or music, or both, were written by Irving Berlin. Such compositions were copyrighted at various dates between 1909 and 1939. Specimen compositions, giving the collaborator, the publisher, the date of copyright, are the following:

Composition	Collaborator/s	Publisher	Copyright Date	Renewed	Remarks
Alexander's Ragtime Band		ABC Standard	3/18/11		
All Alone		Irving Berlin Inc	9/ 9/24		
Always		Irving Berlin Inc	9/17/25		
Araby		ABC Standard	7/29/15		
Because I Love You		Irving Berlin Inc	9/30/26		
Blue Skies		Irving Berlin Inc	1/15/27		
Call Me Up Some Rainy Afternoon		ABC Standard	4/23/10	4/30/37	ABC Music Corp.
Cheek to Cheek		Irving Berlin Inc	7/ 2/35		Top Hat
Crinoline Days		Irving Berlin Inc	11/ 3/22		Music Box Revue 1922-23
Cuddle Up		ABC Standard	11/24/11		A Real Girl
Easter Parade		Irving Berlin Inc	9/22/33		As Thousands Cheer
Everybody's Doing It Now		ABC Standard	11/ 2/11		
Follow the Fleet		Irving Berlin Inc	5/27/36		
For Your Country and My Country		ABC Standard Music	5/ 9/17		
He's a Devil in His Own Home Town	Grant Clarke	ABC Standard Music	3/14/14		
How Deep Is the Ocean, How High Is the Sky		Irving Berlin Inc	9/27/32		
I Can't Do without You		Irving Berlin Inc	3/21/28		
When I Lost You		ABC Standard Inc	11/ 8/12		
God Bless America		Irving Berlin Inc	2/20/39		

(Here follows 1 photolithograph, side folio 1679)

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PLAINTIFFS' DEPOSITION EXHIBIT 49-A

Census of American Business

SERVICE ESTABLISHMENTS, PLACES OF AMUSEMENT, AND HOTELS: 1963

TABLE 4I.—MOTION PICTURE, AND MOTION PICTURE AND TELEVISION THEATERS—NUMBER AND RECEIPTS, BY SIZE OF ESTABLISHMENT, FOR THE UNITED STATES, BY GEOGRAPHIC DIVISIONS AND STATES 1/

(Receipts expressed in thousands of dollars)

DIVISION AND STATE	ALL ESTABLISHMENTS		ESTABLISHMENTS WITH ANNUAL RECEIPTS OF —													
			$100,000 or more		$50,000 to $99,999		$25,000 to $49,999		$10,000 to $24,999		$5,000 to $9,999		$1,000 to $4,999		Less than $1,000	
	Number	Receipts	Number	Receipts	Number	Receipts	Number	Receipts	Number	Receipts	Number	Receipts	Number	Receipts	Number	Receipts
UNITED STATES TOTAL	10,140	694,940	992	100,619	1,831	68,660	2,589	81,028	1,884	30,887	1,318	10,047	1,729	3,888	499	331
NEW ENGLAND	478	30,681	68	10,899	129	6,628	362	6,948	76	1,121	40	388	81	181	16	10
Connecticut	140	9,899	21	3,000	37	1,884	87	1,886	10	888	7	88	8	88	8	8
Maine	76	1,146	-	-	8	888	16	488	14	184	14	188	8	88	8	8
Massachusetts	888	81,888	41	18,888	71	8,077	188	8,888	88	888	18	888	11	888	8	8
New Hampshire	47	1,888	8	811	8	884	16	888	11	188	7	88	8	88	8	1
Rhode Island	88	8,181	8	8,087	11	788	8	888	1	118	8	88	1	8	-	-
Vermont	88	888	-	-	-	-	10	888	8	188	8	88	8	18	8	1
MIDDLE ATLANTIC	1,418	138,878	888	88,888	888	88,818	888	18,884	884	8,888	178	1,888	188	888	48	88
New Jersey	888	18,884	88	18,888	80	8,884	88	1,888	18	888	88	188	17	88	7	8
New York	888	88,888	888	88,888	188	11,187	818	8,888	188	1,888	88	888	88	188	18	18
Pennsylvania	888	88,888	88	18,888	188	8,884	188	8,878	188	1,118	88	888	88	188	88	18
EAST NORTH CENTRAL	8,188	88,788	188	88,818	888	17,888	888	18,818	487	8,888	888	8,188	888	888	88	88
Illinois	888	88,888	88	18,888	88	6,888	188	4,718	88	1,884	88	888	88	188	88	11
Indiana	888	7,888	18	1,888	88	1,888	78	8,877	88	1,888	88	888	88	188	88	8
Michigan	888	18,888	88	8,818	88	8,888	188	8,888	88	1,888	88	888	88	188	88	11
Ohio	888	88,888	87	8,878	88	4,888	188	8,888	188	1,888	88	888	88	188	88	8
Wisconsin	888	8,888	8	1,888	88	1,884	88	8,711	88	888	88	888	88	188	87	8
WEST NORTH CENTRAL	1,888	88,888	88	8,188	78	8,188	888	18,188	888	4,888	888	8,188	888	1,888	188	88
Iowa	888	8,888	8	1,884	14	888	88	2,888	88	888	88	888	88	888	88	8
Kansas	888	4,888	7	888	8	888	88	2,888	88	888	88	888	88	888	88	8
Minnesota	888	7,888	11	8,888	88	2,888	88	2,888	88	888	88	888	88	888	88	8
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
South Dakota	188	1,888	-	-	8	188	17	888	88	888	88	888	88	888	8	8
SOUTH ATLANTIC	1,888	88,888	88	18,888	188	8,888	888	8,888	888	8,888	888	8,888	888	888	88	88
Delaware	88	888	8	888	1	888	8	188	8	188	8	888	8	888	8	8
District of Columbia	88	4,878	88	8,888	8	888	4	888	1	888	8	888	8	888	8	8
Florida	88	1,888	8	888	8	888	88	888	88	888	88	888	88	888	8	8
Georgia	188	4,188	8	1,188	17	1,888	88	888	88	888	88	888	88	888	8	8
Maryland	188	8,888	18	8,888	88	8,888	88	1,878	88	888	88	888	88	888	8	8
North Carolina	188	4,888	8	888	88	8,888	88	1,888	88	888	88	888	88	888	8	8
South Carolina	88	1,888	8	888	14	888	88	1,888	88	888	88	888	88	888	8	8
Virginia	77	1,888	8	888	7	888	88	888	88	888	88	888	88	888	8	8
West Virginia	188	4,188	8	888	88	1,888	88	1,188	88	888	88	888	88	888	8	8
EAST SOUTH CENTRAL	888	8,788	18	8,788	88	1,884	87	8,888	88	1,888	88	888	888	888	88	88
Alabama	188	1,818	8	888	8	888	18	888	88	888	88	888	88	888	8	8
Kentucky	188	8,888	7	1,888	8	888	88	1,188	88	888	88	888	88	888	8	8
Mississippi	88	1,888	1	118	8	888	88	888	88	888	88	888	88	888	8	8
Tennessee	188	8,787	8	888	8	888	88	888	88	888	88	888	88	888	8	8
WEST SOUTH CENTRAL	1,887	88,888	88	8,888	88	8,888	888	8,888	888	8,888	188	1,888	888	888	88	88
Arkansas	118	1,888	-	-	-	-	18	888	88	888	88	888	88	888	8	8
Louisiana	188	4,888	8	1,888	8	888	88	888	88	888	88	888	88	888	8	8
Oklahoma	888	4,888	-	-	8	888	88	888	88	888	88	888	88	888	8	8
Texas	818	18,878	88	8,788	88	8,888	188	8,888	888	1,888	88	888	88	888	8	8
MOUNTAIN	888	8,188	8	1,888	88	8,888	88	8,888	88	1,888	88	888	88	888	8	8
Arizona	188	1,188	-	-	8	888	18	888	88	888	88	888	88	888	8	8
Colorado	188	8,888	-	-	88	8,888	88	888	88	888	88	888	88	888	8	8
Idaho	88	888	-	-	-	-	8	888	88	888	88	888	88	888	8	8
Montana	88	888	-	-	-	-	8	888	88	888	88	888	88	888	8	8
Nevada	88	888	-	-	-	-	8	888	88	888	88	888	88	888	8	8
New Mexico	88	888	-	-	-	-	8	888	88	888	88	888	88	888	8	8
Utah	88	888	-	-	-	-	8	888	88	888	88	888	88	888	8	8
Wyoming	88	888	-	-	-	-	8	888	88	888	88	888	88	888	8	8
PACIFIC	888	88,888	888	18,888	888	88,888	888	8,888	888	8,888	888	888	888	888	88	88
California	888	88,888	88	18,888	188	11,878	188	8,888	188	1,888	888	888	888	888	88	88
Oregon	188	8,888	8	888	8	888	88	888	88	888	88	888	88	888	8	8
Washington	888	8,888	88	8,888	88	1,888	88	1,888	88	888	88	888	88	888	8	8

1/ Less than $500.
2/ Less than $1,000, but more than $500.
3/ Data for the following classifications are not included in this table:

Size of establishment	Number	Receipts
[illegible]	[illegible]	[illegible]
$100,000 or more	[illegible]	[illegible]
$50,000 to $99,999	[illegible]	[illegible]
$25,000 to $49,999	[illegible]	[illegible]
$10,000 to $24,999	[illegible]	[illegible]
$5,000 to $9,999	[illegible]	[illegible]
$1,000 to $4,999	[illegible]	[illegible]
Less than $1,000	[illegible]	[illegible]

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[fol. 1680]

PLAINTIFFS' DEPOSITION EXHIBIT 49b

Service Establishments, Places of Amusement, and Hotels: 1933

Table 58.—United States Summary—Analysis of Receipts, by Geographic Divisions and States, for—
(Receipts expressed in thousands of dollars)

Census of American Business

Division and State	Places of Amusement: Number of Establishments	Receipts	Receipts from—: Admissions	Sale of Meals	Sale of Merchandise	Other Sources	Division and State	Hotels: Number of Establishments	Receipts	Receipts from—: Room Rentals	Sale of Meals	Sale of Merchandise	Other Sources
United States Total ..	29,737	$520,218	$495,782	$3,487	$7,795	$13,154	United States Total ..	29,462	$515,549	$303,163	$151,022	$15,424	$45,940
• •	•	•	•	•	•								
• •	•	•	•	•	•								
• •	•	•	•	•	•								
Florida...	433	4,982	2,856	7	68	2,051	Florida...	882	10,884	7,635	2,521	69	659

[fol. 1681]

PLAINTIFFS' DEPOSITION EXHIBIT 49c

Service Establishments, Places of Amusement, and Hotels: 1933

Table 54.—United States Summary—Analysis of Receipts, by Geographic Divisions and States
(Receipts expressed in thousands of dollars)

Census of American Business

Division and State	Number of Establishments	Receipts	Receipts from—: Service	Admissions	Room Rentals[1]	Receipts from—: Sale of Meals[1]	Sale of Merchandise	Other Sources
United States Total.....	502,416	$2,760,881	$1,680,717	$495,782	$309,497	$155,423	$51,601	$67,861
• • • • •								
Florida.....	6,270	31,215	14,872	2,856	7,783	2,543	369	2,792

[1] American plan and Mixed plan (American and European) hotels were not always able to show meal sales separately. Room rentals are therefore overstated, and sales of meals understated to some extent.

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[fol. 1682] PLAINTIFF'S DEPOSITION EXHIBIT 50-A

Release by the Federal Communications Commission showing that 10 stations in Florida in the year 1937 with net sales of $25,000 or more, had

Network Time Sales of	$332,535	
Local Time Sales of	427,676	
National Spot Sales of	340,128	
Total Time Sales of		$1,100,339
Talent and Misc. Sales		20,012
Total Gross Sales		$1,120,351
Less Agency Commissions		33,972
Net Sales		$1,086,379

It further shows that there were 15 commercial stations in Florida during that year with

Net Sales of	$1,141,724	
With total expenses of	947,909	
Leaving a net broadcasting revenue of		$193,811

Plaintiffs' Deposition Exhibits 50 B & C—omitted.

(Here follows Exhibit 50-D)

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Exhibit No.....
Witness.....

PLAINTIFFS' DEPOSITION EXHIBIT 50-D

Table 39

Federal Communications Commission

Accounting Department

Summary of responses from broadcast stations to program questionnaire
Types of programs broadcast for the week beginning March 6, 1938
by
Class of Station and Time Designation

Type of program (Col. 1)	Clear Channel: 50,000 Watts or More, Unlimited (Col. 2)		Clear Channel: 50,000 Watts or More, Part-time (Col. 3)		Clear Channel: 5,000 to 25,000 Watts, Unlimited (Col. 4)		Clear Channel: 5,000 to 25,000 Watts, Part-time (Col. 5)		Regional: Unlimited, High Power (Col. 6)		Regional: Unlimited, Other (Col. 7)		Regional: Limited & Day (Col. 8)		Regional: Part-time (Col. 9)		Local: Unlimited (Col. 10)		Local: Day (Col. 11)		Local: Part-time (Col. 12)		Grand Total (Col. 13)	
	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes	Hours	Minutes
No. of stations	29		4		8		10		8		132		62		36		180		33		46		598	
I. Commercial:																								
Music	401	6	37	15	95	48	100	48	64	23	2,453	23	906	39	466	33	2,231	29	338	3	539	7	7,743	32
Dramatic	765	49	41	49	118	18	67	30	130	28	1,963	17	113	28	108	40	394	35	23	55	54	18	3,772	13
Variety	316	58	30	54	77	45	41	20	75	11	1,330	43	126	40	180	34	859	52	42	56	85	8	2,868	7
Talks and Dialogues	257	30	16	53	48	28	30	30	54	46	987	52	198	6	91	45	852	55	62	15	93	51	2,400	57
News	148	19	2	44	27	16	27	4	36	..	903	9	144	30	60	21	591	30	61	18	87	23	1,980	34
Religious & Devotional	24	6	3	45	16	15	44	30	8	31	394	4	156	47	65	37	423	47	39	58	72	18	1,249	47
Special Events	7	13	.....	..	.....	53	7	30	2	5	180	21	18	51	26	28	188	17	13	10	32	47	477	44
Miscellaneous	33	5	1	48	8	56	21	14	12	39	351	59	98	59	72	29	825	51	44	47	68	49	1,040	36
Total I	1,954	6	135	8	393	39	356	..	384	3	8,464	48	1,764	..	1,072	27	5,368	19	626	22	1,023	41	21,542	30
No. of stations	29		4		8		10		8		184		71		50		180		34		51		629	
II. Sustaining:																								
Music	1,037	55	59	44	358	35	337	59	365	51	8,400	5	2,172	53	1,037	46	8,116	20	1,259	15	1,116	11	24,962	34
Dramatic	81	38	4	15	18	26	20	22	23	32	648	51	154	9	90	38	472	47	93	2	86	51	1,910	31
Variety	117	11	15	58	35	32	60	37	40	..	983	24	166	5	144	12	864	11	80	49	123	51	2,641	50
Talks and Dialogues	256	13	18	6	77	24	92	30	84	29	1,678	51	542	21	297	54	1,324	24	146	42	193	41	4,713	4
News	124	45	15	33	31	44	58	30	40	41	1,024	20	429	55	179	40	1,124	32	143	32	165	26	3,338	47
Religious & Devotional	77	11	6	..	31	8	18	18	29	14	538	23	237	48	135	21	658	49	110	40	120	59	1,963	51
Special Events	24	15	3	34	16	39	17	24	23	42	306	2	74	33	53	20	294	24	35	30	49	34	998	57
Miscellaneous	10	59	.....	23	4	25	5	16	6	43	107	7	45	37	19	5	126	12	19	29	35	16	380	32
Total II	1,730	7	123	33	573	53	627	34	614	12	13,687	3	3,823	21	1,957	56	13,881	39	1,888	50	1,901	49	40,810	6
No. of stations	29		4		8		10		8		184		71		50		180		34		51		629	
III. Total:																								
Music	1,439	1	96	59	454	23	447	45	430	14	10,853	28	3,079	32	1,504	19	11,147	40	1,597	18	1,655	18	32,706	6
Dramatic	847	27	46	4	136	44	108	58	154	..	2,612	8	267	37	199	18	1,057	22	116	57	141	9	5,682	44
Variety	434	9	46	52	113	17	102	3	115	11	2,314	7	292	45	324	46	1,424	3	123	45	218	59	5,509	57
Talks and Dialogues	513	43	34	59	125	52	129	35	139	15	2,666	43	740	27	389	39	1,687	19	208	57	277	32	7,114	1
News	273	4	18	17	59	..	85	43	76	41	1,827	29	574	25	240	1	1,716	2	204	50	252	40	5,328	21
Religious & Devotional	101	17	9	45	47	23	62	57	37	45	932	27	394	35	200	58	1,082	36	150	38	193	17	3,213	38
Special Events	31	28	3	34	17	32	24	3	25	47	486	23	93	24	79	48	482	41	43	40	83	31	1,376	41
Miscellaneous	44	4	2	11	13	21	26	20	19	22	459	6	144	36	91	34	452	3	64	16	104	5	1,421	8
Total III	3,684	13	258	41	967	32	983	34	998	15	22,151	51	5,587	21	3,030	23	19,249	55	2,515	21	2,925	30	62,352	36

Note: Of the 629 responses accounted for in these tables 4 cover 2 stations each. Thus the table actually embraces data for 633 stations.

PLAINTIFFS' DEPOSITION EXHIBIT 50E—OMITTED

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[fol. 1663]

PLAINTIFFS' DEPOSITION EXHIBIT 51

Radio Station Rates in the State of Florida*

Figures given are for 1 hr., ½hr., and ¼hr.

Station	Location	1929	1930	1931	1932	1933	1934	1935	1936	1937	1938	1939
WFLA	Clearwater	$50.00	75.00	100.00	100.00	100.00	100.00	120.00	120.00	120.00	120.00	120.00
		25.00	40.00	65.00	60.00	60.00	60.00	60.00	72.00	72.00	72.00	72.00
		.....	25.00	35.00	35.00	35.00	35.00	35.00	40.00	40.00	40.00	40.00
WRUF**	Gainesville	.....	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00	75.00
		.....	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00
		.....	30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00	30.00
WJAX**	Jacksonville	.....	.....	225.00	225.00	225.00	225.00	190.00	190.00	190.00	190.00	190.00
		.....	.....	135.00	135.00	135.00	135.00	120.00	120.00	120.00	120.00	120.00
		.....	.....	75.00	75.00	75.00	75.00	74.00	74.00	74.00	74.00	74.00
WMBL**	Lakeland	.....	5.00	.....	.....	.....	.....	.....	.....	.....	.....	.....
		.....	13.50	.....	.....	.....	.....	.....	.....	.....	.....	.....
		.....	8.50	.....	.....	.....	.....	.....	.....	.....	.....	.....
WQAM	Miami	75.00	75.00	85.00	110.00	100.00	100.00	100.00	.....	140.00	150.00	150.00
		40.00	40.00	45.00	65.00	60.00	60.00	60.00	75.00	75.00	90.00	90.00
		22.50	22.50	25.00	40.00	36.00	36.00	36.00	50.00	50.00	60.00	60.00
WIOD**	Miami	.....	75.00	100.00	100.00	100.00	100.00	.....	.....	140.00	150.00	150.00
		.....	45.00	60.00	60.00	60.00	60.00	75.00	75.00	84.00	90.00	90.00
		.....	25.00	35.00	35.00	35.00	35.00	50.00	50.00	36.00	60.00	60.00
WMBF***	Miami Beach	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
WDBO	Orlando	52.00	52.00	75.00	75.00	75.00	75.00	75.00	100.00	.....	100.00	100.00
		30.55	30.55	40.00	40.00	40.00	40.00	40.00	60.00	60.00	60.00	60.00
		16.25	16.25	25.00	25.00	25.00	25.00	25.00	35.00	35.00	35.00	35.00
WCOA	Pensacola	100.00	75.00	70.00	70.00	50.00	50.00	50.00	75.00	75.00	75.00	75.00
		80.00	60.00	40.00	45.00	32.50	32.50	32.50	40.00	40.00	40.00	40.00
		50.00	40.00	25.00	30.00	20.00	20.00	20.00	25.00	25.00	25.00	25.00

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PLAINTIFFS' DEPOSITION EXHIBIT 51—Continued

Station	Location	1929	1930	1931	1932	1933	1334	1935	1936	1937	1938	1339
WSUN**	St. Petersburg	.....	75.00	75.00	100.00	100.00	100.00	100.00	120.00	120.00	120.00	120.00
		.....	40.00	40.00	60.00	60.00	60.00	60.00	72.00	72.00	72.00	72.00
		.....	25.00	25.00	35.00	35.00	35.00	35.00	40.00	40.00	40.00	40.00
WSIS***	Sarasota	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
WDAE	Tampa	75.00	75.00	80.00	100.00	100.00	.....	.....	110.00	100.00	100.00	100.00
		40.00	40.00	50.00	60.00	60.00	60.00	60.00	60.00	65.00	65.00	65.00
		25.00	25.00	30.00	35.00	35.00	35.00	35.00	35.00	37.50	37.50	37.50
WMBR	Tampa-Jacksonville	20.00	45.00	75.00	75.00	75.00	75.00	.....	.....	125.00	125.00	125.00
		12.50	25.00	40.00	40.00	40.00	40.00	60.00	60.00	75.00	75.00	75.00
		.....	15.00	25.00	25.00	25.00	25.00	35.00	35.00	50.00	50.00	50.00
WMFJ	Daytona Beach	.....	.....	.....	.....	.....	.....	.....	.....	.....	75.00	75.00
		.....	.....	.....	.....	.....	.....	.....	45.00	45.00	45.00	45.00
		.....	.....	.....	.....	.....	.....	.....	30.00	30.00	30.00	30.00
WTAL	Tallahassee	.....	.....	.....	.....	.....	.....	.....	58.00	58.00	58.00	58.00
		.....	.....	.....	.....	.....	.....	.....	30.00	30.00	30.00	30.00
		.....	.....	.....	.....	.....	.....	.....	17.50	17.50	17.50	17.50
WLAK	Lakeland	.....	.....	.....	.....	.....	.....	.....	.....	50.00	50.00	40.00
		.....	.....	.....	.....	.....	.....	.....	.....	30.00	30.00	25.00
		.....	.....	.....	.....	.....	.....	.....	.....	17.50	17.50	14.00
WFOY	St. Augustine	.....	.....	.....	.....	.....	.....	.....	.....	.....	35.00	50.00
		.....	.....	.....	.....	.....	.....	.....	.....	.....	20.00	30.00
		.....	.....	.....	.....	.....	.....	.....	.....	.....	12.00	20.00
WJNO	West Palm Beach	.....	.....	.....	.....	.....	.....	.....	.....	70.00	70.00	70.00
		.....	.....	.....	.....	.....	.....	.....	.....	42.00	42.00	42.00
		.....	.....	.....	.....	.....	.....	.....	.....	26.00	26.00	26.00
WKAT	Miami Beach	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	120.00
		.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	96.00
		.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	72.00

* Taken from March, 1929, and January 1930–1939 issues of Radio Advertising Rates & Data.
** Data Incomplete for some years.

[fol. 1684] PLAINTIFFS' DEPOSITION EXHIBIT 52

P. 59 of Federal Census of Business for Broadcasting for 1935 showing that 557 stations in the United States had a total net revenue from sale of time of $53,325,000, of which $26,321,000 was from national and regional network and spot sales, and $26,004,000 was from local stations.

The same exhibit also shows that in the State of Florida that year 10 stations had a total net revenue from sale of time of $580,000, of which $275,000 was from national and regional network and spot sales, and $305,000 was from local stations.

[fol. 1685] PLAINTIFFS' DEPOSITION EXHIBIT 53

Places of Amusement: 1935

Table 1.—Establishments and Receipts by Kinds of *of* Business for State of Florida

Census of Business

Kind of Business	Number of establishments	Receipts (add 000)
Amusement devices	5	33
Baseball and football clubs, sports and athletic fields and sports promoters	7	95
Bathing beaches (not including municipal)	17	70
Dance halls, studios, and academies	34	113
Horse and dog race tracks	8	3,827
Skating rinks	5	8
Swimming pools (not including municip[illegible]	15	49
Theaters, motion picture (including motion picture theaters with vaudeville)	167	5,791
Other amusements	125	916

0

[fol. 1686] PLAINTIFFS' DEPOSITION EXHIBIT 54

Excerpt from United States Census of Business for hotels for 1935 showing that 1,173 hotels in Florida had receipts for that year of $21,761,000.

[fol. 1687] PLAINTIFFS' DEPOSITION EXHIBIT 55

This shows the annual income of each of the three broadcasting chains, National Broadcasting Company, Columbia Broadcasting System and Mutual Broadcasting System* from the years 1930 to 1939, as follows:

Year	NBC	CBS	MBS	Total
1930	$20,184,914	$8,720,349	.....	$28,905,263
1931	25,370,398	10,693,590	.....	36,063,988
1932	26,504,891	12,602,412	.....	39,107,303
1933	21,452,732	10,063,566	.....	31,516,298
1934	27,833,616	14,825,895	.....	42,659,511
1935	31,148,931	17,637,804	$1,293,103	50,079,838
1936	34,523,950	23,168,148	1,987,573	59,679,671
1937	38,651,286	28,722,118	1,936,102	69,309,506
1938	41,462,879	27,345,397	2,920,323	71,728,309
1939	45,244,354	34,539,665	3,329,782	83,113,801

* Mutual Broadcasting System was organized in 1935.

PLAINTIFFS' DEPOSITION EXHIBIT 56—Omitted

PLAINTIFFS' DEPOSITION EXHIBIT 57
COLUMBIA BROADCASTING SYSTEM

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PLAINTIFFS' DEPOSITION EXHIBIT 57

COLUMBIA BROADCASTING SYSTEM, Inc.: NETWORK RATES

485 Madison Ave., New York City
Telephone: Wickersham 2-2000

RATE CARD

(Rates in effect Jan. 1, 1939)

Night Rates (6 P.M. to 11 P.M.) are in Bold Face. Day Rates (8 A.M. to 6 P.M. and 11 P.M. to midnight) are in Light Face. Transition Rates (two-thirds of the night rates) apply to all stations broadcasting on current New York time from 6 P.M. to 6:30 P.M. Sunday Afternoon Rates (12 Noon to 6 P.M.) are two-thirds of night rates. After Midnight Rates (midnight to 8 A.M.) are one-third of night rates. Day and Night Rates and Sunday Afternoon Rates are figured on the basis of current local time in each city. Network operations prior to 8 P.M. (local time) may be scheduled by special arrangement. All rates apply to network broadcasts only. Rates for periods in excess of one hour in exact proportion to one-hour rates.

STATION RATES

This rate card is published for the convenient reference of advertisers and is not to be considered as an offer of facilities. All data herein are subject to change without notice. When program originates at points other than the studios of the Columbia Broadcasting System in New York, Chicago and Washington, a special charge is made.

BASIC NETWORK

Minimum 25 Cities

Including the following 23 cities:

	Time Zone	Full Hour		Half Hour		Quarter Hour	
Albany (WOKO)	E†	$175	88	105	53	70	35
Akron (WADC)	E	175	88	105	53	70	35
Baltimore (WCAO)	E	275	138	165	83	110	55
Boston (WEEI)	E†	425	213	255	128	170	85
Buffalo (WGR-WKBW)	E†	300	150	180	90	120	60
Chicago (WBBM)	C†	725	363	435	218	290	145
Cincinnati (WKRC)	E	300	150	180	90	120	60
Cleveland (WGAR)	E	300	150	180	90	120	60
Kansas City (KMBC)	C	300	150	180	90	120	60
Lincoln (KFAB)	C	200	100	120	60	80	40
Louisville (WHAS)	C	450	225	270	135	180	90
New York (WABC)	E†	1250	625	750	375	500	250
Omaha (KOIL)*	C	175	88	105	53	70	35
Philadelphia (WCAU)	E†	550	275	330	165	220	110
Pittsburgh (WJAS)	E†	250	175	210	105	140	70
Providence (WPRO)	E†	200	100	120	60	80	40
St. Louis (KMOX)	C	500	250	300	150	200	100
Syracuse (WFBL)	E	200	100	120	60	80	40
Washington (WJSV)	E	300	150	180	90	120	60
Plus at least 2 of the following 4 Optional Basic cities:							
Columbus (WBNS)	E	175	88	105	53	70	35
Dayton (WHIO)	E	175	88	105	53	70	35
Rochester (WHEC)	E	175	88	105	53	70	35
Worcester (WORC)	E†	175	88	105	53	70	35
Total 25 Cities only		$6700	4355	5220	2613	3480	1740

Only 2 Optional Basic cities are included in above totals.

(*Effective April 30)

BASIC SUPPLEMENTARY GROUP

23 Cities

These stations available individually with Basic Network.

Atlantic City (WPG)	E†	$125	63	75	38	50	25
Bangor (WABI)	E†	125	63	75	38	50	25
Binghamton (WNBF)	E	125	63	75	38	50	25
Charleston, W. Va. (WCHS)	E	150	75	90	45	60	30
Elmira (WESG)	E	125	63	75	38	50	25
Evansville (WEOA)	C	125	63	75	38	50	25
Fairmont (WMMN)	E	125	63	75	38	50	25
Harrisburg (WHP)	E	125	63	75	38	50	25
Milwaukee (WISN)	C	175	88	105	53	70	35
New Haven-Waterbury (WBRY)	E†	125	63	75	38	50	25
Parkersburg (WPAR)	E	125	63	75	38	50	25
Peoria (WMBD)	C	125	63	75	38	50	25
Pittsfield (WBRK)	E	125	63	75	38	50	25
Portland, Me. (WGAN)	E	125	63	75	38	50	25
Scranton (WGBI)	E	100	75	90	45	60	30
South Bend (WSBT)	C†	125	63	75	38	50	25
Springfield, Mass. (WMAS)	E†	150	75	90	45	60	30
Springfield, Vt. (WNBX)	E†	125	63	75	38	50	25
Topeka (WIBW)	C	175	88	105	53	70	35
Utica (WIBX)	E†	125	63	75	38	50	25
Wheeling (WWVA)	E	175	88	105	53	70	35
Wichita (KFH)	C	150	75	90	45	60	30
Youngstown (WKBN)	E	150	75	90	45	60	30
Group Total		$2150	1584	1890	964	1260	630

SOUTHEASTERN GROUP

11 Cities

These stations available individually with Basic Network

Anderson (WAIM)	E	$125	63	75	38	50	25
Asheville (WWNC)*	E	125	63	75	38	50	25
Augusta (WRDW)	C	125	63	75	38	50	25
Charlotte (WBT)	E	300	150	180	90	120	60
Durham (WDNC)	E	125	63	75	38	50	25
Greensboro (WBIG)	E	125	63	75	38	50	25
Macon (WMAZ)	E	125	63	75	38	50	25
Richmond (WRVA)	E	300	150	180	90	120	60
Roanoke (WDBJ)	E	125	63	75	38	50	25
Savannah (WTOC)	E	150	75	90	45	60	30
Winston-Salem (WSJS)	E	125	63	75	38	50	25
Group Total		$1750	879	980	529	700	350

(* Effective June 1)

SOUTHCENTRAL GROUP

11 Cities

These stations available individually with Basic Network

Atlanta (WGST)	C†	$200	100	120	60	80	40
Birmingham (WAPI)	C	150	75	90	45	60	30
Chattanooga (WDOD)	C	125	63	75	38	50	25
Knoxville (WNOX)	C	125	63	75	38	50	25
Little Rock (KLRA)	C	150	75	90	45	60	30
Memphis (WREC)	C	200	100	120	60	80	40
Meridian (WCOC)	C	125	63	75	38	50	25
Montgomery (WSFA)	C	125	63	75	38	50	25
Nashville (WLAC)	C	225	113	135	68	90	45
New Orleans (WWL)	C	375	188	225	113	150	75
Pensacola (WCOA)	C	125	63	75	38	50	25
Group Total		$1925	966	1155	581	770	385

SOUTHWESTERN GROUP

7 Cities

These Stations are available with the Basic Network in a group of not less than 5 of the following cities:

Oklahoma City (KOMA)	C	225	113	135	68	90	45
San Antonio (KTSA)	C	175	88	105	53	70	35
Shreveport (KWKH)	C	175	88	105	53	70	35
Tulsa (KTUL)	C	125	63	75	38	50	25
Waco (WACO)	C	125	63	75	38	50	25
Group Total		$1350	678	810	408	540	270

WEEKLY DISCOUNTS

(Applicable only to rates on this card)

The following weekly discounts, computed on gross weekly billing for time, will be allowed to each advertiser using network broadcasts for thirteen or more consecutive weeks:

Less than 5 station-hours per week	Net
5 or more but less than 10 station-hours per week	2½%
10 or more but less than 15 station-hours per week	5%
15 or more but less than 25 station-hours per week	7½%
25 or more but less than 45 station-hours per week	10%
45 or more but less than 70 station-hours per week	12½%
70 or more station-hours per week	15%

Station-hours will be calculated as follows:

1 hr. (day or night) on 1 station	1.0 station-hour
½ hr. (day or night) on 1 station	.6 station-hour
¼ hr. (day or night) on 1 station	.4 station-hour

(Thus, in computing station-hour discounts, ½ hour and ¼ hour periods are given a weight equivalent, respectively, to their proportioned cost—60% and 40% of the full-hour rate.)

Two or more network contracts for the same advertiser may be combined in computing station-hour discounts.

ANNUAL DISCOUNTS

(Applicable only to rates on this card)

At the end of 52 consecutive weeks of network broadcasting, there will be due and payable to the advertiser an additional discount on network time computed as follows: 52 times 10% of the largest amount of weekly gross billing that has run consecutively for 52 weeks.

If an advertiser broadcasts weekly for a period longer than 52 weeks, but shorter than 104 weeks, he will be paid the maximum discount, under the foregoing terms, for any consecutive 52 weeks during the period of his broadcasting.

COMMISSIONS

A commission of 15% is allowed to recognised agencies on net station time charges and on any line charges.

NO CASH DISCOUNT

Charges for facilities are payable immediately after each broadcast.

CLASSIFICATIONS

Rates listed herein apply to all classes of acceptable accounts and advertising.

SERVICE FACILITIES

The Columbia Broadcasting System makes available a complete supplementary service for advertising agencies and radio advertisers, through the following: Columbia Artists, Inc.; Columbia Concerts Corporation; Continuity Department; Engineering Department; Program Department; Promotion & Research Department; Publicity Department; Sales Service Department; Station Relations Department.

FLORIDA GROUP

5 Cities

These stations available as a group with Basic Network

Jacksonville (WMBR)	E	$125	63	75	38	50	25
Miami (WQAM)	E	150	75	90	45	60	30
Orlando (WDBO)	E	125	63	75	38	50	25
Tampa (WDAE)	E	150	75	90	45	60	30
West Palm Beach (WJNO)	E	125	63	75	38	50	25
Group Total		$650	276	330	165	220	110

NORTHWESTERN GROUP

9 Cities

These stations available individually with Basic Network

Davenport (WOC)	C	$125	63	75	38	50	25
Dubuque (WKBB)	C	125	63	75	38	50	25
Duluth (KDAL)*	C	125	63	75	38	50	25
Green Bay (WTAQ)	C	125	63	75	38	50	25
La Crosse (WKBH)	C	125	63	75	38	50	25
Mason City (KGLO)	C	125	63	75	38	50	25
Minneapolis-St. Paul (WCCO)	C	475	238	285	143	190	95
Sioux City (KSCJ)	C	125	63	75	38	50	25
Yankton (WNAX)	C	150	75	90	45	60	30
Group Total		$1500	754	900	454	600	300

*Optional supplementary facilities are available, with Duluth only, in Hibbing (WMFG) and Virginia (WHLB) at an additional rate of $25 per evening hour; with costs of other periods in proportion.

MOUNTAIN GROUP

8 Cities

Available individually with Basic Network

Denver (KLZ)	M	$200	100	120	60	80	40
Salt Lake City (KSL)	M	200	100	120	60	80	40
The following stations available individually with Mountain or Pacific Coast groups.							
Albuquerque (KGGM)	M	125	63	75	38	50	25
Billings (KGHL)	M	125	63	75	38	50	25
Cheyenne (KFBC)	M	125	63	75	38	50	25
Colorado Springs (KVOR)	M	125	63	75	38	50	25
Great Falls (KFBB)	M	125	63	75	38	50	25
Minneapolis (KGVO)	M	125	63	75	38	50	25
Phoenix-Tucson (KOY-KGAR)	M	125	63	75	38	50	25
Reno (KOH)	P	125	63	75	38	50	25
Group Total		$1250	625	750	375	500	250

PACIFIC COAST GROUP

6 Cities

Available only as a group

Los Angeles (KNX)	P	$300	250	300	150	200	100
Portland (KOIN)	P	225	113	135	68	90	45
San Francisco (KSFO)	P	325	163	195	98	130	65
Seattle-Tacoma (KIRO-KVI)	P	225	113	135	68	90	45
Spokane (KFPY)	P	175	88	105	53	70	35
Fresno (KARM)	P	75	37.50	45	22.50	30	15
Group Total		$1525	764.50	915	459.50	610	305

SUPPLEMENTARY PACIFIC COAST STATION

Sacramento (KROY)	P	75	37.50	45	22.50	30	15

When the Pacific Coast and the Basic Network are joined Denver and Salt Lake must be used.

CANADIAN GROUP

2 Cities

These stations available individually with Basic Network

Montreal (CKAC)	E†	$200	100	120	60	80	40
Toronto (CFRB)	E†	300	150	180	90	120	60
Group Total		$500	250	300	150	200	100

HAWAIIAN STATION

Honolulu-Hilo (KGMB-KHBC)	..	$250	125	150	125	100	90

TOTAL OF ALL CITIES LISTED

Full Hour		Half Hour		Quarter Hour	
$22,445	11,341	13,478	6824	8990	4585

† Observes daylight saving.
.. 2½ hrs. earlier than P.S.T.

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PLAINTIFFS' DEPOSITION EXHIBIT 58

COLUMBIA BROADCASTING SYSTEM, Inc.: NETWORK RATES

485 Madison Ave., New York City
Telephone: Wickersham 2-6000

RATE CARD

(Rates in effect Jan. 1, 1940)

Night Rates (6 P.M. to 11 P.M.) are in Bold Face. Day Rates (8 A.M. to 6 P.M. and 11 P.M. to midnight) are in Light Face. Transition Rates (two-thirds of the night rates) apply to all stations broadcasting on current New York time from 6 P.M. to 6:30 P.M. Sunday Afternoon Rates (12 Noon to 6 P.M.) are two-thirds of night rates. After Midnight Rates (midnight to 8 A.M.) are one-third of night rates. Day and Night Rates and Sunday Afternoon Rates are figured on the basis of current local time in each city. Network operations prior to 8 A.M. (local time) may be scheduled by special arrangement. All rates apply to network broadcasts only. Rates for periods in excess of one hour are in exact proportion to one-hour rates.

STATION RATES

This rate card is published by the Columbia Broadcasting System for the convenient reference of advertisers and is not to be considered as an offer of facilities. All data herein are subject to change without notice. When program originates at points other than Columbia Network studios in New York, Chicago, Los Angeles and Washington, a special origination charge is made.

BASIC NETWORK

Minimum 26 Cities

Including the following 23 cities:

	Time Zone	Full Hour		Half Hour		Quarter Hour	
New York (WABC)	E†	$1320	675	810	405	540	270
Akron (WADC)	E	190	95	114	57	76	38
Baltimore (WCAO)	E	300	150	180	90	120	60
Boston (WEEI)	E†	475	238	285	143	190	95
Buffalo (WGR-WKBW)	E†	300	150	210	105	140	70
Des Moines (KRNT)	C	220	110	165	80	88	44
Detroit (WJR)	E	700	350	490	245	280	140
Hartford (WDRC)	E†	190	95	114	57	76	38
Indianapolis (WFBM)	C	200	100	120	60	80	40
Kansas City (KMBC)	C	225	113	135	68	90	45
Lincoln (KFAB)	C	200	100	120	60	80	40
Louisville (WHAS)	C	475	237	285	143	190	95
Omaha (KOIL)	C	175	88	105	53	70	35
Philadelphia (WCAU)	E†	600	300	360	180	240	120
Pittsburgh (WJAS)	E†	375	188	225	113	150	75
Providence (WPRO)	E†	240	120	144	72	96	48
St. Louis (KMOX)	C	575	288	345	173	230	115
Syracuse (WFBL)	E†	220	110	132	66	88	44
Washington**(WJSV)	E	375	188	225	113	150	75
Plus at least 3 of the following Optional cities:							
Albany (WOKO)	E†	175	88	105	53	70	35
Columbus (WBNS)	E	175	88	105	53	70	35
Dayton (WHIO)	E	175	88	105	53	70	35
Harrisburg (WHP)	E†	175	88	105	53	70	35
Rochester (WHEC)	E†	175	88	105	53	70	35
Total 26 Cities		$9655	4949	5831	2972	3854	1977

(Only 3 Optional cities are included in above totals.)
*Joins Basic Network May 1, 1940.
**Effective when station begins operating with 50,000 watts power.

BASIC SUPPLEMENTARY GROUP

21 Cities

Available individually with Basic Network.

Bangor (WABI)	E†	125	63	75	38	50	25
Binghamton (WNBF)	E†	125	63	75	38	50	25
Charleston, W. Va. (WCHS)	E	170	85	102	51	68	34
Elmira (WESG)	E	125	63	75	38	50	25
Evansville (WEOA)	C	125	63	75	38	50	25
Fairmont (WMMN)	E	125	63	75	38	50	25
Milwaukee (WISN)	C	190	95	114	57	76	38
New Haven-Waterbury (WBRY)	E†	125	63	75	38	50	25
Parkersburg (WPAR)	E	100	50	60	30	40	20
Peoria (WMBD)	C	175	88	105	53	70	35
Portland, Me. (WGAN)	E†	125	63	75	38	50	25
Scranton (WGBI)	E	175	88	105	53	70	35
South Bend (WSBT)	C†	125	63	75	38	50	25
Springfield, Mass. (WMAS)	E†	150	75	90	45	60	30
Springfield, Vt. (WNBX)	E†	125	63	75	38	50	25
Topeka (WIBW)	C	200	100	120	60	80	40
Utica (WIBX)	E†	125	63	75	38	50	25
Wheeling (WWVA)	E	190	95	114	57	76	38
Wichita (KFH)	C	175	88	105	53	70	35
Worcester (WORC)	E†	175	88	105	53	70	35
Youngstown (WKBN)	E	170	85	102	51	68	34
Group Total		$3139	1567	1872	948	1248	624

SOUTHWESTERN GROUP

7 Cities

Available with the Basic Network in a group of not less than 4 of the following cities, one of which must be Shreveport.

Dallas (KRLD)	C	$400	200	260	130	160	80
Houston (KTRH)	C	250	125	188	75	100	50
Oklahoma City (KOMA)	C	225	113	135	68	90	45
San Antonio (KTSA)	C	225	113	135	68	90	45
Shreveport* (KWKH)	C	275	138	165	83	110	55
Tulsa (KTUL)	C	165	83	99	50	66	33
Wichita Falls (KWFT)	C	125	63	75	38	50	25
Group Total		$1665	835	999	502	666	333

*Effective when station begins operating with 50,000 watts power.

SOUTHEASTERN GROUP

11 Cities

Available with the Basic Network in a group of not less than 4 of the following cities.

Anderson (WAIM)	E	$100	50	60	30	40	20
Asheville (WWNC)	E	125	63	75	38	50	25
Augusta (WRDW)	E	100	50	60	30	40	20
Charleston (WCSC)	E	125	63	75	38	50	25
Charlotte (WBT)	E	250	175	210	105	140	70
Durham (WDNC)	E	100	50	60	30	40	20
Greensboro (WBIG)	E	125	63	75	38	50	25
Richmond (WRVA)	E	250	175	210	105	140	70
Roanoke (WDBJ)	E	125	63	75	38	50	25
Savannah (WTOC)	E	150	75	90	45	60	30
Winston-Salem (WSJS)	E	100	50	60	30	40	20
Group Total		$1750	877	1050	527	700	350

SOUTHCENTRAL GROUP

12 Cities

Available individually with Basic [illegible]

Atlanta (WGST)	C†	$225	113	[illegible]		[illegible]	45
Knoxville (WNOX)	C	140	70	[illegible]		[illegible]	[illegible]
Little Rock (KLRA)	C	100	50	[illegible]		[illegible]	[illegible]
Macon (WMAZ)	E	125	63	[illegible]		[illegible]	[illegible]
Memphis (WREC)	C	200	100	[illegible]		[illegible]	[illegible]
Meridian (WCOC)	C	100	50	60	30	40	20
Montgomery (WSFA)	C	125	63	75	38	50	25
Nashville (WLAC)	C	240	120	144	72	96	48
New Orleans (WWL)	C	400	200	240	120	160	80
Group Total		$2165	1095	1311	658	874	437

WEEKLY DISCOUNTS

(Applicable only to rates on this card)

The following weekly discounts, computed on gross weekly billing for time, will be allowed to each advertiser using network broadcasts for thirteen or more consecutive weeks:

	Net
Less than 10 station-hours per week	
10 or more but less than 15 station-hours per week	2½%
15 or more but less than 25 station-hours per week	5%
25 or more but less than 45 station-hours per week	7½%
45 or more but less than 70 station-hours per week	10%
70 or more station-hours per week	12½%

Station-hours will be calculated as follows:

1 hr. (day or night) on 1 station ..... 1.0 station-hour
½ hr. (day or night) on 1 station ..... .6 station-hour
¼ hr. (day or night) on 1 station ..... .4 station-hour

(Thus, in computing station-hour discounts, ½ hour and ¼ hour periods are given a weight equivalent, respectively, to their proportioned cost—60% and 40% of the full-hour rate.)

Two or more network contracts for the same advertiser may be combined in computing station-hour discounts.

ANNUAL DISCOUNT 12½%

(Applicable only to rates on this card)

At the end of 52 consecutive weeks of network broadcasting, there will be due and payable to the advertiser an additional discount on network time computed as follows:

52 times 12½% of the largest amount of weekly gross billing that has run consecutively for 52 weeks.

If an advertiser broadcasts weekly for a period longer than 52 weeks, but shorter than 104 weeks, he will be paid the maximum discount, under the foregoing terms, for any consecutive 52 weeks during the period of his broadcasting.

COMMISSIONS

A commission of 15% is allowed to recognized agencies on net station time charges and on any line charges. There are no cash discounts.

Charges for facilities are payable immediately after each broadcast.

CLASSIFICATIONS

Rates listed herein apply to all classes of acceptable accounts and advertising.

SERVICE FACILITIES

The Columbia Broadcasting System makes available a complete supplementary service for advertising agencies and radio advertisers, through the following: Columbia Artists, Inc.; Columbia Concerts Corporation; Continuity Department; Engineering Department; Program Department; Promotion and Research Department; Publicity Department; Sales Service Department; Station Relations Department.

FLORIDA GROUP

4 Cities

Available as a group with Basic Network.

Jacksonville (WMBR)	E	$120	60	72	36	48	24
Miami (WQAM)	E	145	73	87	44	58	29
Orlando (WDBO)	E	125	63	75	38	50	25
Tampa (WDAE)	E	145	73	87	44	58	29
West Palm Beach (WJNO)	E	Bonus 6to. with Florida Group					
Group Total		$535	294	321	177	214	117

CBS CANADIAN GROUP*

2 Cities

Available individually with Basic Network.

Montreal (CKAC)	E†	$250	125	150	75	100	50
Toronto (CFRB)	E†	225	113	195	98	130	65
Group Total		$475	238	345	173	230	115

*In addition to Montreal and Toronto, the 21 stations of the Canadian Broadcasting Corp. are available to CBS Advertisers.

NORTHWESTERN GROUP

9 Cities

Available individually with Basic Network, except that Sioux City-Yankton must be used when Minneapolis is used.

Davenport (WOC)	C	$125	63	75	38	50	25
Dubuque (WKBB)	C	100	50	60	30	40	20
Duluth (KDAL)	C	125	63	75	38	50	25
*Hibbing & Virginia, Minn. (WMFG-WHLB)	C	50	25	30	15	20	10
Green Bay (WTAQ)	C	125	63	75	38	50	25
La Crosse (WKBH)	C	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Mason City (KGLO)	C	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Minneapolis (WCCO)	C	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Sioux City-Yankton (WNAX)	C	[illegible]					

MOUNTAIN

7 Cities

Available individually with Ba[illegible]

Denver (KLZ)	M	$225	113	135	68	90	45
Salt Lake City (KSL)	M	280	175	210	105	140	70
The following stations available individually with Mountain or Pacific Coast groups.							
Albuquerque (KGGM)	M	$100	50	60	30	40	20
Colorado Springs (KVOR)	M	125	63	75	38	50	25
Great Falls* (KFBB)	M	100	50	60	30	40	20
Missoula* (KGVO)	M	100	50	60	30	40	20
Phoenix & Tucson (KOY-KTUC)	M	140	70	84	42	56	28
Group Total		$1140	571	684	348	456	228

‡When the Pacific Coast and the Basic Network are joined Denver and Salt Lake City must be used.
*Available with Mountain and Pacific Groups but not with Mountain Group alone.
KVSF, Santa Fe, bonus with Albuquerque.

PACIFIC COAST GROUP

6 Cities

Available only as a group.

Los Angeles (KNX)	P	$575	288	345	173	230	115
Fresno (KARM)	P	75	38	45	23	30	15
Portland (KOIN)	P	240	120	144	72	96	48
San Francisco (KSFO)	P	340	170	204	102	136	68
Seattle & Tacoma (KIRO-KVI)	P	200	110	120	60	80	45
Spokane (KFPY)	P	175	88	105	53	70	35
Group Total		$1620	817	973	491	652	326

SUPPLEMENTARY PACIFIC COAST STATION

Sacramento (KROY)	P	$75	38	45	23	30	15

HAWAIIAN GROUP

Honolulu-Hilo (KGMB-KHBC)	H*	$220	195	160	125	180	90

*2½ hours earlier than Pacific Standard Time.

PORTO RICAN STATION

San Juan (WKAQ)	A*	$100	140	125	90	90	65

*1 hour later than E.S.T.
†Observes Daylight Saving.

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PLAINTIFFS' DEPOSITION EXHIBIT 59

NATIONAL BROADCASTING CO., Inc.: NETWORK RATES

30 Rockefeller Plaza, New York City
Telephone: Circle 7-8300

NBC—RED NETWORK RATES

(Rates in Effect Jan. 1, 1939)

BASIC RED NETWORK

	Time*	1 Hr.	½ Hr	¼ Hr.
New York (WEAF)	E-DS	$1,200	$720	$480
Boston (WNAC)	E-DS	480	240	160
Hartford (WTIC)	E-DS	360	216	144
Providence (WJAR)	E-DS	200	120	80
Worcester (WTAG)	E-DS	160	96	64
Portland, Me. (WCSH)	E-DS	160	96	64
Philadelphia (KYW)	E-DS	480	288	192
Wilmington (WDEL)	E-DS	120	72	48
Baltimore (WFBR)	E	240	144	96
Washington (WRC)	E	200	120	80
Schenectady (WGY)	E-DS	350	220	152
Buffalo (WBEN)	E-DS	300	180	120
Pittsburgh (WCAE)	E-DS	350	228	152
Cleveland (WTAM)	E	480	288	192
Detroit (WWJ)	E	350	228	152
Cincinnati (One Cincinnati station, listed below, must be used)				
Indianapolis (WIRE)	C	200	120	80
Chicago (WMAQ)	C-DS	720	432	288
St. Louis (KSD)	C	360	216	144
Milwaukee (WTMJ)	C	320	192	128
Minneapolis-St. Paul (KSTP)	C	280	168	112
Des Moines (WHO)	C	480	288	192
Omaha (WOW)	C	320	192	128
Kansas City (WDAF)	C	360	216	144
Total for Network (Without Cincinnati)		$8,480	$5,088	$3,392
Cincinnati (WLW)	E	$1,200	$800	$532
Cincinnati (WCKY)	E	320	192	128
Cincinnati (WSAI)	E	240	144	96

BASIC RED SUPPLEMENTARIES

*E or EST—Eastern Standard Time.
C or CST—Central Standard Time.
M or MST—Mountain Standard Time.
P or PST—Pacific Standard Time.
-DS—Observes Daylight Saving Time.

PACIFIC COAST RED NETWORK, PST

For use with Mountain Group in conjunction with a Basic Network. When used separately, special program production in San Francisco or Hollywood studios required.

San Francisco (KPO)	$360	$228	$152
Los Angeles (KFI)	480	288	192
Portland, Ore. (KGW)	220	132	88
Seattle (KOMO)	220	132	88
Spokane (KHQ)	160	96	64
Total for Network	$1,460	$876	$584

RED MOUNTAIN GROUP, MST

Available only as a group. For use with Basic or Pacific Coast Networks.

Denver (KOA)	$280	$168	$112
Salt Lake City (KDYL)	200	120	80
Total for Group	$480	$288	$192

RED SOUTHCENTRAL GROUP, CST

Available only as a group. Midsouth, if available, must be used with this group.

Memphis (WMC)	$200	$120	$80
Atlanta (WSB) -DS	320	192	128
Birmingham (WBRC)	160	96	64
Jackson (WJDX)	120	72	48
New Orleans (WSMB)	200	120	80
Total for Group	$1,000	$600	$400

RED SOUTHWESTERN GROUP, CST

Available only as a group.

Tulsa (KVOO)	$240	$144	$96
Oklahoma City (WKY)	240	144	96
Dallas-Fort Worth (WFAA-WBAP)	400	240	160
Shreveport (KTBS)	120	72	48
Houston (KPRC)	240	144	96
San Antonio (WOAI)	260	156	104
Hot Springs (KTHS) and/or	120	72	48
Little Rock (KARK)	†120	72	48
Total for Group	$1,740	$1,044	$696

NBC—BLUE NETWORK RATES

(Rates in Effect Jan. 1, 1939)

BASIC BLUE NETWORK

	Time*	1 Hr.	½ Hr.	¼ Hr.
New York (WJZ)†	E-DS	$1,200	$720	$480
Boston (WBZ)	E-DS	480	288	192
Springfield (WBZA)	E-DS	160	96	64
Providence (WEAN)	E-DS	200	120	80
Bridgeport (WICC)	E-DS	160	96	64
Philadelphia (WFIL)	E-DS	400	240	160
Baltimore (WBAL)†	E	220	132	88
Washington (WMAL)	E	200	120	80
Syracuse (WSYR)	E	220	132	88
Rochester (WHAM)	E	360	216	144
Buffalo (WEBR)	E-DS	120	72	48
Pittsburgh (WDKA)	E-DS	480	288	192
Cleveland (WHK)	E	340	204	136
Toledo (WSPD)	E	220	132	88
Detroit (WXYZ)	E	360	216	144
Cincinnati (One Cincinnati station, listed below, must be used.)				
Fort Wayne (WOWO)	C-DS	220	132	88
Chicago (WFNR-WLS)	C-DS	720	432	288
St. Louis (KWK)	C	300	180	120
Cedar Rapids (WMT)	C	300	180	120
Minneapolis-St. Paul (WTCN)	C	180	108	72
Des Moines (KSO)	C	180	108	72
Omaha (WOW)	C	200	120	80
Kansas City (WREN)	C	240	144	96
Total for Group (Without Cincinnati)		$7,560	$4,536	$3,024
Cincinnati (WLW)	E	$1,200	$800	$532
Cincinnati (WCKY)	E	320	192	128
Cincinnati (WSAI)	E	240	144	96

BASIC BLUE SUPPLEMENTARIES

(WMBC)	P-DS	180	72	48
Fleetwood (WMFF)	E-DS			
(No charge. Available only when WABY is used.)				
Jamestown, N. Y. (WJTN)	E-DS			
(No charge.)				
Erie (WLEU)	P-DS	120	72	48
Shenandoah, Ia. (KMA)	C	140	84	56

Michigan Network available with WXYZ, Detroit

Flint (WFDF)	E			
Lansing (WJIM)	E		$240	$144	$96
Jackson (WIBM)	E				
Battle Creek (WELL)	E				

PACIFIC COAST BLUE NETWORK, PST

For use with Mountain Group in conjunction with a Basic Network. When used separately, special program production in San Francisco or Hollywood studios required.

San Francisco (KGO)	$280	$168	$112
Los Angeles (KECA)	240	144	96
Santa Barbara (KTMS)	120	72	48
San Diego (KFSD)	140	84	56
Portland, Ore. (KEX)	160	96	64
Seattle (KJR)	200	120	80
Spokane (KGA)	120	72	48
Total for Group	$1,260	$756	$504

BLUE MOUNTAIN GROUP, MST

Available only as a group. For use with Basic or Pacific Coast Networks.

Denver (KVOD)	$120	$72	$48
Ogden (KLO)	120	72	48
Salt Lake City (KUTA)	80	48	32
Total for Group	$320	$192	$128

BLUE SOUTHERN GROUP, CST

Individually available. Midsouth, if available, may be used with this Group.

Memphis (WMPS)		$140	$84	$56
Birmingham (WSGN)		120	72	48
Atlanta (WAGA)	-DS	180	108	72
New Orleans (WDSU)		180	108	72
Baton Rouge (WJBO)		120	72	48
Total for Group		$740	$444	$296

BLUE SOUTHWESTERN GROUP, CST

Individually available.

Oklahoma City (KTOK)	$120	$72	$48
Fort Worth-Dallas (KGKO)	240	144	96
Houston (KXYZ)	200	120	80
Total for Group	$560	$336	$224

* (KTHS and/or KARK of Red Southwestern Group, if available, may be used with this Group.)

†WJZ and WBAL are synchronized from 9:00 p.m. to 12:00 Midnight when on Standard Time—10:00 p.m. to to 1:00 a.m. on Daylight Saving Time.

*E or EST—Eastern Standard Time.
C or CST—Central Standard Time.
M or MST—Mountain Standard Time.
P or PST—Pacific Standard Time.
-DS—Observes Daylight Saving Time.

SPECIAL BLUE NETWORK DISCOUNTS

Applicable only to specified Blue Network facilities, when some or all of the Blue supplementary groups are purchased in their entirety with the complete Basic Blue Network. (WLW not included.)

Contracted Value of Blue Network Time at Gross Rates

One group whose evening hour rate equals $500 or more	5%
Two groups whose combined evening hour rate equals $1,000 or more	10%
Three groups whose combined evening hour rate equals $1,500 or more	15%
The four groups	20%

(These discounts are predicated on gross rate of one evening hour per group, applicable to standard quarter, half or hour, day or evening purchases.)

NBC—

BASIC BLUE SUPPLEMENTARIES

Individually av				
Fargo (WDAY)		+$60	$60	$40
Bismarck (KFYR)		200	120	80
Total for Group		$260	$216	$144

NORTH MOUNTAIN GROUP, MST

Individually available. For use with Red or Blue Mountain or Coast Groups.

Boise (KIDO)	$120	$72	$48
Butte (KGIR)	120	72	48
Helena (KPFA) (No charge. Available only when KGIR is used.)			
Billings (KGHL)	120	72	48
Pocatello, Idaho (KSEI) (No charge. Available only when complete Group is used.			
Twin Falls, Idaho (KTFI)			
Total for Group	$360	$216	$144

SOUTH MOUNTAIN GROUP, MST

Individually available. For use with either Red or Blue Basic or Mountain Groups.

Pueblo (KGHF)	$120	$72	$48
Albuquerque (KOB)	120	72	48
El Paso (KTSM)	120	72	48
Total for Group	$360	$216	$144

CALIFORNIA VALLEY GROUP, PST

Available only as a group with Pacific Red or Blue Network, all hours.

Sacramento (KFBK)	$160	$96	$64
Stockton (KWG)	120	72	48
Fresno (KMJ)			
Bakersfield (KERN)			
Total for Group	$280	$168	$112

ADDITIONAL TO PACIFIC NETWORK

Individually available with Pacific Coast Red or Blue Network.

Phoenix (KTAR)	M	$120	$72	$48
Medford (KMED)	P	120	72	48

SPECIAL HAWAIIAN SERVICE, BST

For use with Pacific Coast Red and Blue Networks.

Honolulu (KGU)	†$160	†$96	†$64

†These rates apply for all periods, day and night.

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BASIC SUPPLEMENTARIES

Individually available with either Basic Network.

	Time*	1 Hr.	½ Hr.	¼ Hr.
Manchester, N.H. (WFEA)	B-DS	$120	$72	$48
Bangor, Me. (WLBZ)	B-DS	120	72	48
Augusta, Me. (WRDO)	B-DS	60	36	24
(WRDO available only when WLBZ is used)				
Wilkes-Barre (WBRE)	B	120	72	48
Allentown, Pa. (WSAN)	B-DS	120	72	48
York, Pa. (WORK)	B	120	72	48
Lancaster, Pa. (WGAL)	B			
(No charge—available only when WORK is used.)				
Columbus, O. (WCOL)	B	120	72	48
Norfolk (WTAR)	B	140	84	56
Fort Wayne (WGL)	C-DS	120	72	48
(WGL available to Basic Blue only when WOWO is off the air.)				
Grand Rapids (WOOD)	B	$120	$72	$48
Terre Haute (WBOW)	C	120	72	48
Evansville (WGBF)	C	120	72	48
Madison (WIBA)	C	140	84	56
Duluth-Superior (WEBC)	C	140	84	56
Sioux Falls, S. D. (KSOO)	C	140	84	56
Sioux Falls, S. D. (KELO)	C	120	72	48
(KELO available only when KSOO is off the air.)				
Wichita (KANS)	C	120	72	48

SOUTHERN GROUP, EST

Available in a group of not less than four.

Raleigh (WPTF)	$140	$84	$56
Charlotte (WSOC)	120	72	48
Greenville (WFBC)	120	72	48
Asheville (WWNC)	120	72	48
Columbia (WIS)	120	72	48
Charleston (WCSC)	120	72	48
Total for Group	$740	$444	$296

FLORIDA GROUP, EST

Available only as a group for use with Southeastern, Red Southcentral or Blue Southern group.

Jacksonville (WJAX)	$160	$96	$64
Tampa (WFLA-WSUN)	140	84	56
Lakeland (WLAK)			
(No charge—available only when WFLA-WSUN is used.			
Miami (WIOD)	140	84	56
Total for Group	$440	$264	$176

MIDSOUTH GROUP, CST

Available only as a group. If available, must be used with Red Southcentral or may be used with Blue Southern.

Total for Group	$840	$504	$336

SPECIAL CUBAN SERVICE, EST

Subject to availability

Havana (CMQ)	*200	*120	*80

*These rates apply for all periods, day and night. Rate includes transmission charges but does not include extra announcing and translating services.

INDIVIDUAL SUPPLEMENTARIES

Individually available. For use with Red Southcentral or Blue Southern.

Mobile (WALA)	C	$120	$72	$48
Knoxville (WROL)	C	120	72	48
Chattanooga (WAPO)	C	120	72	48

Individually available. For use with Red or Blue Southwestern Groups.

Pittsburg, Kan. (KOAM)	C	$120	$72	$48
Springfield, Mo. (KGBX)	C	120	72	48
Amarillo (KGNC)	C	120	72	48
Beaumont (KFDM)	C	120	72	48
Corpus Christi (KRIS)	C	120	72	48
Wesaco (KRGV)	C	120	72	48

CANADIAN SERVICE, EST

Individually available. For use with Basic Red Network.

Toronto (CBL)	-DS	$200	$120	$120
Montreal (CBM)	-DS	240	144	96

Supplementary

Montreal (CBF) (French Language Station)	-DS	300	180	120
(CBF-CBM) Combination rate		325	195	130

Individually available. For use with Basic Blue Network.

Toronto (CBL)	-DS	$200	$120	$120
Montreal (CFCF)	-DS	240	144	96

Supplementary

Montreal (CBF) (French Language Station.)	-DS	300	180	120
(CBF-CFCF) Combination rate		325	195	130

NOTE: Rates for Canadian Broadcasting Corporation Network facilities on application.

All Supplementary Groups shown on this Rate Card, for clarity, when listed with the Red and the Blue Basic Networks may be purchased with either the Red or the Blue Network. Rates quoted herein subject to change without notice. This Card is for information purposes and does not constitute an offer on the part of the National Broadcasting Company.

*E or EST—Eastern Standard Time.
C or CST—Central Standard Time.
M or MST—Mountain Standard Time.
P or PST—Pacific Standard Time.
*DS—Observes Daylight Saving Time.

GENERAL SERVICE DATA

RATE CLASSIFICATIONS

(All rates quoted on Local Time. Fractional rates do not apply to Honolulu.)

a. 6:00 p.m. to 11:00 p.m., Gross Rates as listed on this card.

b. 12:00 Noon to 6:00 p.m., Sundays only, Three-quarters Gross Rates.

c. 11:00 p.m. to 12:00 Midnight and 8:00 a.m. to 6:00 p.m. (exclusive of Sunday afternoon), One-half Gross Rates.

d. 12:00 Midnight to 8:00 a.m., One-third Gross Rates.

Service available only if a regularly scheduled program precedes or follows.

e. Rates for periods longer than one hour in exact proportion to corresponding one-hour rate.

COMMISSIONS AND DISCOUNTS

a. Weekly discounts for 13 or more consecutive weeks network broadcasting.

All network contracts for the same advertiser may be combined for determining rate of discount.

Contracted Value of Network Time at Gross Rates On Blue Network contracts receiving special Blue Discounts these discounts are paid on the Net Rate after the special discounts.	Percentage Discount on Weekly Gross Billing
Less than $1,000 per week	None
$1,000 or more but less than $2,000 per week	2½%
$2,000 or more but less than $4,000 per week	5%
$4,000 or more but less than $8,000 per week	7½%
$8,000 or more but less than $12,000 per week	10%
$12,000 or more but less than $18,000 per week	12½%
$18,000 or more per week	15%

A rebate will be allowed the advertiser for each 52 weeks of consecutive network broadcasting, said rebate to be ten per cent (10%) of the gross billing on those facilities only which are under contract for broadcasting during each and every week throughout the entire 52-week period. On Blue Network contracts receiving special Blue Discounts this 10% rebate is paid on the net rate after the special discount. The rebate will be due and payable at the end of each 52 weeks of consecutive service or currently on firm 52-week contracts. Interruptions of the series necessitated by the broadcasting of special events of importance will not affect the advertiser's right to the rebate.

c. Gross billing after deductions of percentage discounts, if any, shall be subject to an advertising agency commission of 15%. From the annual rebate, if any, the company shall deduct the excess agency commission previously allowed. Commissions allowed only to recognized advertising agencies.

d. No commission on program charges.

e. No cash discounts—Bills due and payable when rendered.

TERMS OF USE

a. Minimum period sold is 15 minutes. No periods are sold in bulk for re-sale. Advertisers cooperating in group broadcasts are required to make individual contracts with the National Broadcasting Company, subject to card rate and regulations.

b. All programs are subject to program policies and approval of the National Broadcasting Company.

c. The closing date is three weeks in advance of initial program.

PRODUCTION SERVICES

a. Services of the NBC Artists Service and Program Department in arranging and presenting programs are included without extra charge.

b. No special charge is made for facilities when programs originate in NBC Studios in New York City, Chicago, Washington, San Francisco and Los Angeles (Hollywood) provided the City in which the program originates is included in the Network facilities ordered. Special charge, subject to agency commission but not to discount or rebate, made for facilities when program origination does not conform to these conditions—and for programs requiring special production.

REPRESENTATIVES

RCA Bldg., New York, N. Y.
Hotel Bradford (WBZ), Boston, Mass.
Grant Bldg. (KDKA), Pittsburgh, Pa.
Transportation Building, Washington, D. C.
Hotel Kimball (WBZA), Springfield, Mass.
815 Superior Ave. N.E. (WTAM), Cleveland, Ohio
Merchandise Mart, Chicago, Ill.
1510 Walnut St., Philadelphia, Pa.
625 Fisher Bldg., Detroit, Mich.
111 Sutter St., San Francisco, Calif.
1 Rowe Rd., (WGY), Schenectady, N. Y.
1000 California St. (KOA), Denver, Colo.
6418 Hollywood Blvd., Hollywood, Cal.

WNBC

A Distinguished Station

Distinguished Call Letters

Joined NBC Blue

Network On

December 21, 1938

•

WNBC serves the famous Connecticut Valley, consistently, with fine, diversified programs.

•

The

HARDWARE and INSURANCE

Centers of the U. S.

in

NEW BRITAIN • HARTFORD

It's

WNBC

(NBC Blue Network)

PLAINTIFFS' DEPOSITION EXHIBIT 60

NATIONAL BROADCASTING CO., Inc.: NETWORK RATES

30 Rockefeller Plaza, New York City
Telephone Circle 7-8300

NBC—RED NETWORK RATES

(Rates in *Effect Jan. 1, 1940*)

BASIC RED NETWORK

City and Call Letter	Time*	1 Hr.	½ Hr.	¼ Hr.
New York (WEAF)	E-DS	$1,400	$840	$560
Boston (WNAC)	E-DS	440	264	176
Hartford (WTIC)	E-DS	400	240	160
Providence (WJAR)	E-DS	300	180	80
Worcester (WTAG)	E-DS	180	108	72
Portland, Me. (WCSH)	E-DS	160	96	64
Philadelphia (KYW)	E-DS	480	288	192
Wilmington (WDEL)	E-DS	120	72	48
Baltimore (WFBR)	E	260	156	104
Washington (WRC)	E	240	144	96
Schenectady (WGY)	E-DS	400	240	160
Buffalo (WBEN)	E-DS	320	192	128
Pittsburgh (WCAE)	E-DS	300	225	150
Cleveland (WTAM)	E	520	312	208
Toledo, O. (WSPD)	E	220	132	88
Detroit (WWJ)	E	420	252	168
Cincinnati (See Cincinnati station, listed below, must be used)				
Indianapolis (WIRE)	C	200	120	80
Chicago (WMAQ)	C-DS	800	480	320
St. Louis (KSD)	C	360	216	144
Milwaukee (WTMJ)	C	340	204	136
Minneapolis-St. Paul (KSTP)	C	320	192	128
Des Moines (WHO)	C	320	312	208
Omaha (WOW)	C	340	204	136
Kansas City (WDAF)	C	350	228	168
Total for Network (without Cincinnati)		$9,400	$5,640	$3,760
Cincinnati (WLW)	E	$1,050	$720	$480
Cincinnati (WSAI)	E	240	144	96

BASIC RED SUPPLEMENTARIES

Hartford (WTIC)	E-DS	$140	$84	$56
Richmond (WMBG)	E	140	84	56
Johnstown (WJAC)	E	100	84	56
Altoona (WFBG)	E			

*E or EST—Eastern Standard Time.
C or CST—Central Standard Time.
M or MST—Mountain Standard Time.
P or PST—Pacific Standard Time.
-DS—Observes Daylight Saving Time.

RED SOUTH-CENTRAL GROUP, CST

Available only as a group. Midsouth, if available, must be used with this group.

Memphis (WMC)	$240	$144	$96
Atlanta (WSB) -DS	360	216	144
Birmingham (WBRC)	160	96	64
Jackson (WJDX)	120	72	48
New Orleans (WSMB)	200	120	80
Total for Group	$1,080	$648	$432

RED SOUTHWESTERN GROUP, CST

Available only as a group.

Tulsa (KVOO)	$280	$168	$112
Oklahoma City (WKY)	240	144	96
Dallas-Fort Worth (WFAA-WBAP)	440	264	176
Houston (KPRC)	260	156	104
San Antonio (WOAI)	300	180	120
And at least two of the following:			
Shreveport (KTBS)	120	72	48
Little Rock (KARK)	120	72	48
Amarillo (KGNC)	120	72	48
Total for Group of 8	$1,880	$1,128	$752

RED MOUNTAIN GROUP, MST

Available only as a group. For use with Basic or Pacific Coast Networks.

Denver (KOA)	$300	$180	$120
Salt Lake City (KDYL)	200	120	80
Total for Group	$500	$300	$200

PACIFIC COAST RED NETWORK, PST

For use with Mountain Group in conjunction with a Basic Network. When used separately, special program production in San Francisco or Hollywood studios required.

San Francisco (KPO)	$420	$252	$168
Fresno (KMJ)	120	72	48
Los Angeles (KFI)	320	312	208
Portland, Ore. (KGW)	220	132	88
Seattle (KOMO)	220	132	88
Spokane (KHQ)	140	84	56
Total for Group	$1,460	$876	$584

NBC—BLUE NETWORK RATES

(Rates in *Effect Jan. 1, 1940*)

BASIC BLUE NETWORK

City and Call Letter	Time*	1 Hr.	½ Hr.	¼ Hr.
New York (WJZ)†	E-DS	$1,200	$720	$480
Boston (WEI)	E-DS	400	240	160
Springfield (WBZA)	E-DS	160	96	64
Providence (WEAN)	E-DS	160	120	80
Bridgeport (WICC)	E-DS	160	96	64
Philadelphia (WFIL)	E-DS	480	240	160
Baltimore (WBAL)†	E	400	240	160
Washington (WMAL)	E	400	240	160
Syracuse (WSYR)	E-DS	300	180	120
Rochester (WHAM)	E-DS	300	180	120
Buffalo (WEBR)	E-DS	150	90	60
Pittsburgh (KDKA)	E-DS	450	270	180
Cleveland (WHK)	E	300	180	120
Detroit (WXYZ)	E	360	216	144
Cincinnati (See Cincinnati station, listed below, must be used)				
Fort Wayne (WOWO)	C-DS	250	150	80
Chicago (WENR-WLS)	C-DS	750	450	300
St. Louis (KWK)	C	300	180	120
Cedar Rapids (WMT)	C	300	180	120
Minneapolis-St. Paul (WTCN)	C	150	108	72
Des Moines (KSO)	C	150	108	72
Kansas City (WREN)	C	240	144	96
Total for Group (Without Cincinnati)		$7,160	$4,296	$2,864
Cincinnati (WLW)	E	$1,050	$720	$480
Cincinnati (WSAI)	E	240	144	96

BASIC BLUE SUPPLEMENTARIES

Richmond (WRTD)	E	$120	$72	$48
New Britain-Hartford (WNBC)	E-DS	120	72	48
Albany (WABY)	E-DS	120	72	48
Plattsburg (WMFF)	E-DS			
(No charge. Available only when WABY is used)				
Jamestown, N. Y. (WJTN)	E-DS	80	48	32
Erie (WLEU)	E-DS	120	72	48
Omaha (KOWH)	C	100	60	40
Shreveport, La. (KWEA)	C	100	60	40

MICHIGAN NETWORK

(Available only with WXYZ, Detroit)

Flint (WFDF)	E			
Lansing (WJIM)	E			
Jackson (WIBM)	E	$240	$144	$96
Battle Creek (WELL)	E			
Bay City (WBCM)	E			

BLUE SOUTHERN GROUP, CST

Individually available. Midsouth, if available, may be used with this Group.

Memphis (WMPS)	$140	$84	$56
Birmingham (WBGN)	120	72	48
Atlanta (WAGA) -DS	140	84	56
Hot Springs (KTHS)	120	72	48
New Orleans (WDSU)	180	108	72
Baton Rouge (WJBO)	80	48	32
Total for Group	$780	$468	$312

BLUE SOUTHWESTERN GROUP, CST

Individually available.

Oklahoma City (KTOK)	$120	$72	$48
Fort Worth-Dallas (KGKO)	240	144	96
Houston (KXYZ)	200	120	80
Beaumont (KFDM)	120	72	48
Total for Group	$680	$408	$272

BLUE MOUNTAIN GROUP, MST

Available only as a group. For use with Basic or Pacific Coast Networks.

Denver (KVOD)	$120	$72	$48
Ogden (KLO)	120	72	48
Salt Lake City (KUTA)	80	48	32
Total for Group	$320	$192	$128

PACIFIC COAST BLUE NETWORK, PST

For use with Mountain Group in conjunction with a Basic Network. When used separately, special program production in San Francisco or Hollywood studios required.

San Francisco (KGO)	$280	$168	$112
Sacramento (KFBK)			
Stockton (KWG)	$160	$96	$64
Bakersfield (KERN)			
Los Angeles (KECA)	240	144	96
Santa Barbara (KTMS)	80	48	32
San Diego (KFSD)	140	84	56
Portland, Ore. (KEX)	160	96	64
Seattle (KJR)	200	120	80
Spokane (KGA)	120	72	48
Total for Group	$1,380	$828	$552

†WJZ and WBAL are synchronized from 9:00 p.m. to 12:00 Midnight when on Standard Time—10:00 p.m. to 1:00 a.m. on Daylight Saving Time.

*E or EST—Eastern Standard Time.
C or CST—Central Standard Time.
M or MST—Mountain Standard Time.
P or PST—Pacific Standard Time.
-DS—Observes Daylight Saving Time.

SPECIAL BLUE NETWORK DISCOUNTS

Available only to specified Blue Network facilities, when some or all of the Blue supplementary groups are included in their contract with the complete Red Blue Network. (WLW not included.)

Combined Value of Blue Network Time at Gross Rates: One group whose combined hour rate equals $600 or more, 5%
Two groups whose combined evening hour rate equals $1,200 or more, 10%
Three groups whose combined evening hour rate equals $1,800 or more, 15%
The four groups, 20%

(These discounts are predicated on given rate of one evening hour per group, applicable to standard quarter, half or hour, day or evening purchase.)

NBC—SUPPLEMENTARY FACILITIES

(Rates in *Effect Jan. 1, 1940*)

BASIC SUPPLEMENTS

City and Call Letter	Time*	1 Hr.	½ Hr.	¼ Hr.
Individually available with other Basic Network.				
Manchester, N. H. (WFEA)	E-DS	$100	$60	$40
Bangor, Me. (WLBZ)	E-DS	120	72	48
Augusta, Me. (WRDO)	E-DS	60	36	24
(WRDO available only when WLBZ is used)				
Wilkes-Barre (WBRE)	E	120	72	48
Allentown, Pa. (WSAN)	E-DS	120	72	48
York, Pa. (WORK)	E-DS	120	72	48
Lancaster, Pa. (WGAL)	E-DS			
(No charge—available only when WORK is used)				
Harrisburg, Pa. (WKBO)	E-DS	100	60	40
(WKBO available only when WORK is used)				
Johnstown, Pa. (WJAC)	E	140	84	56
Charleston, W. Va. (WCHS)	E			
(WCHS available only when WSAZ is used)				
Charleston, W. Va. (WSAZ)	E	140	84	56
Clarksburg (WBLK)	E			
Beckley (WJLS)	E	80	48	32
Parkersburg, O. (WCOL)	E	100	60	40
(WJLS available when WJLK not used)				
Grand Rapids (WOOD)	E	120	72	48
Fort Wayne (WGL)	C-DS	120	72	48
(WGL available to Basic Blue only when WOWO is off the air.)				
Terre Haute (WBOW)	C	100	60	40
Evansville (WGBF)	C	120	72	48
Madison (WIBA)	C	140	84	56
Duluth-Superior (WEBC)	C	140	84	56
Sioux Falls, S. D. (KSOO)	C	140	84	56
Sioux Falls, S.D. (KELO)	C	80	48	32
(KELO available only when KSOO is off the air.)				
Wichita (KANS)	C	100	60	40

MINNESOTA NETWORK

Mankato (KYSM)	C			
Rochester (KROC)	C	120	72	48
St. Cloud (KFAM)	C			

SOUTHEASTERN GROUP, EST

Available with either Basic Network in a group of not less than three.

Raleigh (WPTF)	$140	$84	$56
Charlotte (WBOC)	120	72	48
Greenville (WFBC)	120	72	48
Asheville, N. C. (WISE)			
(No charge. Available only when WFBC is used.)			
Columbia (WIS)	120	72	48
Florence (WOLS)			
(No charge. Available only when WIS is used.)			
Charleston (WTMA) E	80	48	32
Total for Group	$580	$348	$232

FLORIDA GROUP, EST

Available only as a group for use with Southeastern Red Southcentral or Blue Southern groups.

Jacksonville (WJAX)	$160	$96	$64
Tampa (WFLA-WSUN)	140	84	56
Lakeland (WLAK)			
(No charge—available only when WFLA-WSUN is used.)			
Miami (WIOD)	100	96	64
Total for Group	$400	$276	$184

NORTHWESTERN GROUP, CST

Individually available with other Basic Network.

Fargo (WDAY)	$120	$96	$64
Bismarck (KFYR)	200	120	80
Total for Group	$320	$216	$144

MIDSOUTH GROUP, CST

Available only as a group. If available, must be used with Red Southcentral or may be used with Blue Southern.

Louisville (WAVE)	$200	$120	$80
Nashville (WSM)	400	240	160
Total for Group	$600	$360	$240

COUCH

INDIVIDUAL SUPPLEMENTARIES, CST

Individually available. For use with Red Southcentral or Blue Southern.

City and Call Letter	Time*	1 Hr.	½ Hr.	¼ Hr.
Mobile (WALA)		$120	$72	$48
Pensacola (WCOA)		100	60	40
Knoxville (WROL)		100	60	40
Chattanooga (WAPO)		100	60	40

Individually available. For use with Red or Blue Southwestern Groups.

Pittsburg, Kan. (KOAM)	$120	$72	$48
Springfield, Mo. (KGBX)	120	72	48
Corpus Christi (KRIS)	100	60	40
Weslaco (KRGV)	100	60	40

NORTH MOUNTAIN GROUP, MST

Individually available. For use with Red or Blue Mountain or Coast Groups.

Boise (KIDO)	$120	$72	$48
Butte (KGIR)	120	72	48
Helena (KPFA) (No charge. Available only when KGIR is used.)			
Billings (KGHL)	120	72	48
Pocatello, Idaho (KSEI) (No charge. Available only when Twin Falls, Idaho (KTFI) complete Group is used.			
Total for Group	$360	$216	$144

SOUTH MOUNTAIN GROUP, MST

Individually available. For use with either Red or Blue Basic or Mountain Groups.

Pueblo (KGHF)	$120	$72	$48
Albuquerque KOB	120	72	48
El Paso (KTSM)	120	72	48
Total for Group	$360	$216	$144

ADDITIONAL TO PACIFIC NETWORKS

Individually available with Pacific Coast Red or Blue Network.

Phoenix (KTAR)	M	$160	$96	$64
Tucson (KVOA)	M			
(No charge. Available only when KTAR is used.)				
Reno (KOH)	P	80	48	32
Medford (KMED)	P	80	48	32

CANADIAN SERVICE, EST

Individually available. For use with Basic Red Network.

Toronto (CBL)	-DS	$300	$180	$120
Montreal (CBM)	-DS	240	144	96
Supplementary				
Montreal (CBF) (French Language Station)	-DS	$300	$180	$120
(CBF-CBM) Combination rate		325	195	130

Individually available. For use with Basic Blue Network. Special Blue discount on CPCF only.

Toronto (CBL)	-DS	$300	$180	$120
Montreal (CPCF)	-DS	240	144	96
Montreal (CBF) (French Language Station)	-DS	300	180	120
(CBF-CPCF) Combination rate		325	195	130

NOTE: Rates for Network facilities or... Canadian Broadcasting Corporation application.

SPECIAL SERVICE

HAWAIIAN, HST

For use with PC ... d and Blue Networks.

Honolulu (KGU)	†$160	†$96	†$64

†These rates appl... or all periods, day and night.

CUBAN, EST

For use with Basi... ed and Blue.

Havana (CMX)	†$200	†$120	†$80

†These rates appl... or all periods, day and night.

GENERAL SERVICE DATA

RATE CLASSIFICATIONS

(All rates quoted ... Local Time. Fractional rates do not apply to Honolulu a... Havana.)

a. 6:00 p.m. to 1... 00 p.m., Gross Rates as listed on this card.

b. 12:00 Noon to ... 00 p.m., Sundays only, Three-quarters Gross Rates.

c. 11:00 p.m. to 1... 00 Midnight and 8:00 a.m. to 6:00 p.m. (exclusive of Sunday ... afternoon), One-half Gross Rates

d. 12:00 Midnight ... 8:00 a.m., One-third Gross Rates.

Service available ... only if a regularly scheduled program precedes or follows.

e. Rates for per... longer than one hour in exact proportion to correspon... ng one-hour rate.

COMMISSIONS AND DISCOUNTS

a. Weekly discou... for 13 or more consecutive weeks network broadcastin...

All network contr... for the same advertiser may be combined for determinin... rate of discount.

Contracted Value of Network Time at Gross Rates	Rate of Discount on Weekly Gross Billing
On Blue Network contracts receiving special Blue Discounts these discounts are paid on the Net rate after the special discounts.	
Less than $2,000 per week	None
$2,000 or more but less than $4,000 per week	2½%
$4,000 or more but less than $8,000 per week	5%
$8,000 or more but less than $12,000 per week	7½%
$12,000 or more but less than $18,000 per week	10%
$18,000 or more per week	12½%

Network Programs Between 8:00 and 10:00 p.m. New York Time

On the Basic Red Network and its supplementary facilities used on such programs and on their rebroadcasts, weekly rate of discounts will be reduced 5% (for example—12½% becomes 7½%). Where Red Network supplementary facilities are used with the Blue Network the 5% reduction on the rate of discount will apply to the Red facilities only.

b. Annual rebate for 52 consecutive weeks network broadcasting.

Rebate to be 12½% of the gross billing on all facilities used during the contract year, except on such facilities as are discontinued prior to the end of the contract year. On Blue Network contracts receiving special Blue Discounts this 12½% rebate is paid on the net rate after the special discount. The rebate will be due and payable at the end of each 52 weeks of consecutive service or currently on firm 52-week contracts. Interruptions of the series necessitated by the broadcasting of special events of importance will not affect the advertiser's right to the rebate.

c. Gross billing after deductions of percentage discounts, if any, shall be subject to an advertising agency commission of 15%. From the annual rebate, if any, the company shall deduct the excess agency commission previously allowed. Commissions allowed only to recognized advertising agencies.

d. No commission on program charges.

e. No cash discounts—Bills due and payable when rendered

TERMS OF USE

a. Minimum period sold is 15 minutes. No periods are sold in bulk for re-sale. Advertisers cooperating in group broadcasts are required to make individual contracts with the National Broadcasting Company, subject to card rate and regulations.

b. All programs are subject to program policies and approval of the National Broadcasting Company.

c. The closing date is three weeks in advance of initial program.

Rates quoted herein subject to change without notice. This Rate Card is for informative purposes, and does not constitute an offer on the part of the National Broadcasting Company.

PRODUCTION SERVICES

a. Services of the NBC Artists Service and Program Department in arranging and representing programs are included without extra charge.

b. No special charge is made for facilities when programs originate in NBC Studios in New York City, Chicago, Washington, San Francisco and Los Angeles (Hollywood) provided the City in which the program originates is included in the Network facilities ordered. Special charge, subject to agency commission but not to discount or rebate, made for facilities when program origination does not conform to these conditions—and for programs requiring special production.

REPRESENTATIVES

RCA Bldg., New York, N. Y.
Hotel Bradford (WBZ), Boston, Mass.
Grant Bldg. (KDKA), Pittsburgh, Pa.
Trans-Lux Bldg., (WRC-WMAL), Washington, D. C.
Hotel Kimball (WBZA), Springfield, Mass.
815 Superior Ave. N.E. (WTAM), Cleveland, Ohio
Merchandise Mart, (WMAQ-WENR), Chicago, Ill.
1613 Walnut St., (KYW), Philadelphia, Pa.
802 Fisher Building, Detroit, Mich.
111 Sutter St., San Francisco, Calif.
1 River Rd., (WGY), Schenectady, N. Y.
1626 California St. (KOA), Denver, Colo.
Sunset Blvd. & Vine St., Hollywood, Calif.

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[fol. 1694] PLAINTIFFS' DEPOSITION EXHIBIT 61

Shows the group ownership of broadcasting stations in the United States and includes among others the following (being from pp. 198 to 199 of the 1940 Yearbook of Broadcasting Magazine).

Columbia Broadcasting System Group—WABC, New York; WBBM, Chicago; WJSV, Washington; WKRC, Cincinnati; WBT, Charlotte; WCCO, Minneapolis; KMOX, St. Louis; KNX, Hollywood; WEEI, Boston (leased from Boston Edison Co.). Isaac D. Levy and Dr. Leon Levy, directors of CBS, are also chief owners of WCAU, Philadelphia, in which William S. Paley, CBS president, Samuel Paley and Jacob Paley, also CBS directors, are minority stockholders.

James M. Cox Group—WHIO, Dayton, O.; WIOD, Miami, Fla.; WSB, Atlanta; WAGA, Atlanta.

K. G. Marshall-Glenn Marshall Group—WBRC, Birmingham; WMBR, Jacksonville, Fla. (31%).

National Broadcasting Co. Group—WEAF, New York; WJZ, New York; WRC, Washington; WMAQ, Chicago, WENR, Chicago; WTAM, Cleveland; KPO, San Francisco. Leases from owners; WMAL, Washington. Operates and manages for General Electric Co.; WGY, Schenectady; KOA, Denver; KGO, San Francisco. Operates and manages for Westinghouse Co.; KDKA, Pittsburgh; WBZ, Boston; WBZA, Springfield, Mass.; KYW, Philadelphia. (Owns but leases to Fishers Blend Station Inc., KJR, Seattle.)

Ed Norton-Thad Holt Group—WAPI, Birmingham (lease); WMBR, Jacksonville, Fla.

John H. Perry Newspapers Group—WCOA, Pensacola; WJHP, Jacksonville, Fla.

S. H. Campbell Holdings—WSPB, Sarasota, Fla. (33 1/3%); WJHL, Johnson City, Tenn. (20%).

[fol. 1695] PLAINTIFFS' DEPOSITION EXHIBITS 62 AND 63 OMITTED

[fol. 1696] PLAINTIFFS' DEPOSITION EXHIBIT 64

This is p. 74 of the 1940 Yearbook of Broadcasting Magazine and contains a list of new broadcast stations author-

ized by the FCC during 1939, among them being the following stations in the State of Florida:

WFTL, Fort Lauderdale—Licensed to Tom M. Bryan, contracting and real estate. Granted July 13; 100 watts night and 250 day on 1370 kc.

WFTM, Fort Myers—CP issued to Fort Myers Broadcasting Co.; W. E. Benns Jr., president; Mrs. W. E. Benns, vice-president and treasurer; B. Julian Skinner, director. Granted Oct. 3; 250 watts on 1210 kc.

WTMC, Ocala—Licensed to John T. Alsop, Jr., former mayer of Jacksonville, motion pictures and real estate. Granted March 13; 100 watts on 1500 kc.

WDLP, Panama City—CP issued to Panama City Broadcasting Co.; Phillip A. Roll, attorney, president, 33⅓% stockholders; E. D. DeWitt, retired newspaper broker, vice-president, 33 1/3%; W. J. Cook, Ford dealer and bank vice-president, secretary treasurer, 33 1/3%. Granted June 27; 100 watts night and 250 day on 1200 kc.

WSPB, Sarasota—Licensed to WSPB Inc.; 32% of stock each owned by S. H. Campbell Jr., Chattanooga oil distributor, president; R. C. Jones Jr., Chattanooga merchant; S. C. Hutcheson, Chattanooga miller; C. L. Babcock, Punta Gorda, Fla., retired, vice-president, 2%; Clyde H. Wilson, Sarasota, Fla., attorney, secretary, 2%. Granted July 13; 100 watts night and 250 day on 1420 kc.

WTSP, St. Petersburg—Licensed to Pinellas Broadcasting Co.; Sam H. Mann Jr., attorney, president, 48 shares; McKinney Barton, attorney, vice-president, 1 share; James R. Bussey, attorney, secretary-treasurer, 1 share. Granted April 3; 250 watts on 1370 kc. (Sale to Nelson Poynter, publisher of St. Petersburg Times, pends FCC approval.)

[fol. 1697] PLAINTIFFS' DEPOSITION EXHIBIT 65

This is p. 76 of the 1939 Yearbook of Broadcasting Magazine showing that there was authorized by the FCC in the year 1938 new stations, among them being the following stations in the State of Florida:

WJHP, Jacksonville—CP issued to The Metropolis Co., owned by John H. Perry, publisher of the Jacksonville Journal, Pensacola Journal and News and owner of WCOA, Pensacola; 250 watts on 1290 kc.

(Here follow 4 photolithographs, side folios 1698-1701.)

PLAINTIFFS' DEPOSITION EXHIBIT 66

National Association of Broadcasters 1939-40 Of...

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PLAINTIFFS' DEPOSITION EXHIBIT 66

National Association of Broadcasters: 1939-40 Officers and Committees

Headquarters Office: 1626 K St. N. W., Washington, D. C. Phone: NAtional 2080

*Board of Directors

Paul W. Morency, WTIC, Hartford, Conn.
(District 1: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island)

*Harry C. Wilder, WSYR, Syracuse, N. Y.
(District 2: New York)

Clifford M. Chafey, WEEU-WRAW, Reading, Pa.
(District 3: Delaware, New Jersey, Pennsylvania)

*John A. Kennedy, WCHS, Charleston, W. Va.
(District 4: D. C., Maryland, North Carolina, South Carolina, Virginia, West Virginia)

W. Walter Tison, WFLA, Tampa, Fla.
(District 5: Alabama, Florida, Georgia, Puerto Rico)

*Edwin W. Craig, WSM, Nashville
(District 6: Arkansas, Louisiana, Mississippi, Tennessee)

J. H. Ryan, WSPD, Toledo, O.
(District 7: Kentucky, Ohio)

*John E. Fetzer, WKZO, Kalamazoo, Mich.
(District 8: Indiana, Michigan)

William H. West, WTMV, E. St. Louis, Ill.
(District 9: Illinois, Wisconsin)

*John J. Gillin, Jr., WOW, Omaha
(District 10: Iowa, Missouri, Nebraska)

Earl H. Gammons, WCCO, Minneapolis
(District 11: Minnesota, North Dakota, South Dakota)

*Herbert Hollister, KANS, Wichita, Kan.
(District 12: Kansas, Oklahoma)

O. L. Taylor, KGNC, Amarillo, Tex.
(District 13: Texas)

*Eugene O'Fallon, KFEL, Denver
(District 14: Colorado, Idaho, Utah, Wyoming, Montana)

Howard Lane, KFBK, Sacramento, Cal.
(District 15: California, excluding San Luis Obispo, Kern, San Bernardino, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Diego and Imperial counties; Nevada, Hawaii)

*Donald W. Thornburgh, KNX, Hollywood
(District 16: Arizona, New Mexico, California, including [illegible] counties not in District 15)

[illegible]

Directors at Large

Large Stations

Harold Hough, WBAP, Fort Worth
Frank M. Russell, WRC-NBC, Washington

Medium Stations

George Norton Jr., WAVE, Louisville, Ky.
Dan S. Elias, WWNC, Asheville, N. C.

Small Stations

John Elmer, WCBM, Baltimore, Md.
Harry R. Spence, KXRO, Aberdeen, Wash.

*Term expires in 1940.

Presidents of NAB

Eugene F. McDonald Jr. (WJAZ)	1923-1925
Frank W. Elliot (WHO)	1925-1926
Earle C. Anthony (KFI)	1926-1928
William S. Hedges (WMAQ)	1928-1930
Walter Damm (WTMJ)	1930-1931
*Harry Shaw (WMT)	1931-1932
Truman Ward (WLAC)	1932-1933
Alfred J. McCosker (WOR)	1933-1935
Leo Fitzpatrick (WJR)	1935-1936
Charles W. Myers (KOIN)	1936-1937
John Elmer (WCBM)	6-23-37—2-16-38
Mark Ethridge (WHAS)	3-30-38—7-1-38
Neville Miller	1938-

* Deceased.

HEADQUARTERS STAFF

Neville Miller, *President*
Edwin M. Spence, *Secretary-Treasurer*
Russell P. Place, *General Counsel*
Paul F. Peter, *Director of Research*
Edward M. Kirby, *Director of Public Relations and Education*
Joseph L. Miller, *Director of Labor Relations*
Lynne C. Smeby, *Director of Engineering*
Andrew W. Bennett, *Special Copyright Counsel*
C. J. Henry, Jr., *Bureau of Radio Advertising*
Arthur Stringer, *Promotion*
L. Robert Myers, *Research Assistant*
Everett Revercomb, *Auditor*

BROADCAST MUSIC, INC.

(In process of formation)

Officers

Neville Miller, *President*
Everett Revercomb, *Secretary-Treasurer*

Directors

Neville Miller
Walter J. Damm, WTMJ, Milwaukee
John Elmer, WCBM, Baltimore
Edward Klauber, CBS
Lenox R. Lohr, NBC
S. R. Rosenbaum, WFIL, Philadelphia
John Shepard 3rd, Yankee Network

COMMITTEES

EXECUTIVE COMMITTEE — Neville Miller, NAB, chairman; Edwin W. Craig, WSM, Nashville; John Elmer, WCBM, Baltimore; Herbert Hollister, KANS, Wichita, Kan.; John A. Kennedy, WCHS, Charleston, W. Va.; Paul W. Morency, WTIC, Hartford; Harry C. Wilder, WSYR, Syracuse.

CODE COMPLIANCE COMMITTEE— Edgar L. Bill, WMBD, Peoria, Ill., chairman; Martin Campbell, WFAA, Dallas; Edward Cargill, WMAZ, Macon, Ga.; Earl J. Glade, KSL, Salt Lake City; Edward Klauber, CBS, New York; Don Searle, KOIL, Omaha; Calvin J. Smith, KFAC, Los Angeles; Theodore Streibert, WOR-MBS, New York; Niles Trammell, NBC, New York; E. M. Kirby, NAB, secretary.

ACCOUNTING COMMITTEE — C. T. Lucy, WRVA, Richmond, chairman; H. W. Batchelder, WFBR, Baltimore; S. R. Dean, CBS, New York; E. J. Gluck, WSOC, Charlotte, N. C.; N. L. Kidd, WSYR, Syracuse; Harry F. McKeon, NBC, New York.

COMMITTEE TO STUDY QUESTION OF ASSOCIATE MEMBERSHIPS IN NAB—John J. Gillin, Jr., WOW, Omaha, chairman; Earl H. Gammons, WCCO, Minneapolis; Eugene P. O'Fallon, KFEL, Denver.

LABOR COMMITTEE—Samuel R. Rosenbaum, WFIL, Philadelphia, chairman; Ralph R. Brunton, KJBS, San Francisco; Don S. Elias, WWNC, Asheville, N. C.; Earl J. Glade, KSL, SaltLake City; George W. Norton, Jr., WAVE, Louisville; J. H. Ryan, WSPD, Toledo; Lloyd C. Thomas, WROK, Rockford, Ill.

LEGISLATIVE COMMITTEE—John A. Kennedy, WBLK, Clarksburg, W. Va., chairman; Harry C. Butcher, WJSV, Washington; Edwin W. Craig, WSM, Nashville; E. B. Craney, KGIR, Butte, Mont.; William B. Dolph, WOL, Washington; John Elmer, WCBM, Baltimore; Lenthor L. Witt, Washington; Theodore C. Streibert, WOR, New York.

WAGE AND HOUR ACT COMMITTEE—Joseph L. Miller, NAB, Washington, acting chairman; H. W. Batchelder, WFBR, Baltimore; William B. Dolph, WOL, Washington; John V. L. Hogan, WQXR, New York; C. T. Lucy, WRVA, Richmond.

NAB-RMA COMMITTEE—For NAB: Neville Miller, NAB, Washington, D. C., chairman; Edward Klauber, CBS; I. R. Lounsberry, WGR-WKBW, Buffalo; Theodore Streibert, MBS. For RMA: James M. Skinner, Philadelphia Storage Battery Co., Philadelphia, chairman; Henry C. Bonfig, RCA Manufacturing Co. Inc., Camden, N. J.; Powel Crosley, The Crosley Corp., Cincinnati; Comdr. E. F. McDonald Jr., Zenith Radio Corp., Chicago; A. S. Wells, Wells-Gardner Co., Chicago (ex-officio member).

Endorsed by the NAB

Lang-Worth is the largest TAX-FREE music library in the world. Lang-Worth is the ONLY tax-free library guaranteed and insured in its entirety for the Broadcasters' protection.

LANG-WORTH, INC., NEW YORK, N.Y.

1069A

PLAINTIFFS' DEPOSITION EXHIBIT 67

National Association of Broadcasters: 1938-39 Officers and Committees

Headquarters Office: 1626 K St. N. W., Washington, D. C. Phone: NAtional 2080

Neville Miller, President

Edwin M. Spence, Secretary-Treasurer
Paul F. Peter, Director of Research

Joseph L. Miller, Director of Labor Relations
Edward M. Kirby, Director of Public Relations and Education

*Board of Directors

John Shepard, 3d, Yankee Network
(District 1: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island)

Harry C. Wilder, WSYR, Syracuse, N. Y.
(District 2: New York)

Clair McCollough, WDEL, Wilmington, Del.
(District 3: Delaware, New Jersey, Pennsylvania)

John A. Kennedy, WCHS, Charleston, W. Va.
(District 4: D. C., Maryland, North Carolina, South Carolina, Virginia, West Virginia)

W. Walter Tison, WFLA, Tampa, Fla.
(District 5: Alabama, Florida, Georgia, Puerto Rico)

†Edwin W. Craig, WSM, Nashville
(District 6: Arkansas, Louisiana, Mississippi, Tennessee)

†Mark Ethridge, WHAS, Louisville
(District 7: Kentucky, Ohio)

John E. Fetzer, WKZO, Kalamazoo, Mich.
(District 8: Indiana, Michigan)?

†Walter J. Damm, WTMJ, Milwaukee
(District 9: Illinois, Wisconsin)

John J. Gillin, Jr., WOW, Omaha
(District 10: Iowa, Missouri, Nebraska)

Earl H. Gammons, WCCO, Minneapolis
(District 11: Minnesota, North Dakota, South Dakota)

†Herbert Hollister, KANS, Wichita, Kan.
(District 12: Kansas, Oklahoma)

O. L. Taylor, KGNC, Amarillo, Tex.
(District 13: Texas)

Eugene O'Fallon, KFEL, Denver
(District 14: Colorado, Idaho, Utah, Wyoming, Montana)

Ralph R. Brunton, KJBS, San Francisco
(District 15: California, excluding San Luis Obispo, Kern, San Bernardino, Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Diego and Imperial counties, Hawaii, Hawaii)
(Big counties excepted in District 15)

C. W. Myers, KOIN-KALE, Portland, Ore.
(District 17: Alaska, Oregon, Washington)

Directors at Large

Clear Channel

Harold Hough, WBAP, Fort Worth
Lambdin Kay, WSB, Atlanta

Regional Channel

†Frank M. Russell, WRC, Washington
Elliott Roosevelt, Hearst Radio Inc.

Local Channel

†John Elmer, WCBM, Baltimore
Edward A. Allen, WLVA, Lynchburg, Va.

*Directors elected at 1938 convention from Districts 1, 3, 5, 9, 11, 13, 15 and 17 will serve one-year terms; all others two-year terms. Thereafter all directors will be elected for two-year terms.

†Constitute executive committee which will also include new president to be named.

Presidents of NAB

Eugene F. McDonald Jr. (WJAZ)	1922-1925
Frank W. Elliot (WHO)	1925-1926
Earle C. Anthony (KFI)	1926-1928
William S. Hedges (WMAQ)	1928-1930
Walter Damm (WTMJ)	1930-1931
*Harry Shaw (WMT)	1931-1932
Truman Ward (WLAC)	1932-1933
Alfred J. McCosker (WOR)	1933-1935
Leo Fitzpatrick (WJR)	1935-1936
Charles W. Myers (KOIN)	1936-1937
John Elmer (WCBM)	6-22-37—2-16-38
Mark Ethridge (WHAS)	3-30-38—7-1-38
Neville Miller	1938-

*Deceased.

COMMITTEES

ACCOUNTING—Harry C. Wilder, WSYR, Syracuse, chairman; L. A. Benson, WIL, St. Louis; E. E. Hill, WTAG, Worcester; E. M. Stoer, Hearst Radio Inc.; Harold Wheelahan, WSMB, New Orleans; Frank White, CBS; Mark Woods, NBC.

COMMITTEE TO CONSIDER REPORT OF NAB BUREAU OF COPYRIGHTS Inc.—John Elmer, WCBM, Baltimore, chairman; John J. Gillin, Jr., WOW, Omaha; Eugene O'Fallon, KFEL, Denver.

COMMITTEE TO STUDY QUESTION OF ASSOCIATE MEMBERSHIPS IN NAB—John J. Gillin, Jr., WOW, Omaha, chairman; Earl H. Gammons, WCCO, Minneapolis; Eugene P. O'Fallon, KFEL, Denver.

ENGINEERING COMMITTEE—John V. L. Hogan, WQXR, New York, chairman; E. K. Cohan, CBS; J. H. DeWitt, Jr., WSM, Nashville; William G. Egerton, KTSA, San Antonio; John E. Fetzer, WKZO, Kalamazoo, Mich.; O. B. Hanson, NBC; Albert E. Heiser, WLVA, Lynchburg, Va.; Herbert Hollister, KANS, Wichita; Porter Houston, WCBM, Baltimore; Paul A. Loyet, WHO, Des Moines; Paul de Mars, WNAC, Boston; Carl J. Meyers, WGN, Chicago; J. R. Poppele, WQR, New York; John T. Schilling, WHB, Kansas City; William H. West, WTMV, East St. Louis, Ill.

EXECUTIVE COMMITTEE—Neville Miller, NAB, Washington; Edwin W. Craig, WSM, Nashville; Walter J. Damm, WTMJ, Milwaukee; John Elmer, WCBM, Baltimore; Mark Ethridge, WHAS, Louisville; Herbert Hollister, KANS, Wichita; Frank M. Russell, WRC, Washington.

COMMITTEE OF SIX OF FEDERAL RADIO EDUCATION COMMITTEE—Levering Tyson, National Advisory Council on Radio in Education, Inc., New York, chairman; Hadley Cantril, Princeton University, Princeton, N. J.; Dr. W. W. Charters, Ohio State University, Columbus; Neville Miller, Washington, NAB, D. C.; John F. Royal, NBC; Frederick A. Willis, CBS.

LABOR COMMITTEE—Samuel R. Rosenbaum, WFIL, Philadelphia, chairman; Ralph R. Brunton, KJBS, San Francisco; Don S. Elias, WWNC, Asheville, N. C.; Earl J. Glade, KSL, Salt Lake City; George W. Norton, Jr., WAVE, Louisville; J. H. Ryan, WSPD, Toledo; Lloyd C. Thomas, WROK, Rockford, Ill.

LEGISLATIVE COMMITTEE—John A. Kennedy, WBLK, Clarksburg, W. Va., chairman; Harry C. Butcher, WJSV, Washington; Edwin W. Craig, WSM, Nashville; E. B. Craney, KGIR, Butte, Mont.; William B. Dolph, WOL, Washington; John Elmer, WCBM, Baltimore; Luther L. Hill, KRNT, Des Moines; Frank M. Russell, WRC, Washington; Theodore C. Streibert, WOR, New York.

SALES MANAGERS COMMITTEE—Craig Lawrence, KSO, Des Moines, chairman; Frank Bishop, KFEL, Denver; Charles C. Caley, WMBD, Peoria; K. W. Church, KMOX, St. Louis; William B. Cline, WLS, Chicago; E. Y. Flanigan, WSPD, Toledo; Purnell Gould, WFBR, Baltimore; Herbert Hollister, KANS, Wichita; J. Buryl Lottridge, KTUL, Tulsa.

WAGE AND HOUR ACT COMMITTEE—Joseph L. Miller, NAB, Washington, acting chairman; H. W. Batchelder, WFBR, Baltimore; William B. Dolph, WOL, Washington; John V. L. Hogan, need.

NAB-RMA COMMITTEE—For NAB: Neville Miller, NAB, Washington, D. C., chairman; Edward Klauber, CBS; I. R. Lounsberry, WGR-WEBW, Buffalo; H. Bliss McNaughton, WTBO, Cumberland, Md.; Theodore Streibert, MBS. For RMA: James M. Skinner, Philadelphia Storage Battery Co., Philadelphia, chairman; Henry C. Boenig, RCA Manufacturing Co. Inc., Camden, N. J.; Powel Crosley, The Crosley Corp., Cincinnati; Comdr. E. F. McDonald Jr., Zenith Radio Corp., Chicago; A. S. Wells, Wells-Gardner Co., Chicago (ex-officio member).

RESEARCH COMMITTEE—*Arthur B. Church, KMBC, Kansas City, chairman; H. K. Carpenter, WHK, Cleveland; John V. L. Hogan, WQXR, New York; *Paul Kesten, CBS; *J. O. Maland, WHO, Des Moines; George Roeder, WCBM, Baltimore; *Roy C. Witmer, NBC; ex-officio, Paul F. Peter, NAB, Washington; *Neville Miller, NAB, Washington. *Committee of five representing NAB on the Joint Committee on Radio Research. Mr. Miller is chairman of this group.

Code of Ethics of the National Association of Broadcasters

Adopted at 1935 Convention

1. Recognizing that the radio audience includes persons of all ages and all types of political, social and religious belief, each member station will endeavor to prevent the broadcasting of any matter which would commonly be regarded as offensive.

2. When the facilities of a member station are used by others than the owner, the member shall ascertain the financial responsibility and character of such client, that no dishonest, fraudulent or dangerous person, firm or corporation may gain access to the radio audience.

3. Matter which is barred from the mails as fraudulent, deceptive or obscene shall not be broadcast by a member station.

4. Each member station shall refuse any advertising matter regarding products or services injurious to health.

5. Each member station shall maintain a public record of its current rates charged to advertisers for the use of broadcasting time together with all discounts, rebates, refunds and agency commissions which shall be allowed to the users of such time or to their recognized agents.

6. Each member station shall refuse to accept any business on a cost per inquiry, contingent, or percentage basis, or to accord free time for commercial use.

7. No member station shall permit the broadcasting of advertising statements or claims which he knows or believes to be false, deceptive or grossly exaggerated.

8. No member station shall defame or disparage a competitor, directly or indirectly, by words or acts which untruthfully call in question such competitor's business integrity, ability to perform contracts, credit standing or quality of service.

9. No member station shall claim for its service a character, scope or quality which cannot be substantiated, nor shall it claim as regular characteristics of its service features which it knows to be purely temporary or accidental.

10. Where charges of violation of any article of the code of ethics of the National Association of Broadcasters are filed in writing with the Managing Director, the Board of Directors shall investigate such charges, give opportunity for hearing and afterwards notify the station of its findings.

PLAINTIFFS' DEPOSITION EXHIBIT 68-A

Map of Network of Columbia Broadcasting System

(As of January 1, 1940)

1700

1940 Yearbook Number • Page 179
BROADCASTING • Broadcast Advertising

PLAINTIFFS' DEPOSITION EXHIBIT 68-A

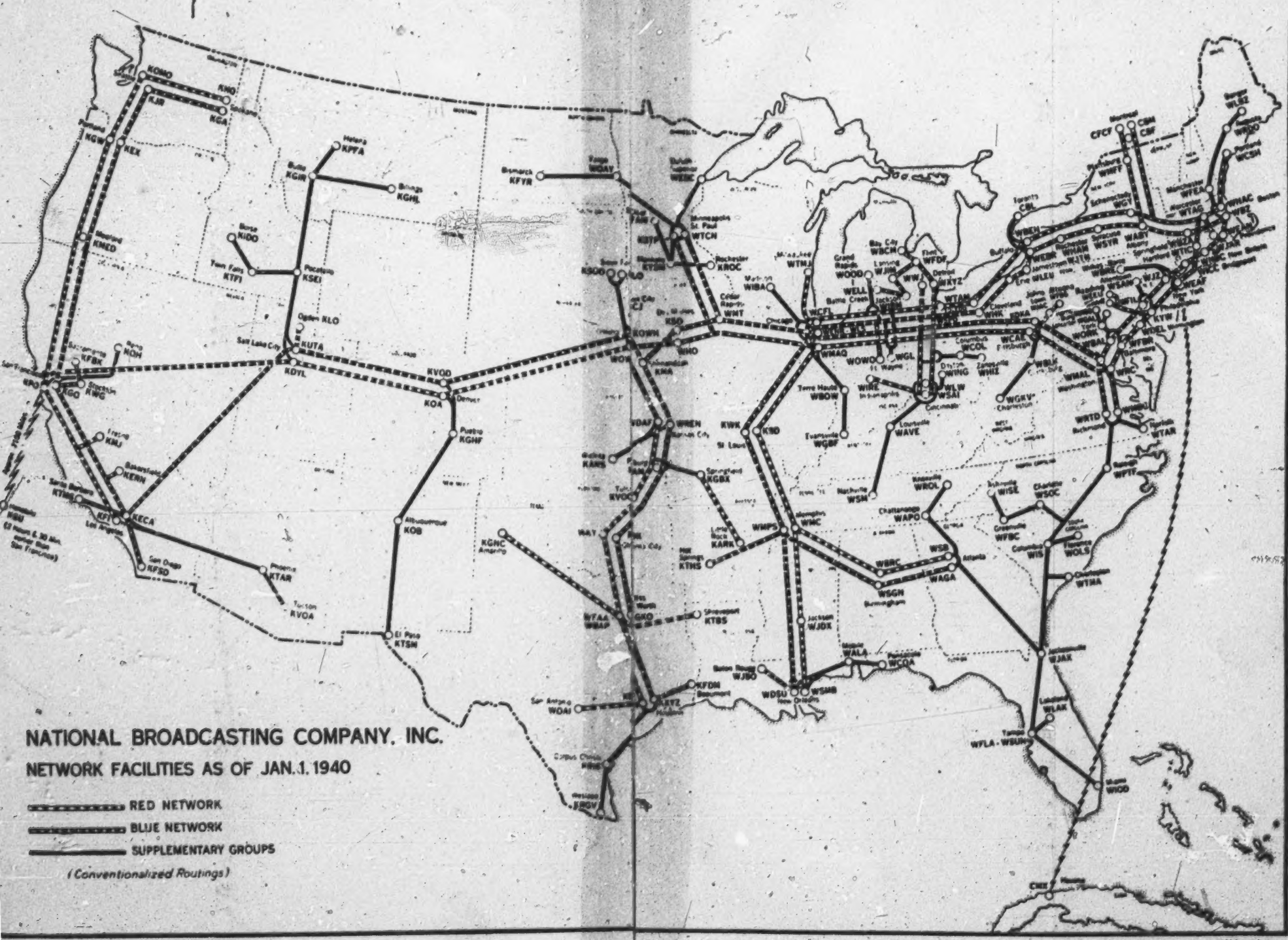
PLAINTIFFS' DEPOSITION EXHIBIT 68-B

10660

Map of Networks of the National Broadcasting Company

1701

(As of January 1, 1940)


KGW
KEX
KOIN
KJR
KGA
KFPY
KGIR
KGHL
KIDO
KTFI
KSEI
KLO
KUTA
KDYL
KVOO
KOA
KGHF
KFBK
KGO
KPO
KMJ
KERN
KECA
KFI
KFSD
KTAR
RVOA
KOB
KTSM
KFYR
WDAY
WEBC
WTCN
KROC
WIBA
KSCJ
KSO
KOWH
WHO
WOW
WMAQ
WCFL
WTMJ
WBCN
WWJ
WJR
WLW
WSAI
WGRV
WCAE
WHIZ
WTAM
WEWS
WJW
WEEI
WTIC
WEAN
WJZ
WEAF
WFBR
WRC
WTAR
WRTD
WPTF
WSM
WSB
WAGA
WBRC
WSGN
WJDX
WALA
WCOA
WJAX
WLAX
WFLA-WSUN
WOD
WJBO
WDSU
WSMB
KFDM
KTRH
KTBS
KGBX
KARK
KTHS
WMPS
WMC
WSH
WGBF
WAVE
WBOW
WIRE
WOWO
WGL
WKZO
WKBN
WKRC
WCOL
WWVA
WCAU
WBAL
WRVA
WDBJ
WBIG
WFBC
WSOC
WISE
WROL
WAPO
WIS
WOLS
WTMA
WFTC
WDAF
WREN
KWK
KSD
KMOX
KWTO
KGBX
KGNC
WTAA
WBAP
KTRH
KFDM
KRIS
WOAI
KGKO
KFYR
KSOO
WDAY
WEBC
WTCN
KROC
WIBA

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[fol. 1702] PLAINTIFFS' DEPOSITION EXHIBIT 69—Omitted

(Here follows 1 photolithograph, side folio 1703.)

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PLAINTIFFS' DEPOSITION EXHIBIT 70

Nice shootin' Kid!

1199 TAX-FREE "MUSICAL HITS"!

AVAILABLE TO RADIO ADVERTISERS EVERYWHERE
THROUGH *Lang Worth Licensed* STATIONS

Instrumental Selections

790 Instrumental

409 Vocal

TOTAL—1199 Tax-Free "Musical Hits"

ADVERTISERS

RADIO STATIONS

LANG-WORTH FEATURE PROGRAMS, INC.

420 Madison Avenue New York City

1703

1068A

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[fol. 1704] PLAINTIFFS' DEPOSITION EXHIBITS 71-A AND 71-B —Omitted

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[fol. 1705] PLAINTIFFS' DEPOSITION EXHIBIT 72-A

This exhibit is p. 216 of the 1939 Yearbook of the Broadcasting Magazine and shows the stations subscribing to transcription program libraries, among them being the following stations in the State of Florida:

City	Station	Service
Daytona Beach	WMFJ	AMP, LW
Gainesville	WRUF	WBS, NAB
Jacksonville	WJAX	NBC
Jacksonville	WMBR	NAB, MG
Lakeland	WLAK	WBS
Miami	WIOD	AMP, NBC
Miami	WQAM	WBS, NAB
Miami Beach	WKAT	AMP
Orlando	WDBO	NBC
Pensacola	WCOA	MG
St. Augustine	WFOY	WBS
St. Petersburg	WSUN	WBS
Tallahassee	WTAL	WBS, NAB
Tampa	WDAE	SR
Tampa	WFLA	NBC
West Palm Beach	WJNO	WBS

For the year 1940, 5 additional stations in Florida were added to the above list (as shown in Plaintiffs' Exhibit 74 omitted from this record.)

[fol. 1706] PLAINTIFFS' DEPOSITION EXHIBIT 72-B

A page from the yearbook of Broadcasting Magazine for the year 1939 showing stations affiliated with the World Transcription System, and the hourly, half-hourly and quarter-hourly rates of such stations. These stations are located throughout the United States, the Florida station being station WIOD located at Miami, Florida; the night rates being $150, $90 and $60 per hour, half-hour and quarter-hour respectively, and the day rates being $75, $45 and $30 for an hour, half-hour and quarter-hour respectively. It is stated therein that studios and complete recording facilities are available in New York, Chicago and Hollywood; services of program, continuity and production departments being available without extra charge.

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[fol. 1704] PLAINTIFFS' DEPOSITION EXHIBITS 71-A AND 71-B —Omitted

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[fol. 1705] PLAINTIFFS' DEPOSITION EXHIBIT 72-A

This exhibit is p. 216 of the 1939 Yearbook of the Broadcasting Magazine and shows the stations subscribing to transcription program libraries, among them being the following stations in the State of Florida:

City	Station	Service
Daytona Beach	WMFJ	AMP, LW
Gainesville	WRUF	WBS, NAB
Jacksonville	WJAX	NBC
Jacksonville	WMBR	NAB, MG
Lakeland	WLAK	WBS
Miami	WIOD	AMP, NBC
Miami	WQAM	WBS, NAB
Miami Beach	WKAT	AMP
Orlando	WDBO	NBC
Pensacola	WCOA	MG
St. Augustine	WFOY	WBS
St. Petersburg	WSUN	WBS
Tallahassee	WTAL	WBS, NAB
Tampa	WDAE	SR
Tampa	WFLA	NBC
West Palm Beach	WJNO	WBS

For the year 1940, 5 additional stations in Florida were added to the above list (as shown in Plaintiffs' Exhibit 74 omitted from this record.)

[fol. 1706] PLAINTIFFS' DEPOSITION EXHIBIT 72-B

A page from the yearbook of Broadcasting Magazine for the year 1939 showing stations affiliated with the World Transcription System, and the hourly, half-hourly and quarter-hourly rates of such stations. These stations are located throughout the United States, the Florida station being station WIOD located at Miami, Florida; the night rates being $150, $90 and $60 per hour, half-hour and quarter-hour respectively, and the day rates being $75, $45 and $30 for an hour, half-hour and quarter-hour respectively. It is stated therein that studios and complete recording facilities are available in New York, Chicago and Hollywood; services of program, continuity and production departments being available without extra charge.

[fol. 1707] PLAINTIFFS' DEPOSITION EXHIBIT 73—Omitted

PLAINTIFFS' DEPOSITION EXHIBIT 74—Omitted

[fol. 1708] PLAINTIFFS' DEPOSITION EXHIBIT 75-A

Advertisement of the World Broadcasting System from the 1940 Yearbook of Broadcasting Magazine showing its service in 200 stations throughout the United States, including 5 stations in the State of Florida.

[fol. 1709] PLAINTIFFS' DEPOSITION EXHIBIT 76

Gross License Fees Collected From the United States

1935	4,451,692.62
1936	5,206,316.58
1937	5,926,941.57
1938	5,976,577.31
1939	6,511,753.59
Total	$28,073,281.67

Radio Receipts

1935	2,680,406.46
1936	3,239,181.50
1937	3,878,751.94
1938	3,845,206.34
1939	4,142,024.44
Total	$17,785,570.68

Accounting Dept.

[fol. 1710]

PLAINTIFFS' DEPOSITION EXHIBIT 77
Resume

ASCAP Foreign Accounts
1936–1939

	1936		1937		1938		1939	
	Received	Paid	Received	Paid	Received	Paid	Received	Paid
Argentine	2,080.76	.....	.....	222.28	.....	.....	2,122.11	2,496.60
Australia	.....	.....	4,305.24	.....	.....	.....	.....	.....
Austria	.....	4,000.00	3,616.24	22,727.49	18,572.98	23,090.28	29,345.62	34,524.26
Belgium	.....	.....	.....	.....	.....	200.00	.....	908.53
Brazil	748.50	.....	.....	.....	711.16	892.60	85.00	100.00
Bulgaria	.....	.....	.....	.....	.....	.....	170.00	200.00
Canada	20,220.28	.....	35,279.94	.....	35,069.04	.....	.....	454.27
Czecho Slovakia	125.86	.....	.....	.....	.....	.....	.....	.....
Denmark	3,450.34	500.00	.....	.....	6,884.59	1,127.27	3,011.51	1,817.07
England	109,314.21	95,000.00	121,527.83	95,000.00	160,992.11	240,777.57	.....	58,876.91
Finland	.....	.....	165.61	487.07	166.41	471.00	.....	200.00
France	115,591.74	.....	87,165.94	46,512.42	56,443.60	92,352.96	96,807.66	83,161.46
Germany	.....	120.00	.....	.....	26,849.74	36,662.51	12,356.05	14,536.53
Hungary	.....	.....	7,255.60	2,580.46	1,775.94	2,249.93	1,158.38	1,362.80
Italy	14,590.03	.....	210.52	.....	25,056.01	26,983.05	14,190.08	16,694.21
Jugo Slavia	.....	.....	.....	.....	.....	.....	649.78	100.00
Norway	2,612.64	.....	.....	1,389.26	.....	3,436.95	808.67	5,451.20
Poland	.....	.....	.....	.....	.....	.....	1,507.30	.....
Portugal	175.45	.....	137.32	277.85	123.70	139.22	237.49	908.53
Rumania	.....	.....	477.00	.....	2,085.19	300.00	668.87	100.00
Spain	.....	.....	.....	.....	.....	.....	.....	279.31
Sweden	13,212.69	.....	.....	.....	22,532.03	682.95	.....	566.48
Switzerland	.....	.....	4.21	277.85	.....	139.22	5.74	100.00
	282,122.50	99,620.00	260,145.42	169,474.68	357,262.50	429,505.51	163,124.26	222,838.16

January 29, 1940

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[fol. 1711]

PLAINTIFFS' DEPOSITION EXHIBIT 78

Royalties Paid to Certain Members 1932–1939, Inc.

	1932	1933	1934	1935	1936	1937	1938	1939	Total
Gene Buck	$3,000.00	$3,000.00	$4,197.03	$6,233.45	$7,288.09	$8,740.32	$7,952.60	$8,137.12	$48,548.61
Carl Fischer, Inc	31,116.31	42,178.26	58,084.70	74,669.38	102,211.79	112,543.12	94,808.05	99,490.58	615,102.19
G. Schirmer, Inc	31,116.31	42,178.26	58,084.69	74,669.38	102,903.23	107,244.16	94,977.87	94,425.42	605,599.32
Irving Berlin, Inc	35,482.39	52,756.58	70,921.98	92,546.48	141,716.04	123,442.37	115,671.53	126,793.81	759,331.18
Deems Taylor	1,629.66	3,417.73	6,522.64	9,350.14	10,932.13	13,110.49	11,928.88	12,205.68	69,097.35
Oley Speaks	4,478.43	6,835.46	9,598.26	12,466.88	14,576.16	17,480.65	15,905.16	16,274.24	97,615.24
William J. Hill	220.00	3,226.39	3,062.94	2,935.04	6,560.00	8,311.65	7,952.60	12,205.68	44,474.30
Estate of Ethelbert Nevin	4,478.43	6,835.46	9,598.26	12,466.88	14,576.16	17,480.65	15,905.16	16,274.24	97,615.24
Estate of Victor Herbert	4,478.43	6,835.46	9,598.26	12,466.88	14,576.16	17,480.65	15,905.16	16,274.24	97,615.24
Estate of John P. Sousa	4,478.43	6,835.46	9,598.26	12,466.88	14,576.16	17,480.65	15,905.16	16,274.24	97,615.24

(Here follow 4 photolithographs, side folios 1712, 1712a, 1713, 1713a)

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DEFENDANTS' DEPOSITION EXHIBIT A

FEB - 9 1940

Approved by

1939

Publisher

STANDARD UNIFORM POPULAR SONGWRITERS CONTRACT

AGREEMENT made this day of , 19 , between

(hereinafter called "Publisher"), and

jointly and/or severally, (hereinafter called "Writer(s)");

WITNESSETH:

1. The Writer(s) hereby sells, assigns, transfers and delivers to the Publisher, its successors and assigns, a certain heretofore unpublished original musical composition, written and/or composed by the above named Writer(s) now entitled

including the title, words and music thereof, and the right to secure copyright thereto throughout the entire world, and to have and to hold the said copyright and all rights of whatsoever nature thereunder existing, subject to the terms of this Agreement, forever by and Publishers.

2. The Writer(s) hereby warrants that the said composition is his sole, exclusive and original work, and that he has full right and power to make the within agreement, and that there exists no adverse claim to or in the said composition, except as aforesaid in Clause 2 hereof and except such rights as are specifically set forth in Paragraph 17 hereof.

4. In consideration of this agreement, the Publisher agrees to pay the Writer(s) as follows:

(a) An advance of $ in hand paid, receipt of which is hereby acknowledged, which sum shall be deductible from any payments hereafter becoming due the Writer(s) under this agreement.

(b) In respect of regular piano copies sold and paid for at wholesale in the United States of America, royalties per copy as follows:

Wholesale price cents — — — royalty cents per copy.

Wholesale price cents — — — royalty cents per copy.

Wholesale price cents — — — royalty cents per copy.

Wholesale price cents (or less) — royalty cents per copy.

(c) A royalty % (in no case however less than 50% jointly) of all net sums received by the Publisher in respect of regular piano copies and/or orchestrations thereof sold and paid for in any foreign country.

(d) A royalty of cents per copy of orchestrations thereof in any form sold and paid for in the United States of America.

(e) The said composition shall not be published in any folio or composite work until after publication thereof in regular piano copies, and subsequent to said date, only upon such terms and conditions as may hereafter be agreed to in writing by the parties hereto.

(f) Folios and/or composite works as referred to in the next preceding paragraph shall be deemed to include any publications of two or more compositions within the same volume and/or binding.

(g) For purposes of royalty statements, if a composition is printed and published in the United States of America, as to copies and rights sold in the Dominion of Canada, revenue herefrom shall be considered as of domestic origin. If, however, the composition is printed by a party other than the Publisher in the Dominion of Canada, revenue from sales of copies and rights in Canada shall be considered as originated in a foreign country.

(h) As to "professional material"—not sold or resold, no royalty shall be payable.

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(i) An amount equal to % (in no case, however, less than 50% jointly) of:

All receipts of the Publisher in respect of any licenses issued authorizing the manufacture of parts of instruments serving to mechanically reproduce the said composition, or to use the said composition in synchronization with sound motion pictures, or to reproduce it upon so-called electrical transcriptions for broadcasting purposes; and of any and all receipts of the Publisher from any other source or right now known or which may hereafter come into existence, all such sums to be divided amongst the Writer(s) of said composition as provided in Paragraph 5 hereof; provided, however, that if the Publisher administers the said licenses, or any of them, through the agent, trustee or other administrator acting for a substantial part of the industry and not in the exclusive employ of the Publisher, the Publisher, in determining his receipts, shall be entitled to deduct from gross license fees paid by the licensees a sum equal to the charges paid by the said Publisher to said agent, trustee or administrator, said deduction in no event, however, to exceed 10% of the license fee.

The percentage of the Writer(s) on moneys received from foreign sources shall be computed on the Publisher's net receipts.

The Writer(s) shall not be entitled to any share of the moneys distributed to the Publisher by the American Society of Composers, Authors and Publishers or any other performing rights society throughout the world which makes a distribution to the Writer(s) either directly or through the American Society of Composers, Authors and Publishers of an amount which, in the aggregate, is at least equal to the aggregate amount distributed to Publishers.

(j) Upon the use of the composition in synchronization with motion pictures under any bulk or block license heretofore made, the Writer(s) shall be entitled to receive an amount equal to % (in no case less than 50% jointly) of the license fee for each synchronization by the licensee, but in no event less than the following:

FOR WORLD-WIDE USE

For Entire Uses

In Shorts	In Features
$25 for each background instrumental or background vocal use.	$25 for each background instrumental or background vocal use.
$37.50 for each visual instrumental	$50 for each visual instrumental use.

the Publisher may appoint agents or representatives in countries outside of the United States and Canada to grant licenses for the use of said composition on the customary royalty fee basis.

A license or transaction in bulk or block shall be deemed to mean the licensing of two or more compositions where the currently prevailing license fees are not charged separately for each separate use of each composition.

(l) Except to the extent that the Publisher and Writer(s) have heretofore or may hereafter assign to or vest in the American Society of Composers, Authors and Publishers the said rights or the right to grant licenses therefor, it is agreed that no licenses shall be granted without the consent, in each instance, of the Writer(s) for the use of the said composition by means of television, or by any means, or for any purpose not commercially established, or for which licenses were not granted by the Publisher on musical compositions prior to June 1, 1937.

(m) The Publisher shall not, without the written consent of the Writer(s) in each case, give or grant any right or license (a) to use the title of the musical composition, or (b) for the exclusive use of said composition in any form or for any purpose, or for any period of time, or for any territory, or (c) to give a dramatic representation of the said musical composition or to dramatize the plot or story thereof, or (d) for a vocal visual rendition of said composition in synchronization with a motion picture. If, however, the Publisher shall give to the Writer(s) written notice, by registered mail or telegram, specifying the right or license to be given or granted, the name of the licensee and the terms and conditions thereof, including the price or other consideration to be received therefor, then, unless the Writer(s) (or any one or more of them, or anyone acting on their behalf) shall, within seventy-two hours (exclusive of Saturdays, Sundays and holidays) after the delivery of such notice, object thereto, the Publisher may grant such right or license in accordance with the said notice without first obtaining the consent of the Writer(s). Such notice shall be deemed sufficient if sent to

at (or at the address last furnished to the Publisher in writing by the Writer(s) or any of them). The tender of delivery of such notice at such address by the post office carrier or the telegraph company messenger shall be deemed a delivery hereunder.

(n) Any portion of the receipts which may become due to the Writer(s) from license fees (in excess of advances), whether received directly from the licensees or from the agent, administrator and trustee, shall, if not paid immediately on the receipt thereof by the Publisher, belong to the Writer(s) and shall be held in trust for such Writer(s) until payment is made; the ownership of said trust fund by the Writer(s) shall not be questioned whether the moneys are physically segregated or not.

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5. It is understood and agreed by and between all of the parties hereto that all sums hereunder payable jointly to the Writer(s) shall be divided amongst them respectively as follows:

Name	Share
	%

6. The Publisher shall render the Writer(s), as above, on or before each covering the 3 months ending ; each covering the 3 months ending ; each covering the 3 months ending ; each covering the 3 months ending ; however, so long as he shall continue publication or the licensing of any rights in the said composition, royalty statements accompanied by remittances of the amount due, provided, however, that if it shall have heretofore been the custom of the Publisher to render royalty statements accompanied by remittances semi-annually, such custom may be continued.

7. The Publisher agrees to publish in printed form the said musical composition within from the date hereof. Should he fail so to do the Writer(s) shall have the right in writing to demand the return of said composition, whereupon the Publisher must publish same (1) months after receipt of such written demand.

8. If foreign publication rights in the said composition are expressly assigned, royalties shall be paid as a part of the Publisher's current mailings hereunder, any advances received in respect thereof shall be divided in accordance with Section 4, sub-division (i) hereof and credited to the accounts of the respective Writer(s).

9. The Writer(s) or his representative may appoint a certified public accountant who shall at any time during usual business hours have access to all records of the Publisher relating to the said composition for the purpose of verifying royalty statements rendered or which are delinquent under the terms hereof.

10. (a) The Publisher shall, upon written demand of the Writer(s) or his (their) representative, cause the agent, trustee or administrator referred to above, to furnish to the Writer(s) or his (their) representative, statements showing in detail all licenses granted, uses had and payments made in connection with said composition, which licenses or permits were granted, or payments were received, by or through said agent, trustee or administrator, and to permit the Writer(s) or his (their) representative to inspect at the place of business of such agent, trustee or administrator all books, records and documents of the agent, trustee or administrator relating thereto.

(b) The Publisher shall from time to time, upon written demand of the Writer(s) or his (their) representative, furnish to the Writer(s) or his (their) representative, statements showing in detail all licenses granted, uses had and payments made therefor in connection with said composition (other than licenses, uses and payments for commercial phonograph records and music rolls) for which licenses or permits were granted or payments received by the Publisher without the intervention of said agent, trustee or administrator, and to permit the Writer(s) or his (their) representative to inspect at the place of business of the Publisher, all books, records and documents relating to said composition and all licenses granted, uses had and payments made therefor, such right of inspection to include, but not by way of limitation, the right to examine all original accountings and records relating to uses and payments by manufacturers of commercial phonograph records and music rolls. Nothing in this paragraph contained, furthermore, shall be deemed or construed to relieve the Publisher of its obligation to pay royalties on the use of the composition on commercial phonograph records and music rolls or the obligation to include a statement of such royalties in the periodical royalty statements to be rendered to the Writer(s) in accordance with Paragraph 6 of this agreement.

11. In the event that the Publisher shall fail or refuse, within sixty days after written demand, to furnish said statements, or cause the same to be furnished, or to make available or cause to be made available to the Writer(s) or his (their) representative all of such books, records or documents as aforesaid, or in the event that the Publisher shall fail to make the payment of any royalties due within thirty days after written demand therefor, then the Writer(s) shall have the option, to be exercised upon ten days' written notice, to terminate this agreement.

Upon such termination, all rights of the Publisher, of any and every nature, in and to said composition, shall cease and terminate and the said rights, including but not limited to the right to secure copyright and/or any copyright thereto-fore secured by the Publisher, shall revert to and become the property of the Writer(s) and shall be assigned to him (them). The Publisher agrees that it will execute any and all assignments or other documents which may be necessary or proper to vest the said rights in the Writer(s).

12. Written demands and notices provided for in Paragraphs 10 and 11 hereof shall be sent to the Publisher by registered mail.

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13. Any legal action brought by the Publisher against any alleged infringer of the said composition shall be initiated and prosecuted at his sole expense, and of any recovery made by him as a result thereof, after deduction of the expenses of the litigation, a sum equal to fifty per cent. shall be divided as agreed among the Writer(s) of the said composition.

(a) If a claim is presented against the Publisher alleging that the said composition is an infringement upon some other, and because thereof the Publisher is jeopardized, he shall thereupon serve written notice upon the Writer(s), containing the full details of such claim and thereafter until the claim has been adjudicated or settled shall pay any monies coming due the Writer(s) hereunder to anyone to any bank or trust company to be held pending the outcome of such claim provided however, if no suit be filed within twelve months after written notice to the Writer(s) by the Publisher of the adverse claim, the said bank or trust company shall release and pay to the Writer(s) all sums held in escrow, plus any interest which may have been earned thereupon. Such payment shall be without prejudice to the rights of the Publisher in event of a subsequent adverse adjudication.

(b) From and after the service of summons in a suit for infringement filed against the Publisher in respect of the said composition, any and all payments hereunder thereafter coming due the Writer(s) shall be paid by the Publisher in trust to any bank or trust company until the suit has been finally adjudicated and shall be disbursed accordingly, unless the Writer(s) shall elect to file an acceptable bond in the sum of such payments, in which event the same shall be paid to him.

14. The parties hereto hereby agree to submit to arbitration under the rules of the American Arbitration Association, and pursuant to the New York Arbitration Law any differences arising in relation to the payment of royalties due or in default hereunder, and hereby agree individually and jointly to abide by and perform any award rendered by the arbitration and that a judgment of the Supreme Court of the State of New York may be entered upon such award.

15. This agreement is binding upon the parties hereto and their respective successors in interest.

16. Three identical copies hereof are executed by the parties, the original copy of which shall remain in possession of the Publisher, the duplicate in possession of the Writer(s), and the triplicate thereof be forwarded by mail by the Publisher to the Songwriters' Protective Association.

Witness _____

Writer _____ (L.S.)

_____

Address _____

Witness _____

Writer _____ (L.S.)

_____

Address _____

Witness _____

Writer _____ (L.S.)

_____

Address _____

Witness _____

Publisher:

_____

By _____

Address:

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[fol. 1714] DEFENDANTS' DEPOSITION EXHIBIT B

Agreement made between Song Writers Protective Association, an unincorporated association (hereinafter referred to as "S. P. A."), party of the first part, and —— (hereinafter referred to as the "publisher"), party of the second part, Witnesseth:

In consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, each to the other in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties agree as follows:

First: S. P. A. hereby approves, for use during the term of this agreement, the form of contract, a copy of which is hereto annexed and made a part hereof, marked Exhibit A, which shall be known as the "Standard Uniform Popular Songwriters Contract" and which is herein referred to as the "Uniform Contract". It is agreed that the publisher may note on any printed form of said Uniform Contract (prepared without insertions in the blank spaces) that it is the official form endorsed by S. P. A.

Second: (a) The Publisher agrees to use the said Uniform Contract exclusively during the term hereof in connection with the acquisition of any and all compositions from members of S. P. A., other than educational numbers and except such compositions which may, during the term hereof, be acquired pursuant to the terms of written agreements made prior to June 1, 1937, or written extensions or renewals thereof made subsequent to June 1, 1937 under options contained in the said prior agreements, and except in connection with the acquisition of renewal copyrights on musical compositions which were published and copyrighted prior to June 1, 1937.

(b) The Publisher agrees to furnish to S. P. A., within thirty days after the execution hereof, a statement of said written agreements made prior to June 1, 1937, or extensions or renewals thereof, showing the name of the writer with whom such agreement has been made, the date thereof, and shall forthwith upon the exercise of any option give notice thereof to S. P. A. The Publisher hereby consents that any member of S. P. A., party to such agreement, may

make known to S. P. A. any further information concerning the same.

(c) The term "educational work" is limited to mean works compiled for musical instruction and arranged for and intended to be used by teachers and students of music, for the sole purpose of giving instruction in and studying music, and shall not include popular songs, standard works, dramatic-musical compositions or any other musical compositions intended to be sung, played or performed for any other purposes.

Third: Any and all compositions, other than compositions excepted from the terms of this agreement as provided in Subdivision (a) of Paragraph "Second" hereof, acquired by the Publisher from a member of S. P. A. since May 31, 1937, shall be deemed to have been acquired pursuant to the terms and provisions hereof, and if any of the terms of an agreement made on or after June 1, 1937 under which a composition was acquired, are less favorable to the writer than those contained in the Uniform Contract, then such less favorable terms shall be disregarded, and there shall be substituted in the place thereof the terms of the Uniform Contract. Provided, however, that if, in order to conform to the minimum terms of said Uniform Contract, an increase in the rate of royalties is made necessary, then such increased rates shall be effective only from and after [fol. 1715] September 30, 1939, and all accountings for transactions thereafter shall be in accordance with the terms and provisions hereof.

The Publisher agrees to furnish to S. P. A. within thirty days after the execution hereof, a complete list of the compositions acquired by the Publisher from members of S. P. A. since the 1st day of June, 1937, and prior to the date of execution hereof. S. P. A. agrees to furnish to the Publisher, within five days after the execution hereof, a list of its members.

Fourth: Should the Publisher acquire, during the term hereof, any musical compositions of a member of S. P. A., covered by this agreement, under any contract, written or oral, which shall contain terms or conditions less favorable to said member than those provided for in the Uniform Contract, then such less favorable terms shall in each instance be disregarded, and the minimum terms and conditions of the Uniform Contract shall be substituted therefor.

Fifth: If compliance with the terms of this agreement with respect to compositions heretofore acquired by the Publisher shall require such a revision of any term or terms which would make it impossible for the Publisher to perform the terms of any written agreement made by such Publisher prior to August 1, 1939, with a person or persons other than the writer or writers, then the Publisher shall be entitled to a modification of such revised term or terms to the limited extent which will enable the Publisher to perform such prior agreement, and upon such terms and conditions as may be agreed upon between the parties hereto, or if they are unable to agree, then upon such terms and conditions as may be imposed by a Board of Arbitration, one of which is to be selected by the Publisher, one by S. P. A., and the third by the two so selected.

The Publisher shall, within ninety days after the date hereof, file with the Chairman of the Board of Music Publishers' Protective Association and with the President of S. P. A., a list of all contracts containing commitments for which a waiver is required under this Paragraph "Fifth" of this agreement.

Sixth: (a) The Publisher shall, upon written demand of S. P. A. cause the agent, trustee or administrator referred to in the Uniform Contract, to furnish to S. P. A., statements showing in detail all licenses granted, uses had and payments made therefor, on all compositions acquired by the Publisher from members of S. P. A. under the provisions hereof, for which licenses or permits were granted, or payments received, by or through the said agent, trustee or administrator, and to permit S. P. A. by a duly authorized representative to inspect at the place of business of such agent, trustee or administrator, all books, records and documents of the agent, trustee or administrator relating thereto.

(b) The Publisher shall from time to time, upon written demand of S. P. A., furnish to S. P. A. statements showing in detail all licenses granted, uses had and payments made therefor (other than licenses, uses and payments for commercial phonograph records and music rolls), on all compositions acquired by the Publisher from members of S. P. A. under the provisions hereof and for which licenses or permits were granted or payments received by the Publisher without the intervention of the said agent, trustee or ad-

ministrator, and to permit S. P. A., by a duly authorized representative, to inspect, at the place of business of the Publisher, all books, records and documents, relating to such compositions and all licenses granted, uses had and payments made therefor, such right of inspection to include, [fol. 1716] but not by way of limitation, the right to examine all original accountings and records relating to uses and payments by manufacturers of commercial phonograph records and music rolls. Nothing in this paragraph contained, furthermore, shall be deemed or construed to relieve the Publisher of its obligation to pay royalties on the use of the compositions on commercial phonograph records and music rolls or the obligation to include a statement of such royalties in the periodical royalty statements to be rendered to the Writers in accordance with Paragraph 6 of the Uniform Contract.

(c) In the event that the Publisher shall fail or refuse, within sixty days after written demand, to furnish said statements or cause the same to be furnished, or to make available or cause to be made available, to S. P. A., as above provided, all of such books, records and documents, then the same shall be deemed to be a refusal to comply with the terms and conditions of the individual contracts made by its members, as though each of said members shall have individually made such demand under the Uniform Contract, and with the same effect as if the refusal had been to the specific demand of the writer of each composition with respect to each composition.

(d) The written demands provided for in this Paragraph "Sixth" shall be sent to the Publisher by registered mail.

Seventh: The terms set forth in the uniform Contract are to be deemed minimum terms, and nothing herein or therein contained shall be deemed or construed to prevent or prohibit any writer from entering into an agreement wherein and whereby the terms and conditions shall be more favorable to the writer than those contained in said Uniform Contract. Similarly, nothing herein contained shall be deemed or construed to require the Publisher to enter into any agreement wherein and whereby the terms and conditions shall be more favorable to the writer than those contained in said Uniform Contract.

Eighth: Should S. P. A. enter into any agreement with any other publisher covering the subject matter hereof upon terms more favorable to said other publisher, then the Publisher hereunder shall be entitled thereafter to such more favorable terms, and this agreement shall, upon demand of the Publisher, be amended accordingly. S. P. A. agrees to give the Publisher notice of any contract made by it with another publisher on terms different than those herein contained.

Ninth: As and when, during the term hereof, the Publisher shall acquire from a member or members of S. P. A. each musical composition, it shall deposit with S. P. A. an executed copy of the contract by which the said composition is so acquired. Upon such deposit, and provided that the said contract is in all respects in accordance with the terms hereof and of the Uniform Contract, S. P. A. agrees to deliver, or cause to be delivered, to the Publisher a release of any and all rights, if any, of S. P. A. and of Ray Henderson, Gus Kahn and George Meyer, as Administrators, in and to the musical composition named in the contract so deposited. Provided, however, that should the Publisher acquire any such composition subject to the rights of a third person (other than the American Society of Composers, Authors and Publishers), then:

[fol. 1717] (a) The releases to be delivered by S. P. A. shall exclude any rights vested in S. P. A. or the Administrators which may be claimed by said third person; and

(b) S. P. A. shall not be obligated to furnish said releases if, as a result of said reservation or the agreement giving rise to the rights so reserved, either the Publisher or said third person, directly or indirectly, shall acquire, or shall have acquired, any rights in said composition on terms less favorable to the writer than those provided for in the Uniform Agreement.

Tenth: If either of the parties hereto shall fail, refuse or neglect to perform the provisions of this agreement and such default shall continue for fifteen days after receipt of notice by registered mail to repair the breach, then, in such event, the party not committing the breach shall have the right, at its or his option, to terminate this agreement, such option to be exercised by notice in writing by regis-

tered mail addressed to the party who has committed the breach.

Eleventh: This agreement shall be effective as at June 1, 1937, and shall continue until May 31, 1940, unless terminated prior thereto in accordance with the terms hereof. The Publisher, however, shall have and is hereby given the option, provided it is not in default in the performance of the terms and conditions of this agreement, to extend the term of this agreement to December 31, 1946, by giving to S. P. A. written notice of its election to exercise the said option not later than May 1, 1940.

In Witness Whereof, the parties hereto have hereunto set their hands and seals this day of , 1939.

Song Writers' Protective Association. By ——,
—— L. S.

[fol. 1718] DEFENDANTS' DEPOSITION EXHIBIT C

Telephone Wasatch 4505
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
Intermountain Branch
623 Continental Bank Building
Salt Lake City, Utah
ASCAP
Received, June 14, 1937 K. D. Y. L.
Hugo B. Anderson, Resident Counsel

June 9, 1932

S. S. Fox
Mgr. Radio Station KDYL,
Ezra Thompson Building,
City

DEAR MR. FOX:

Paragraph 5 of the existing license of this society with your broadcasting station provides:

"This license is limited solely to the copyrighted works of members of Society in programs rendered at said radio station or at a place duly licensed by society to transmit rendition of such works to said radio station for the purpose of being broadcast therefrom."

We note that on June 7th you broadcast a musical program from the Brass Rail, and inasmuch as they are not yet licensed to publicly perform the musical numbers of the members of this society in their establishment, it is necessary that we ask you to broadcast no further musical programs from that establishment until it carries the license of this society.

We trust that this establishment will immediately secure license in order that your service to them may not be interrupted, and we shall be pleased to notify you immediately on the licensing of this establishment.

Thanking you for your cooperation in the matter.

Very truly yours, American Society of Composers, Authors and Publishers, (S.) By Hugo B. Anderson, Resident Counsel.

[fol. 1719] DEFENDANTS' DEPOSITION EXHIBIT D

WIBA Exhibit 1

Telephone Broadway 9080

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
Bartlett Building, 176 W. Wisconsin Ave.,
Milwaukee, Wis.
ASCAP
Counsel for Wisconsin, Robert A. Hess

November 18, 1931

Mr. Tom C. Bowden
Station W-I-B-A,
Madison, Wisconsin.

DEAR SIR:

Our attention is directed to the fact that the Studio Ballroom at Madison, operated by Joe Maes, is broadcasting through Station W-I-B-A.

You are informed that this man has no license from this Society and any pick-up by remote control or otherwise is prohibited where the pick-up is an unlicensed place.

Under the circumstances may I request and respectfully insist that there should be no further infringement on the

part of your Station broadcasting any music emanating from the Studio Ballroom.

Your acknowledgment of this letter will be appreciated.

Yours very truly, American Society of Composers, Authors & Publishers, (S.) By (Signature illegible), Counsel for Wisconsin.

RAH:ELB

[fol. 1720] DEFENDANTS' DEPOSITION EXHIBIT E

Telephone Riley 1533
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
1214 Circle Tower
Indianapolis, Indiana
Edward O. Snethen, Paul R. Summers
Address All Communications to the Indianapolis Office
Indianapolis, Indiana
ASCAP
General Counsel for Indiana, Kentucky, Minnesota, North Dakota, South Dakota, N. W. Wisconsin

December 6, 1932

Radio Station K. S. T. P.
Atten: Mr. Stanley Hubbard,
St. Paul, Minn.

Re: K. S. T. P.

DEAR MR. HUBBARD:

Following our notices heretofore, we have reports of infringements on the occasion of December 3, 1932, including the following numbers from the Coliseum: "Love Me Tonight," "You'll Get By with a Twinkle in Your Eye," and "I'm So Ashamed"; and the following from the Marigold Ballroom, Minneapolis, by Wally Erickson's Orchestra: "Night Fall" and "Fit as a Fiddle."

Under our instructions we cannot do other than proceed on these infringements reported unless you arrange to return signed copies of contract license and your accounting thereon. Such return will need to be in this office not later than December 10th.

Please be advised further that the Marigold Ballroom at Minneapolis permitted its contract to be cancelled for non

payment and you are not now permitted to make any broadcasts from that location, pending further notice.

I will thank you for prompt acknowledgment.

Yours very truly, Paul R. Summers, Snethen & Summers.

PRS/AMC

[fol. 1721] DEFENDANTS' DEPOSITION EXHIBIT F

Telephone: Geneva 2618

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
911-921 Metropolitan Bank Building
Minneapolis, Minnesota
Dwain M. Ewing
ASCAP
Counsel for Minnesota, North Dakota, South Dakota, Northwest Wisconsin

Feb. 1, 1935

Radio Station KSTP
St. Paul, Minn.

GENTLEMEN:

Re: St. Paul Auto Show

Please be advised that the St. Paul Auto Show does not have a license to publicly perform for profit music of this Society. We do not wish to cause you loss of a commercial customer, but we must ask you to refrain from picking up programs for broadcast from this enterprise until further notified.

This notice is given pursuant to Section 4 of your contract.

Very truly yours, Dwain M. Ewing.

DME:LSH

[fol. 1722] DEFENDANTS' DEPOSITION EXHIBIT G

Chickering 4-2540
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
Paramount Building—1501 Broadway
New York City
ASCAP

June 6, 1933

Mr. John G. Cary, Auditor
Central Broadcasting Company,
1002 Brady Street
Davenport, Iowa.

DEAR MR. CARY:

We have yours of the 2nd, inquiring whether we have available a complete list of copyrighted productions, and if so to forward such a copy to your executive offices in Davenport.

No such list as ever been compiled. We are attempting to compile similar information for our own records and have been at it for a considerable time.

The numbers run into the millions and new ones are constantly being added. This is without the selections copyrighted by the foreign societies with which we are affiliated, so you can readily see even if there were such a list available it would be so enormous that it would take quite a bit of effort to handle.

However, if there is any information you desire regarding a particular number we will be very glad to furnish same upon request.

Yours very truly, American Society of Composers, Authors and Publishers, Herman Greenberg.

HG GW WMB

[fol. 1723] IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed August 5, 1940

This suit having been duly commenced on February 7, 1938, by filing a subpoena and Bill of Complaint in this Court, and personal service of copies thereof having been duly made upon all the Defendants, and the supplemental

and further supplemental Bills of Complaint herein having been duly filed thereafter, and personal service of copies thereof having been duly made upon all the Defendants herein, and this Court having duly granted a temporary injunction on April 5, 1938, and the same having been affirmed by the Supreme Court of the United States April 17, 1939, and this Court having duly granted a further temporary injunction on October 30, 1939, and Defendants having duly filed their answers to said bills on June 21, 1939 and November 15, 1939 respectively, and this case having come on for trial on the 15th, 16th and 17th days of April, 1940, in the District Court of the United States, Northern District of Florida, Gainesville Division, at the Court House thereof in the City of Gainesville, Florida, and Complainants having appeared by Frank J. Wideman, Manley P. Caldwell, (Louis D. Frohlich and Herman Finkelstein, of Counsel), and Defendants having appeared by George Couper Gibbs, Attorney General, (Thomas J. Ellis, Assistant Attorney General, and Lucien H. Boggs, Special Assistant Attorney General, and Andrew W. Bennett of Council), and evidence having been adduced upon the merits of this case and due deliberation having been had, and the Court having filed its opinion, hereby makes the following Findings of Fact and Conclusions of Law:

[fol. 1724] FINDINGS OF FACT

1. The State of Florida enacted Chapter 17807 General Laws of Florida which became effective June 9, 1937. Said Statute is hereinafter referred to as the "1937 Act." The State of Florida enacted Chapter 19653 which became effective on June 12, 1939. Said Statute is hereinafter referred to as the "1939 Act." Both Statutes are hereinafter referred to collectively as the State Statutes.

2. The plaintiff American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and

corporations who are members of the Society and are interested in copyrighted musical compositions. They are all citizens of the United States and citizens and residents of States other than Florida.

3. The Attorney General, the Secretary of State, and the Comptroller, all of the State of Florida, as well as the State Attorneys of the fifteen judicial circuits of Florida, all citizens and residents of Florida, are the Defendants.

4. There are approximately 1,425 composers and author members of the American Society of Composers, Authors and Publishers, hereinafter referred to as the Society, in the United States, and 131 publisher-members who constitute the principal music publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical [fol. 1725] compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued and still does issue only blanket licenses to the users of its copyrights by which such users are permitted publicly to perform at any time all of the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 45,000 members of other similar societies in foreign countries throughout the civilized world, with which foreign societies the Society has exclusive contracts authorizing the Society to grant such licenses. The management of the Society is vested by its Articles of Association exclusively in a self-perpetuating Board of Directors of 24 members consisting of 12 directors representing publisher-members of the Society and 12 directors representing composer and author members. The Board has absolute control over the fixing of prices to be charged for performance licenses, the expenditure of all moneys received, including distribution to members, the admission of composer, authors and publishers to membership, the prosecution of infringements and all other activities engaged in by the Society.

5. At the time the 1937 Act was passed, there were in existence 410 signed contracts between the Society and establishments in the State of Florida engaged in the busi-

ness of publicly performing copyrighted musical compositions for profit. For that year, these licensees paid the Society $61,347.94 pursuant to such contracts. Among such licensees of the Society were the owners of 188 motion picture theatres, 12 radio broadcasting stations, and 210 hotels, restaurants, dance halls and miscellaneous establishments. Among the 12 radio stations in Florida licensed [fol. 1726] by the Society, six are affiliated with the Columbia Broadcasting System and four with the National Broadcasting Corporation. Part of the programs broadcast by the eleven affiliated stations emanate from points outside of the State and the remaining part initiate in the studios of such Florida broadcasters or elsewhere within the State. There were on January 1, 1939, 308,900 radio receiving sets in private homes in the State of Florida. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performances for profit. In 1937 and 1939 respectively, the Society's net income from motion picture theatres, broadcasting stations, hotels, restaurants, cabarets and miscellaneous establishments in the State of Florida was approximately $46,623.00 and $71,316.00. When the 1937 Act was passed, the following annual license fees were paid by users of various types in the State of Florida to the Society as follows:

39 Restaurants paid fees totalling $3,988.50, such fees ranging from $15 to $300 per year, the majority paying less than $100.

22 Dance halls paid fees totalling $2,166.00, such fees ranging from $15 to $180.

69 Miscellaneous establishments paid fees totalling $8,671.50 or an average of $125.

80 Hotels paid fees totalling $6,580.79 or an average of $82.

188 Motion picture theatres paid fees totalling $15,343.71, such fees ranging from $1.91 to $463, many paying less than $25 annually.

The cost of operation of the Society is approximately 20% of the gross amount received.

The Society is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public perform-

ance for profit of all the musical compositions copyrighted by its members. Some $6,000,000 was received for public performance rights by the Society from such licensing in [fol. 1727] the entire United States during 1938, of which approximately 20% was used to defray all expenses, the balance being distributed among its members. 50% of such net income was divided among the composer and author-members and the other 50% was divided among the publisher-members, in accordance with a method of classification defined in the Articles of Association of the Society.

7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. None of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized.

8. The Society and its members, including the other Complainants, come within the purview, and regulative provisions of the state statutes.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint, the supplemental Bill of Complaint, and further supplemental Bill of Complaint are common and general interest to all the members of the Society who constitute a class so numerous as to make it [fol. 1728] impracticable to bring them before the Court; Complainants herein are suing on their own behalf and on the behalf of all the members of the Society.

10. The value of the matter in dispute herein between Complainants and Defendants is in excess of the sum of $3,000.00 exclusive of interest and costs.

11. The repertoire of music controlled by the Society is sufficiently diversified and substantial to furnish a comprehensive and instantaneously available reservoir upon which licensees may draw at will. Indeed it is so complete and comprehensive that users of music in the public entertainment industry find it very difficult, if not impossible, to conduct their businesses without a license from the Society.

12. The Society's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought.

13. The radio broadcasting stations in the State of Florida are members of the National Association of Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with the Society.

14. Under the contracts between the Society and said foreign societies, the latter are not required to, and never have, filed with the Society or with any State Authority, copies of the respective compositions copyrighted by their respective members.

15. Many thousands of the copyrighted musical composi-[fol. 1729] tions owned and published by Complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1(3) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; Complainants and others similarly situated have no control over the sale or disposition of such phonograph records,

music rolls or electrical transcriptions and they cannot compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof.

16. The requirements of Section 2 of the 1939 Act with reference to the disclosure of information concerning the identification and ownership of musical copyrights to be licensed for public performance in the State of Florida are not unreasonable or difficult of compliance.

17. There are a great number of separate performing rights with separate owners of each of such rights. The 1939 Act applies to both dramatico-musical works and musical compositions. A dramatico-musical composition (an opera, operatta or musical comedy) usually includes a great number of separate musical compositions. The entire work is copyrighted as a dramatico-musical composition under Section 5(e) of the Copyright Act and that copyright protects each of the separate musical compositions under Section 3 of the Copyright Act. With respect to compositions included in dramatico-musical works, the Society licenses the performance of separate numbers from such composition when such performances are given in non-dramatic form. The dramatic rights are not granted to the Society. Such rights are usually owned by a number of dif- [fol. 1730] ferent persons, each of whom has an interest in the rights of the others. The producer of a musical show owns the stage rights for performances in first class theatres where the play is orginally presented and "on the road" where performances are given by so-called "road show companies." The place where the performance may be given is solely within the discretion of the producer, but the price to be paid cannot be fixed withont the consent of the author. The stock rights are usually owned by an entirely different person who, together with authors, licenses performances by "stock companies." The amateur dramatic rights are owned by still another person.

18. The rights granted to the publisher and the rights reserved by the composer and author may not be exercised in such a manner as to conflict with the dramatic rights for this reason: It is necessary that the composer, author and

publisher from whom the Society derives its so-called "small performing rights," shall reserve the right to restrict the performance of the musical compositions in good faith, such restrictions usually being made for the purpose of protecting the investment of the producer of a stage show or motion picture in which the separate musical compositions restricted are incorporated. The right to restrict numbers is the most valuable right certain composer- and publisher-members of the Society have. All these rights are constantly being licensed in the State of Florida. In many cases, the publisher has an interest in the dramatic rights and will fix a price for dramatic uses in collaboration with the composer.

19. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Florida publicly for profit on any basis wherein the price for such performance would be included in the price paid for a copy of the sheet music, phonograph record, music roll, electrical transcription or sound track thereof.

[fol. 1731] 20. The musical compositions of the Society's members and Complainants have been for many years last past, and are presently being performed within the State of Florida in hotels, dance halls, taverns, motion picture theatres and broadcasting stations.

21. Defendants have threatened to and will enforce such States Statutes against these Complainants and others similarly situated in the event that such Complainants and others similarly situated refuse to comply with said State Statutes or do any of the acts made unlawful by said State Statutes.

Conclusions of Law

1. The 1937 Statute is not a reasonable exercise of the police power of the State of Florida, and the penalties and confiscatory provisions provided for therein are not reasonably necessary to meet any alleged evil; enactment of the said Statute was not necessary to protect, nor does it serve the public interest of the State of Florida; the object, purpose and effect of the said Statute is to take the copyrighted musical compositions of the Complainants, and others similarly situated, for a private purpose, to wit:

to benefit the 410 users within the State of Florida; the said Statute discriminates against, and in fact, confiscates the Complainants' copyrighted musical compositions as well as those of others similarly situated; it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, and will deter composers, authors and publishers from securing copyright registration of their works.

2. The 1937 Statute is an invasion of Complainants' constitutional rights in the following respects:

(a) It interferes with and destroys the patterns of the Copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure uniformity [fol. 1732] and certainty in the field of copyright.

(b) It denies to Complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein deny to the Complainants due process of law.

3. Complainants have no adequate remedy at law and are relievable only in this Court of Equity, and if Complainants are not afforded the equitable relief prayed for in the Bill of Complaint and supplemental Bills of Complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said State Statutes, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure Complainants in their persons and property as to make the remedy at law grossly inadequate, and unless an injunctional order is issued Complainants will be irreparably damaged.

4. Complainants are entitled to an injunction perpetually enjoining and restraining the Defendants and each of them individually and in their capacity as officials of the State of Florida, charged by said State Statute with the enforcement of the provisions thereof, from bringing directly or indirectly any proceeding at law or in equity for the purpose of enforcing said State Statute against the Complainants and others similarly situated, their representatives, employees, agents or any of them, and from interfering with all existing contracts entered into by the Complainants and others, including the Society and citizens and

residents of the State of Florida, and from threatening to enforce against any citizen or resident of the State of Florida the penalties of said State Statute, in the event such citizens and residents desire to carry out their contracts with the American Society of Composers, Authors and Publishers, or Complainants, or others similarly situated, and from prosecuting criminally the Complainants, their representatives or agents or any of them or others [fol. 1733] similarly situated for doing any act or thing to detect infringments and to enforce their respective rights under the Copyright Act in the Federal Court of the State of Florida or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of said State Statutes.

5. The said Statute constitutes an attempt to restrict and to regulate the right of Complainants to the full enjoyment of the exclusive rights granted them by the laws of the United States, generally known as the Copyright Laws.

6. The Court has jurisdiction of this suit.

7. The 1939 Act, based as it is upon the purpose to compel disclosure as to the ownership of copyrighted composition is, except as to Section 4-a and Section 4-c, which are not germane to the purpose of the act, for the reasons set out in the opinion, a valid exercise of the police power of the state. Sections 4-a and 4-c of that act are, for the reasons set out in the opinion, invalid as an arbitrary interference with liberty of contract and with the rights granted under the copyright laws. Complainants should have their decree, making the temporary injunction awarded on April 5, 1938, against the 1937 Act, permanent and perpetual and the temporary injunction awarded them October 30, 1939, against the enforcement of the 1939 Act, modified and made permanent and perpetual as to Sections 4-a and 4-c, of that Act. As to the balance of the 1939 Act, the decree should deny plaintiffs the injunction prayed.

Let decree be entered accordingly.

Dated, August 5, 1940.

By the Court: J. C. Hutcheson, Jr., U. S. Circuit Judge; Augustine V. Long, U. S. District Judge; William J. Barker, U. S. District Judge.

[fol. 1734] IN UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

Equity No. 12.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Plaintiffs,

vs.

GEORGE COUPER GIBBS, Individually and as Attorney General of the State of Florida, et al., Defendants

Before Hutcheson, Circuit Judge, and Long and Barker, District Judges

OPINION—Filed August 5, 1940

HUTCHESON, Circuit Judge:

Plaintiffs are owners of musical copyrights or rights of renewal therein, which have been pooled with the American Society of Composers, Authors and Publishers, hereafter called ASCAP. Defendants are the state officers charged with enforcement of the two statutes the suit brings in question. As originally brought, the suit was to enjoin the enforcement of Chap, 17,807, Laws of Florida, 1937[1]. There

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[1] 1937 Act, Chapter 17807.

Section 1 prohibits combinations of authors, composers, publishers, owners of copyrighted vocal or instrumental musical compositions from forming any society, association, partnership, corporation or other group or entity, when the members therein constitute a substantial number of those owning or controlling copyrighted vocal or instrumental musical compositions and when one of the objects of such combination is the determination and fixation of license fees, required by such combination for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit, declares the association so formed unlawful, prohibits the collection of license fees so fixed and makes persons collecting or attempting to collect them subject to the penalties of the Act.

Section 2-A requires selling prices to be stated on sheet music or records and gives purchaser general public per-

was a temporary injunction, an appeal and an affirmance.[2] [fol. 1735] After the enactment of Chapter 19653, Florida Laws, 1939,[3] it was extended by a supplemental bill to include that chapter in its scope and to obtain injunctive relief, temporary and permanent as to it.

[fol. 1736] The claim of the original and supplemental

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formance rights to use for all purposes on paying such price.

Section 2-B provides if selling price not so fixed, purchaser of the composition may use the composition privately or publicly without further license fee and exempts such purchaser from accountability to the copyright owner.

Section 2-C declares against purpose to give a purchaser general right to resell or distribute; or to prevent copyright holders from determining prices not in combinations forbidden in Section 1.

Section 3 declares void existing contracts contrary to the Act and makes their attempted enforcement illegal.

Section 4-A—Relieves Florida broadcasting stations from payment of licensee fee for re-broadcast of copyrighted music controlled by a combination prohibited by Section 1.

Section 4-B—Similarly forbids collection by out-side station of license fees to unlawful combination.

Sections 5-A and 5-B—Counterparts of Section 4-A and 4-B, except relating to theatres, etc.

Section 6—Concerning music broadcast or emanating from without the state, makes outside source of emamation solely liable for compensation to copyright owner and deprives owner of right to collect from Florida user.

Section 7-A—Provides for service of process on agent of outside combination.

Section 7-B—Declares such an agent a part of the combination for which he acts and as such, subject to all the penalties of the Act.

Section 8—Penalty clause for violation of Act.

Section 9—Confers jurisdiction on circuit courts and designates state attorneys under Attorney General to enforce public rights and penal provisions, particularly to dissolve unlawful combinations and otherwise enforce Section 1.

Section 10-A and 10-B—Confers jurisdiction on circuit courts in private suits under the Act.

Section 11-A and 11-B—Provides for discovery of docu-

bills in general was: that the statutes were confessedly aimed as ASCAP and its constituent members and were class legislation of the most indefensible kind and that in addition to violating the equal protection, liberty of con-

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mentary evidence and penalty for failure to produce same.

Section 12—Severability clause.

Section 13—Makes act and rights thereunder cumulative to rights and remedies under existing law.

Section 14—Effective date. (Approved and effective June 9, 1937).

[2] Gibbs v. Buck, 307 U. S. 66.

[3] 1939 Act, Chapter 19653.

Section 1. Definitions. Defines blanket license as including any device whereby public performance for profit is authorized of the combined copyright of two or more owners. The term blanket royalty or fee includes any device whereby prices for performing rights are not based on the public performance of individual copyrights.

Section 2. (Disclosure section). Requires seller of public performance rights in copyrighted music to file with Comptroller a list showing name and title of composition, date and number of copyright, names of author, publisher and present owner and owner of performance rights, with provision for filing additional lists and filing fee of two cents per composition; also for filing affidavit describing rights intended to be sold and verifying the statements in the listing or registration, with name, agent, occupation, residence and authority of affiant.

Section 3. Makes such lists available for public inspection and taking copies "in order that any user * * * may be fully advised concerning the performing rights * * * and avoid being overreached * * * and avoid committing innocent infringement." Comptroller may publish lists and must give certified copies and anyone selling, licensing or otherwise disposing of performing rights, must exhibit them.

Section 4-A. Makes it unlawful "for two or more owners" of musical or dramatics musical copyrights to associate or combine together for purposes of issuing blanket public performance licenses upon a blanket royalty or fee unless each owner or such combination shall make available to each user of such composition within the state the right to perform each at a price established for each separate performance by filing with the Comptroller either as part of

tract and due process, Clauses of the Fourteenth Amendment, they violated various other constitutional provisions, Federal [4] and State.[5]

[fol. 1737] In particular the claim as to ASCAP was that

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the list under Section 2 or separately a schedule of prices for the performing rights to each separate performance with affidavit that such price was fixed by the copyright owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of publication of schedules.

Section 4-B. Provides any person issuing a blanket license shall file verified copies of blanket performance license with Comptroller within thirty days after issuance and fixes filing fee.

Section 4-C. Prohibits the sale or license of performing rights to any musical composition for a compensation based "in whole or in part on any program not containing any such composition," and makes illegal and invalid any charge for compensation so based.

Section 4-D. Makes sale of public performance rights or collection of compensation unlawful if composition not listed as provided in Section 2.

Section 5. Performing rights owner must authorize Secretary of State to accept service of process and copy shall be mailed him by Secretary.

Section 6. No action to be brought without prior compliance with Act. Comptroller to furnish copies of any papers at same fees as clerk of circuit court.

Section 7. Imposes three per cent tax on gross receipts, provides for annual tax return, inspection and audit of books by Comptroller and provides for means of collection.

Section 8. Makes unlawful public performance of compositions without authority of owner if he has complied with the statute.

Section 9. Makes violations misdemeanors under general law.

Section 10. Makes agents of owners subject to the statute.

Section 11. Confers on circuit courts jurisdiction or private suits.

Section 12. Confers on circuit courts jurisdiction of enforcement of public rights by state attorneys under Attor-

it had been organized not to increase, or obtain unfair, prices for the performing rights of copyrighted musical compositions, but to protect authors, owners and publishers from the systematic piracy of their performing rights which, acting alone, they were powerless to prevent. And there was the further claim as to it that by fair and reasonable contracts and arrangements, it had at the same time, afforded full public use of and access to copyrighted musical compositions at fair and reasonable prices, and secured to copyright owners, the benefits of the copyright law. While the claim as to the statutes in question was that they had been enacted, not in response to a public need, to make effective the general will of the people of Florida, but at the instigation of an organized group or band of radio broadcasters and other users of music in order that, the association stricken down and outlawed in Florida, they might with

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ney General upon complaint of a person aggrieved.

Section 13. If prosecuting officers fail to act, aggrieved party may bring such civil action as state officers might have brought.

Section 14. Appropriates taxes above expenses to general revenue fund.

Section 15. Supersedes inconsistent laws with express saving clause as to prior lawful contracts and "any of the statutes of Florida pertaining to monopoly or restraint of trade" including but not limiting the generalties of the foregoing sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14-C, Chap. 17807, Laws of Florida, 1937. Provides for filing copies of existing contracts within thirty days and for compliance otherwise with Act within thirty days.

Section 16. Severability clause.

Section 17. Effective date. (Filed and effective June 12, 1939).

[4] The Copyright Clause (Art 1, Sec. 8, Cl. 8) and the Federal Laws enacted pursuant thereto; the Impa-rment of Contract Clause (Art. 1, Sec. 10); the Privileges and Immunities Clause (Art. 4, Sec. 2); the Interstate Commerce Clause (Art. 1, Sec. 8, Cl. 3).

[5] The Privilege against self-incrimination (Sec. 12, Declaration of Rights); the Prohibition of cruel and unusual punishment (Sec. 8, Declaration of Rights); the Equal Protection and Liberty of Contract Clauses (Sec. 1, Declaration of Rights).

complete impunity, again pirate the performing rights to copyrighted musical compositions without making payment to the owners therefor. As to the 1937 statute, the claim in general was that, though put forward as an antimonopoly statute, it was really a statute designed and enacted, in the interest and at the behest of this anti-copyrighted group, to deprive the members of the society of the protection, in Florida, of the copyright laws. In particular it was that, by at once outlawing ASCAP and providing for the performance, without compensation to them, of the copyrighted vocal or instrumental musical compositions of its members, the statute undertook in effect to nullify the copyright laws and to take plaintiffs properties in their copyrighted compositions without compensation and without due process.

[fol. 1738] As to the 1939 statute, the claim was that its rigorous provisions for registration, its prohibitions against and restriction on blanket licensing, its prohibitions against collection of compensation when based in whole or in part on any program not containing such composition and its general provisions for filing fees, taxes, etc., are so in derogation of the rights of owners under the copyright law, and so onerous that they amount to an illegal taking for private use, that is, for the benefit of broadcasters and other users, of plaintiffs' rights in and under their copyrights.

The defense in general was a denial that the legislation was oppressively or partisanly conceived and that it operated in violation of any constitutional protection, and an assertion that it aimed at and constitutionally reached the evils of a combination to fix prices and in restraint of trade. A combination, organized and operating to fix the prices to be paid for, and to restrain freedom of trade in, the public performance of individual copyrighted musical compositions at a fair price per use, by blanketing them together under general licenses covering many compositions of many owners, authors and composers, and refusing to license or permit the licensing individually and per use of particular compositions. In particular the defense as to the 1937 Act was: that it was an anti-monopoly Act and that taken as such it was valid; that sections 2-A and 2-B and 6, which purport to authorize the performance within the state of copyrighted musical compositions without payment by the users therefor, have been repealed by the 1939 Act; and that

the remaining sections are valid and the Act as to them must stand as an anti-monopoly Act condemning and making illegal, combinations like those of ASCAP and the other plaintiffs.

[fol. 1739] As to the 1939 Act, the defense was: that it is in general an Act for disclosure, and as such, is valid under Allen v. Riley, 203 U. S. 347; and that its other provisions requiring blanket licenses by two or more persons and prohibiting sales or licenses at a price, based other than on a use in a program of the particular music sold or licenses, are mere regulatory measures to reach and do away with the evils of blanket licensing in all its forms.

With their contentions thus put forward, plaintiffs and defendants ring the changes on their respective arguments. Plaintiffs urge upon us that ASCAP is a beneficial, defendants that it is an evil institution; plaintiffs that the copyright laws protect them from the legislation; defendants that copyright owners may not, any more than others, form combinations to monopolize or restrain trade. If the case were as simple in its issues as each contender thinks it is, if it turned, on the one hand, simply on whether plaintiffs had rights and, on the other, as simply on whether these rights were subject to regulation, we could and would end it quite simply by saying to defendants, "The plaintiffs certainly do have rights in their copyrighted musical compositions," and to plaintiffs, "These rights are certainly not beyond reasonable state regulation."

But, the answer to the questions the suit raises is not so simply found. For conceding both plaintiffs rights and the State's power to subject them to reasonable regulation, the difficulty remains of determining whether the statutes in question are unreasonable prohibitions masking under the guise of regulation, or if regulations, whether, unduly and beyond the legitimate purpose to be served, they hamper and restrict plaintiffs' undoubted rights. In short the question for decision comes down at last to, and is to be decided by, not a general st-tement of principles, for as to them there is no real dispute,[6] but a construction and interpre-

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[6] They are sufficiently stated for our purpose in Buck v. Swanson, —— Fed. (2d) ——, dealing with a Nebraska statute of the same purport as the Fla. 1937 Act, and we need not restate them here. Other authorities not cited in Buck's case, which may be consulted are: For the plaintiffs:

tation of the statutes under attack, as to what they purport [fol. 1740] to do and whether they may constitutionally do that.

Both plaintiffs and defendants see plainly enough that this is so and by an analysis both of the statutes as a whole and of each section thereof, plaintiffs undertake to show their invalidity, defendants their validity. Plaintiffs pointing to the confiscatory provisions of Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, by which the 1937 Act undertakes to permit performance, in Florida, of copyrighted music without compensation, urge upon us that not only these sections but the statute as a whole is invalid because, not a reasonable regulation of, but a repressive prohibition of, dealings in copyrighted music, it breathes and attempts to make effective throughout the unconstitutional spirit of repression and reprisal. Outlawing ASCAP and those in association with it, and expropriating their property for the use, without compensation, of radio broadcasters and others, it they say in violation of every constitutional principle, operates as a kind of Bill of Attainder.

Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act

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Lawton v. Steele, 152 U. S. 133; Hale v. Bunco, 306 U. S. 363; State ex rel Fulton v. Ives, 167 So. 394; Peoples Petroleum Producers v. Sterling, 60 Fed. (2d) at 1047; McLeish v. Binford, 52 Fed. (2d) 151; Wolff v. Industrial, 262 U. S. at 539; Smith v. St. Louis S. W., 181 U. S. at 255; McFarland v. American Sugar Refining Co. 241 U. S. 79; Herbert v. Shanley, 242 U. S. 591; Buck v. Jewell, 283 U. S. 191; Remick v. American Automobile, 5 Fed. (2d) 411.

For the defendants: Allen v. Riley, 203 U. S. 347; Fox Film Corp. v. Boyal, 286 U. S. 123; Carbice Corp. v. Amer. Patents Corp. 283 U. S. 27; Straus v. Amer. Publishers Assn. 231 U. S. 222; Interstate Circuit v. U. S. 306 U. S. 208; Strassheim v. Daily, 221 U. S. 280; Ford v. U. S., 273 U. S. 593; Stephenson v. Binford, 287 U. S. 251; Ethyl Gasoline Corp. v. U. S., 60 Sup. Ct. 618-625; Tigner v. State, 84 L. Ed., 756; U. S. v. Socony, 84 L. Ed. 760.

For both: Standard Oil Co. v. U. S., 283 U. S. 163.

contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute.

[fol. 1741] We do not think so. In complete agreement with what was said in Buck's case as to the invalidity of Sections 2-A and 2-B, of the Nebraska Law, we find invalid the similar sections of the Florida 1937 Law. For the same reasons, that they unreasonably interfere with and in effect deprive the owners of their copyright protection, by imposing unlawful conditions, in effect a servitude, in favor of those desiring to use them, upon the performing rights in their copyrighted musical compositions, and even under named conditions completely take the copyright, by permitting use without compensation, we find Sections 3, 4-A, 4-B, 5-A, 5-B and 6, also invalid.

There remain: Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it.

It is, of course, the duty of a Court, if reasonably possible, consistent with the protection of constitutional rights, to receive all doubts as to the validity of a statute in favor of its constitutionality, sustaining it, if it can be done as a whole, or if that cannot be done, as to the part of it that is constitutional. But legislation, even though containing a separability clause, is not of the isolated sections in it, but of the law as a whole, and the function of the Court, if there are invalid sections in a statute, is to search out, not isolated valid ones, but the valid law as a whole. To do this, a Court may, especially where the Act contains a separability clause, cut and pare and trim away its diseased parts, if, when this has been done, the live spirit of the law as enacted still remains, the living tree still stands. But, law making at last is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the

[fol. 1742] valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not by lopping and paring away create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. Williams v. Standard Oil Co., 271 U. S. 241; Sage v. Baldwin, 55 Fed. (2d) 97, and cited cases. Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind, we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the "without pay" sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in Buck v. Swanson, supra, that the whole Act is invalid and must fall. We are the more inclined to this view because of the inconsistent provisions in the 1939 Act, and because, while specifically providing that nothing in it shall be construed to repeal any of the statutes of the state of Florida, pertaining to monopoly or restraint of trade "including Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937," that Act by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole they must stand or fall together. In this view it is not necessary for us to determine whether as plaintiffs claim, Section 1 is invalid, for indefiniteness and uncertainty in its provision that it shall apply to combinations only where "a substantial number" of owners are concerned, nor is it necessary to determine whether defend-
[fol. 1743] ants are right in their counter to this claim of plaintiffs, that if the statute might be regarded as indefinite in its application as to some, it is certainly not so in its application to plaintiffs, for they admit that they own or control substantially all of the playable copyrighted musical

compositions, and they may complain of the statute, not as it applies to others but only as it applies to themselves.

When it comes, however, to the 1939 Act we think the matter stands differently, for having a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and, except as to Sections 4-A and 4-C, which are not germane to that purpose, having gone about effecting that purpose in a reasonable way, the Act as a whole is valid and may stand with those sections stricken from it. These sections constitute clear invasions of plaintiffs' rights under federal laws for which no warrant or justification can be found in the exercise of the state's police power. They may not stand.

As to 4-A, it seriously invades the rights of copyright owners to sell or license or refuse to sell or license as they please, and by its compulsion, opens to the public the unlimited right to use copyrighted material upon terms the owner must fix generally in advance, and under conditions which are not only unreasonable in fact but are in their nature beyond the power of the state to impose. A copyright owner has a right to sell or withhold from sale the matter of, and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state.

[fol. 1744] The defendants seem to recognize that this would be so if the condemned provision were not coupled in the statute with a provision permitting dealing in copyrighted music under blanket licenses. They seem to think that the permission of the statute for two or more owners to combine in a blanket license authorizes the state to impose unreasonable restrictions upon that joining.

This will not at all do. It is not unlawful for one or more copyright owners, merely to pool their compositions for one royalty for them as pooled. Standard Oil Co. v. United States, 283 U. S. 263. Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to

sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do does not authorize it to impose unconstitutional restrictions upon that doing. "But a state may not impose any condition which requires the relinquishment of a right guaranteed by the constitution." Sage v. Baldwin, 55 Fed. (2d) at 969. The copyright laws guarantee to owners of musical compositions protection against the use thereof without their consent. The state of Florida may not, therefore, as a condition to their being allowed to sell in Florida, a right they already have under the Federal constitution and laws, compel them to throw open to general public use the performing rights to their compositions at a price fixed in advance.

Section 4-C is for the same reason invalid. It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud and imposition. [fol. 1745] In attempting to prevent individuals from contracting for the use of their copyrighted music upon any price bases they and their customers may select, the Act goes clearly beyond and is wholly outside the reasonable exercise of the police power. People's Petroleum v. Sterling, note 6 supra. The prohibition of the section against basing the price upon programs in which a particular piece of music is not performed is a completely arbitrary one and as such, it could not stand if the subject of the prohibition were uses unprotected by copyright. For, the end and aim of the prohibition is to limit the right to sell or license copyrighted musical compositions to contracts bases solely upon performances per piece of each particular piece of music and to prohibit contracts arrived at on any other basis, however, reasonable and well adapted to the needs of and acceptable in the business generally, of selling and licensing performing rights in copyrighted musical compositions. If the statute dealt with contracts for the hiring of,

work and labor, or personal services, of animals or things and by its prohibition prevented, wages and salaries from being fixed except on the basis of piece work, the hire of horse, car or boat from being fixed, except upon the basis of each particular use, or journey, we think it would be admitted that such a statute would be invalid as an invasion of the right and liberty of contract, and not at all a reasonable exercise of the police power of the state. Certainly the state is in no better, the owner of a copyright in no worse position as to rights protected by copyright, "While the copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 'The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.'

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, [fol. 1746] may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co. (D. C. Mass.) 27 Fed. (2d) 556; American Tobacco Co. v. Werckmeister, 207 U. S. 284;" Buck v. Swanson, note 6 supra.

For the reasons herein stated, the injunction prayed for will be granted against the enforcement of the 1937 Act and as to Sections 4-A and 4-C in the 1939 Act; as to the remainder of the 1939 Act, it will be denied.

(S.) J. C. Hutcheson, Jr., U. S. Circuit Judge; (S.) Augustine V. Long, U. S. District Judge; (S.) William J. Barker, U. S. District Judge.

[fol. 1747] IN UNITED STATES DISTRICT COURT
FINAL DECREE—Filed August 5, 1940

This cause came on to be heard at this term, under Section 380, Title 28, U. S. C. A. (Jud. Code Sec. 266) on the 15th, 16th and 17th days of April, 1940, and the Court sat as pro-

vided therein; and the cause was tried and testimony taken and argument heard; thereupon, the Court having made its Findings of Fact and Conclusions of Law, upon consideration thereof, it is Ordered, Adjudged and Decreed, as follows, viz.:

1. The temporary injunction order awarded herein on April 5, 1938, against enforcement of the 1937 Act, be and the same hereby is made permanent and perpetual.

2. The temporary injunction order awarded against the enforcement of the 1939 Act, be and the same is hereby vacated and dissolved as to the whole act and all of its sections except Sections 4-a and 4-c, and as to these sections, the order is made permanent and perpetual.

3. That Defendants George Couper Gibbs, individually and as Attorney General of the State of Florida; R. A. Gray, individually and as Secretary of the State of Florida; J. M. Lee, individually and as Comptroller of the State of Florida; E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., individually as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, individually and as State Attorney for the Third Judicial Circuit of Florida; William A. Hallowes, individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. [fol. 1748] Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida; Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida; T. E. Duncan, individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Worley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Clyde H. Wilson, individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; L. D. McRae, individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Phil O'Connell individually and as State Attorney for the Fifteenth Judicial Circuit of Florida, and the respective agents, servants and employees of each

of them, and all other persons acting under or through the authority of each of them or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing directly or indirectly, and from permitting to be brought, directly or indirectly, any proceeding at law or in equity, for the purpose of enforcing or executing the Statute of Florida, known as Chapter 17807, Laws of Florida, 1937, enacted June 9, 1937, and Secs. 4-a and 4-c, of Chapter 19653, Laws of Florida, 1939, enacted June 12, 1939, against the Complainants and others similarly situated, their representatives employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Florida the penalties of the 1937 State Statutes, or those of the 1939 Act for violation of Sections 4-a and 4-c, and from prosecuting criminally the Complainants, their representatives, or agents, or any of them or others simi-
[fol. 1749] larly situated, under the 1937 State Statutes or Sections 4-a and 4-c of the 1939 Act, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida, or elsewhere, and generally from doing any act or thing to carry out or enforce any of the provisions of the 1937 State Statute or Sections 4-a and 4-c of the 1939 Statute.

4. Cost to be taxed against defendants.

Dated August 5th, 1940.

By the Court: J. C. Hutcheson, Jr., U. S. Circuit Judge; Augustine V. Long, U. S. District Judge; William J. Barker, U. S. District Judge.

[fol. 1750] In United States District Court

Defendants' Petition for Appeal—Filed November 2, 1940

To the Honorable Judges of the United States District Court, Northern District of Florida:

The above named defendants, considering themselves aggrieved by the Final Decree made and entered herein August 5, 1940, do hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the Assisgnment of Errors filed herewith.

Wherefore, defendants pray that this appeal may be allowed, that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated may be sent to the United States Supreme Court.

George Couper Gibbs, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Jacksonville, Florida; Andrew W. Bennett, Washington, D. C., Solicitors for Defendants.

[fol. 1751] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 2, 1940

Defendants in the above entitled cause file the following assignments of error upon which they will rely in the prosecution of their appeal from the Final Decree made and entered in this cause August 5, 1940:

I

The Court erred in failing and refusing on defendants' motion to dismiss the original Bill of Complaint herein for want of equity, on the ground that the pertinent sections of Chapter 17807, Laws of Florida, 1939, are valid statutory enactments.

II

The Court erred in failing to hold that the defendants were only charged with the duty of enforcing Section 1 of Chapter 17807, Laws of Florida, 1937, and the sections dependent thereon; viz., sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9; that said sections are valid enactments under the police powers of the State of Florida and that the re-[fol. 1752] maining sections of said Act are without the scope of this suit.

III

That the Court erred in not finding and holding that Section 1 of Chapter 17807, Laws of Florida, 1937, and the sections dependent thereon; viz., sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9 were valid despite the fact that the

Court held that the remaining sections of said Act were unconstitutional and void.

IV

The Court erred in finding and holding that the provisions of Chapter 17807, Laws of Florida, 1937, were not severable and holding the entire Act bad because it found that Sections 2-A, 2-B, 3, 4-A, 4-B, 5-A, 5-B and 6 were invalid and unconstitutional.

V

The Court erred in declaring unconstitutional and void Section 1 of Chapter 17807, Laws of Florida, 1937, on the ground that other sections of the Act were unconstitutional.

VI

The Court erred in not holding and finding that section 1 and the other sections of the Act not specifically found to be unconstitutional were constitutional and valid despite the Court's holding that other sections of the Act were unconstitutional and void.

VII

The Court erred in failing to find and hold that the plaintiffs were a monopolistic combination engaged in price fixing activities and not entitled to injunctive aid in further- [fol. 1753] ance of these activities.

VIII

The Court erred in failing and refusing to adjudge that Sections 2-A, 2-B and 6 of Chapter 17807, Laws of Florida, 1937, were repealed by Chapter 19653, Laws of Florida, 1939.

IX

The Court erred in refusing to adjudge that all questions as to the constitutionality of Sections 2-A, 2-B, and 6 of Chapter 17807, Laws of Florida, 1937, were moot inasmuch as the defendant state officers had no duties to perform with respect to said sections, or any of them.

X

The Court erred in failing and refusing to give effect to the separability clause in Chapter 17807, Laws of Florida, 1937.

XI

The Court erred in holding that Section 4-A of Chapter 19653, Laws of Florida, 1939 was invalid and unconstitutional.

XII

The Court erred in holding that Section 4-C of Chapter 19653, Laws of Florida, 1939 was invalid and unconstitutional.

XIII

The Court erred in failing to recognize that Section 4-A of Chapter 19653, Laws of Florida 1939, does not attempt to interfere with the right of the individual copyright owner [fol. 1754] to license or refuse to license public performance rights in his copyrights as he may see fit, but merely regulates the terms under which combinations of two or more copyright owners may pool their copyrights for blanket licensing.

XIV

The Court erred in holding that Section 4-C of Chapter 19653, Laws of Florida 1939 was outside the reasonable exercise of the police power in that said section was enacted in the public welfare because designed to promote the liberal use of music for public, cultural and entertainment purposes, without the limitations imposed by the enforced payment of a percentage of the gross receipts of such entertainment industries.

XV

The Court erred in making permanent the temporary injunction against enforcement of Chapter 17807, Laws of Florida 1937.

XVI

The Court erred in making permanent the temporary injunction against Sections 4-A and 4-C of Chapter 19653, Laws of Florida, 1939.

George Couper Gibbs, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett.

[fols. 1755-1796—Rule 12]

[fol. 1797] In United States District Court, Northern District of Florida, Gainesville Division

No. 12

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, etc. et al., Plaintiffs,

v.

George Couper Gibbs, individually and as Attorney General of the State of Florida, et al., Defendants

Order Allowing Defendants' Appeal—Filed November 2, 1940

This day came the defendants by their solicitors and having filed and presented to the Court their petition for allowance of appeal to the United States Supreme Court, their Assignment of Errors, and Jurisdictional statement, upon consideration thereof, it is hereby

Ordered that said appeal be allowed upon the filing of a bond in the sum of $500.00, with good and sufficient surety to be approved by the Court.

Done and ordered at Gainesville, Florida, November 2, 1940.

Augustine V. Long, District Judge.

[fols. 1798-1801] Cost Bond on Appeal for $500.00 approved and filed Nov. 2, 1940, omitted in printing.

[fols. 1802-1804] Citation in usual form showing service on Manley P. Caldwell, filed Nov. 2, 1940, omitted in printing.

[fol. 1805] In United States District Court

[Title omitted]

Praecipe to Clerk—Filed November 2, 1940

To the Clerk of the Above Entitled Court:

In making up the transcript of record in this case to be filed in the Supreme Court of the United States, you

will please include in said transcript of record the following papers, to-wit:

1. Bill of Complaint and Exhibits thereto filed herein on Feb. 7, 1938.

2. Order Convening Three Judge Court filed Feb. 7, 1938.

3. Motion to Dismiss Bill of Complaint filed March 3, 1938.

4. Order Denying Motion to Dismiss Bill and granting Interlocutory Injunction entered herein April 5, 1938.

[fol. 1806] 5. Memo opinion of 3-Judge Court filed April 4, 1938.

6. Order substituting George Couper Gibbs, Attorney General, for Cary D. Landis, etc., deceased, filed May 30, 1939.

7. Supplemental Bill of Complaint filed herein on May 31, 1939.

8. Motion to Dismiss Bill and Supplemental Bill of Complaint filed June 6, 1939.

9. Answer to Bill of Complaint and Supplemental Bill of Complaint filed June 19, 1939.

10. Order fixing date of hearing filed October 9, 1939.

11. Further Supplemental Bill of Complaint with Exhibits attached filed October 19, 1939.

12. Defendants' objection to filing of plaintiffs further supplemental bill of complaint, filed October 19, 1939.

13. Plaintiffs' Motion to Dismiss Counter Claim filed Dec. 7, 1939.

14. Defendants' Motion to Dismiss Further Supplemental Bill of Complaint filed October 19, 1939.

15. Order filed October 31, 1939.

16. Defendants' Answer to Further Supplemental Bill of Complaint filed November 17, 1939.

17. Notice of Trial and Final Hearing filed March 15, 1940.

18. Depositions of Witnesses for Complainants taken in New York, N. Y. February 6-9, 1940, together with indices.

19. Transcript of proceedings at trial taken on April 15-16, 1940. Pages 1 to 732 inclusive, together with indices.

20. Stipulations as to Exhibits filed 2nd day of November, 1940.

21. Findings of Fact and Conclusions of Law filed August 5, 1940.

22. Opinion of Court filed August 5, 1940.

23. Final Decree filed August 5, 1940.

24. Petition for Appeal filed herein on the 2nd day of November, 1940.

25. Assignment of Errors filed herein on the 2nd day of November, 1940.

[fol. 1807] 26. Jurisdictional Statement of Appellants filed herein on the 2nd day of November, 1940.

27. Order Allowing Appeal filed herein on the 2nd day of November, 1940.

28. Bond for Costs filed herein on the 2nd day of November, 1940.

29. Citation to Appellees and Proof of Service thereon filed the 2nd day of November, 1940.

30. Statement directing attention of Appellees to the provisions of paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States filed the 2nd day of November, 1940.

31. Proof of Service upon Appellees of the following:

(1) Copy of Petition for Appeal,

(2) Copy of Order Allowing Appeal,

(3) Copy of Appeal Bond and Approval Thereof by Judge,

(4) Copy of Assignment of Errors,

(5) Copy of Jurisdictional Statement,

(6) Copy of Statement directing attention of Appellees to the provisions of paragraph 3 of Rule 12 of the Rules of

the Supreme Court of the United States filed the 2nd day of November, 1940.

(7) Copy of directions for making up transcript of record, filed the 2nd day of November, 1940.

32. These Directions for Making up the Transcript of Record filed November 2nd, 1940.

George Couper Gibbs, Attorney General. Tyrus A. Norwood, Assistant Attorney General. Lucien H. Boggs. Andrew W. Bennett.

[fol. 1808] IN UNITED STATES DISTRICT COURT

[Title omitted]

Equity No. 12

PETITION FOR APPEAL—Filed November 2, 1940

The petitioners, Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, Carl Fischer, Inc., G. Schirmer, Inc., Irving Berlin, Inc., Deems Taylor, Oley Speaks, William J. Hill, Anne Paul Nevin, Ella Herbert Bartlett and Jane Sousa, the complainants in the above entitled action, considering themselves aggrieved from so much of the decree made and entered herein on the 5th day of August, 1940 as vacates and dissolves the temporary injunction order of this Court, made and entered on the 30th day of October, 1939, awarded against enforcement of Chapter 19653 of the Florida Laws of 1939 (hereinafter referred to as the "1939 Act") insofar as the same related to Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, of said 1939 Act, and denies complainants' application to make said temporary injunction perpetual as to such sections, which decree was made and entered by three Judges in accordance with the provisions of Section 266 of the Judicial Code (U. S. C. Tit. 28, Sec. 380), do hereby appeal from said parts of said decree of this Court to the Supreme Court of the United States and pray that this appeal may be allowed [fol. 1809] and that a transcript of the record of proceedings and papers upon which said decree and order were

made, duly authenticated, may be sent to the Supreme Court of the United States, and the bond fixed at the sum of $500.

Dated, West Palm Beach, Florida, November 2nd, 1940.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Petitioners, 822 Connecticut Avenue, Washington, D. C.

[fol. 1810] IN UNITED STATES DISTRICT COURT

[Title omitted]

Equity No. 12

ASSIGNMENT OF ERRORS—Filed November 2, 1940

Come now the complainants in the above entitled cause and file the following Assignment of Errors upon which they will rely in the prosecution of the appeal from so much of the decree made and entered herein on August 5, 1940 as vacates and dissolves the temporary injunction order of this Court, made and entered on October 30, 1939, awarded against enforcement of Chapter 19653 of the Florida Laws of 1939 (hereinafter referred to as the "1939 Act") insofar as the same related to Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of said 1939 Act, and denies complainants' application to make said temporary injunction perpetual as to such sections, which decree was made and entered by three Judges in accordance with the provisions of Section 266 of the Judicial Code (U. S. C. Tit. 28, Sec. 380), and say that the Court erred in the following respects, to wit:

1. The Court erred in vacating and dissolving so much of the temporary injunction order entered on October 30, 1939 as related to Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the 1939 Act.

[fol. 1811] 2. The Court erred in refusing to make the temporary injunction entered herein on October 30, 1939, perpetual.

3. The Court erred in finding that the requirements of Section 2 of the 1939 Act with reference to the disclosure of information concerning the identification and owner-

ship of copyrighted musical compositions to be licensed for public performance for profit in the State of Florida, are not unreasonable or difficult of compliance.

4. The Court erred in holding that Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the 1939 Act have a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and that such sections effected that purpose in a reasonable way.

5. The Court erred in holding that the purpose of the 1939 Act could be effectuated by excising Sections 4A and 4C thereof and that such sections were separable from the balance of the 1939 Act.

6. The Court erred in failing to hold that the entire 1939 Act was unconstitutional.

7. The Court erred in refusing to hold that Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, as well as Sections 4A and 4C, of the 1939 Act, and each of them, constitute an invasion of complainants' constitutional rights in the following respects:

(a) They interfere with and destroy the pattern of the Copyright Law by which Congress has endeavored to carry out the purpose of Article 1, Section 8, Clause 8 of the Constitution of the United States, to insure certainty and uni-
[fol. 1812] formity in the field of copyright; and they unreasonably interfere with the exercise by complainants of rights granted to them under the Copyright Law, and discriminate against complainants in the exercise of such rights.

(b) They deny to complainants equal protection of the laws and deprive them of their property without due process of law.

(c) They impair the obligations of contracts entered into between the Society and similar societies operating in foreign countries.

(d) They interfere with complainants' liberty of contract in the State of Florida.

(e) They interfere with treaties between the United States and foreign countries respecting copyrights and

proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.

8. The Court erred in refusing to hold that Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, as well as Sections 4A and 4C, of the 1939 Act, do not constitute a reasonable exercise of the police power of the State of Florida; that the requirements of compiling certain data and obtaining and exhibiting to prospective licensees certified copies of such data, are not reasonably necessary to meet any alleged evil; that enactment thereof was not necessary to protect, and that it does not serve, the public interest of the State of Florida; that the object, purpose and effect of the 1939 Act, including Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, is to take the copyrighted musical compositions of complainants and others similarly situated for a private purpose, to wit: to [fol. 1813] benefit the 479 users within the State of Florida; that the 1939 Act, including Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, as well as Sections 4A and 4C, discriminates against and in fact confiscates the musical compositions of complainants and others similarly situated; that it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States and will deter composers, authors and publishers from securing copyright registration in their works.

9. The Court erred in refusing to hold that the 1939 Act, including Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, as well as Sections 4A and 4C, denies due process of law to complainants in that it is so vague, uncertain and indefinite that it fails to apprise them of what acts they must do to comply with the law and what acts they may omit or commit which would constitute a crime under the 1939 Act.

10. The Court erred in refusing to hold that the 1939 Act, including Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, as well as Sections 4A and 4C, violates Article 1, Sections 8, 9 and 10, Article 3, Section, 2 Article 4, Section 2, and Article 6, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Section 1 of the Declaration of Rights of the Florida Constitution.

11. The Court erred in refusing to hold that the complainants are entitled to an injunction permanently enjoining the defendants, and each of them, individually and in their several capacities as officials of the State of Florida, [fol. 1814] charged by the 1939 Act with the enforcement of the provisions thereof, from bringing, directly or indirectly, any proceeding at law or in equity for the purpose of enforcing the provisions of Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the 1939 Act against complainants and others similarly situated their representatives, employees, agents or any of them, and from prosecuting criminally the complainants, their representatives or agents, or any of them, or others similarly situated, and generally from doing any act or thing to carry out or enforce any of the provisions of Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the 1939 Act.

12. The Court erred in refusing to hold that Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the 1939 Act, as well as Sections 4A and 4C thereof, constitute an attempt to restrict and to regulate the rights of the complainants to the full enjoyment of the exclusive rights granted them by the Copyright Laws of the United States.

Wherefore, complainants pray that said decree be modified by ordering, adjudging and decreeing as follows:

(a) The temporary injunction order awarded herein on April 5, 1938, against enforcement of the 1937 Act, be and the same hereby is made permanent and perpetual.

(b) The temporary injunction order awarded against the enforcement of the 1939 Act, be and the same is hereby made permanent and perpetual.

(c) That defendants George Couper Gibbs, individually and as Attorney General of the State of Florida; R. A. Gray, individually and as Secretary of the State of Florida; J. M. Lee, individually and as Comptroller of the State of [fol. 1815] Florida; E. Dixie Beggs, Jr., individually and as State Attorney for the First Judicial Circuit of Florida; O. C. Parker, Jr., individually and as State Attorney for the Second Judicial Circuit of Florida; A. K. Black, individually and as State Attorney for the Third Judicial

Circuit of Florida; William A. Hallowes, individually and as State Attorney for the Fourth Judicial Circuit of Florida; J. W. Hunter, individually and as State Attorney for the Fifth Judicial Circuit of Florida; Chester B. McMullen, individually and as State Attorney for the Sixth Judicial Circuit of Florida; Murray Sams, individually and as State Attorney for the Seventh Judicial Circuit of Florida; T. E. Duncan, individually and as State Attorney for the Eighth Judicial Circuit of Florida; Murray W. Overstreet, individually and as State Attorney for the Ninth Judicial Circuit of Florida; L. Grady Burton, individually and as State Attorney for the Tenth Judicial Circuit of Florida; G. A. Wooley, individually and as State Attorney for the Eleventh Judicial Circuit of Florida; Clyde H. Wilson, individually and as State Attorney for the Twelfth Judicial Circuit of Florida; J. Rex Farrior, individually and as State Attorney for the Thirteenth Judicial Circuit of Florida; L. D. McRae, individually and as State Attorney for the Fourteenth Judicial Circuit of Florida; Phil O'Connell, individually and as State Attorney for the Fifteenth Judicial Circuit of Florida, and the respective agents, servants and employees of each of them, and all other persons acting under or through the authority of each of them or by virtue of the authority of the office of each of them, be and they are, each of them, severally, enjoined and restrained permanently from bringing directly or indirectly, or from permitting to be brought directly or indirectly, any proceeding at law or in equity, for the purpose of enforcing or executing the Statutes of Florida, known as Chapter 17807, Laws of Florida, 1937, enacted June 9, 1937, and Chapter 19653, Laws of Florida, 1939, [fol. 1816] enacted June 12, 1939, against the complainants and others similarly situated, their representatives, employees, agents or any of them, and from threatening to enforce against any citizens or residents of the State of Florida the penalties of the 1937 State Statute or those of the 1939 Act, and from prosecuting criminally the complainants, their representatives, or agents, or any of them, or others similarly situated, under the 1937 State Statute or the 1939 Act, for doing any legal act to enforce their respective rights under the Copyright Act in the Federal Courts of the State of Florida, or elsewhere, and generally

from doing any act or thing to carry out or enforce any of the provisions of the 1937 State Statute or the 1939 Act.

(d) Costs to be taxed against defendants.

Dated, West Palm Beach, Florida, November 2nd, 1940.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Complainants.

[fol. 1817] In the United States District Court, Northern District of Florida, Gainesville Division

Equity No. 12

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, etc., et al., Complainants,

against

George Couper Gibbs, individually and as Attorney General of the State of Florida, et al., Defendants.

Order Allowing Appeal—Filed November 2, 1940.

This day came the complainants by their counsel and having filed and presented to the Court their Petition for the allowance of an appeal to the Supreme Court of the United States, together with their Assignment of Errors and Statement as to Jurisdiction, pursuant to Rule 12 of said Supreme Court, and it appearing that an appeal to the Supreme Court of the United States is allowable under the United States Code, Title 28, Section 380, it is hereby

Ordered that the appeal prayed for be and hereby is allowed upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the Court.

Dated at Gainesville, Florida, this 2nd day of November, 1940.

Augustine V. Long, United States District Judge.

[fol. 1818-1821] Cost Bond on Appeal for $500.00 approved and filed November 2, 1940. Omitted in printing.

[fol. 1822-1847] Citation in usual form, filed November 2, 1940. Omitted in printing.

(Here follows 2 Photolithographs, side folios 1848, 1848a)

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In UNITED STATES DISTRICT Court,

NORTHERN DISTRICT OF FLORIDA ~~County,~~

~~State of~~ GAINESVILLE DIVISION - EQUITY NO. 12

Suit Instituted Februrary 7, 1938

Pltff. Attorneys

Schwartz & Frohlich,
New York.

Deft. Attorneys

Tyrus A. Norwood
Asst. Atty. Gen'l,
Lucien H. Boggs,
Andrew W. Bennett.

GENE BUCK (ASCAP) et al,

Plaintiff.

VS.

GEO. C. GIBBS, ET AL

Defendant.

Cause of Action INJUNCTION

Damages, $

Date 1938	Plaintiff's Proceedings	Date 1938	Defendant's Proceedings
" "	Affidavits for temporary injunc.	" "	Motion to deny application
" "	Motion for hearing on temporary injunction application	April 25	Defts affidavits
			Pet. for appeal
" "	Order setting hearing for 3/3/38 in New Orleans	"	Order allowing appeal
" 28	Proof of service on defts.	"	Citation (returned 5/2)
Mar. 1	Acknowledgment of Service of notice of temporary injunction hearing upon Governor of Fla.	"	Assignments of Error
		"	Jurisdictional statement
Apr. 5	Memorandum Opinion	"	Appeal Bond
" "	Order for Interlocutory Injunc. and fixing bond at $5,000.00	"	Praecipe for transcript
" 13	Bond for $5,000. filed by complainants. Bond approved by Judge Long	May 2	Appellees pr. for transcript
		" 11	Stipulation re Answer
" "		"	Motion for enlargement Time
" 18	Notice of Injunction Order & filing of bond	" 31	Order " " " -8-15
		" 31	Suggestion Death-Landis
		" "	Motion dismiss because of death
May 17	Findings of Fact & Conclusions of Law	" "	Order setting hearing on motion 7/11-Pensacola
July 11	Acknowledgment of Service of copy of Supplemental B/C	July 11	Objections of deft. St. Attys. to pltffs mot. for leave to file S/B/C
" "	Motion for leave to file a supplemental bill	" "	Special appearance & objections of Geo. Cooper Gibbs to being made a party deft.
" "	Order of court denying motion to dismiss suit & denying leave to file supplemental bill.	" "	Notice of defts to pltffs to produce Gene Buck as witness

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MEMORANDA

Aug.	8	Motion for leave to amend statement as to jurisdiction and assignment of errors.
"	8	Order allowing amendments to statement as to jurisdiction and " " " . (Signed by Judge Strum on Aug. 4, 1938 at Jacksonville.)
"	10	Transcript of record on appeal certified and forwarded to Supreme Court of U. S.
Sept. 13 1939		Proof of Service
May	19	Mandate received and filed in Supreme Court affirming decree of Dist. Ct. with costs
	19	Mandate from Supreme Court affirming decree of Dist. Ct.
	30	Certified copy Supreme Court order substituting Gibbs for Landis
	31	Supplemental bill
June	1	Notice of filing supplemental bill
	19	Motion to dismiss bill and supplemental bill
	19	Answer to bill and supplemental bill
July	6	Motion and affidavits re further supplemental bill, etc.
	6	Further supplemental bill tendered for filing
	6	Motion to dismiss counterclaim
	20	Stipulation re appeal bond, Petition re appeal bond, Order re appeal bond
Aug.	23	Substitution of solicitors for Complainants
Oct.	9	Order for hearing
	16	Notice of hearing, Affidavit of MPC re proof of service
	19	Motion and affidavit for leave to file further suppl. bill, Further suppl. bill.

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[fol. 1849] (ASCAP) DOCKET SHEET NO. 2.

1939 cont.

Oct.	19	Defendants objections to filing of plaintiff's proposed further sup. Bill
"	"	Offer of defendants to limit issues in case
"	"	Affidavit of W. Walter Tison in opposition to injunction under further S. Bill
"	"	Defendants objections to and motion to strike affidavits of Gene Buck
"	"	Defendants motion to dismiss further supplemental bill
"	"	Defendants motion to strike portions of further supplemental bill
"	23	Notice of oral testimony
"	31	Order
Nov.	2	Supplemental findings of fact and conclusions of law
"	8	Injunction bond filed in sum of $5,000.00 (Md. Cas. Co. as surety)
"	13	Notice of injunction order and filing of bond
"	17	Three copies of defendants' answer to further supplemental bill of complaint
Dec.	9	Motion to dismiss counterclaim
"	20	Transcript of hearing held on October 19, 1939

1940

Jan.	4	Notice of taking depositions and proof of service
"	8	Stipulation postponing time for taking depositions
Mar.	2	Deposition of witnesses for complainants
"	12	Stipulation (re filing depositions)
"	15	Notice of trial and final hearing
April	7	Deposition of Edwin M. Spence
"	10	Praecipes for subpoenas Thomas Belveso, Gerald Maltsby and James W. Baldwin
"	15	Three Judge Court convened at Gainesville, Florida for purpose of taking testimony and for final hearing
"	16	Cause proceeded further with taking of testimony and with argument of counsel
"	16	Court allowed respective parties thirty days within which to file briefs

1940 cont.

May 29 Transcript of testimony at trial and briefs filed with Judge Long
Aug. 5 Findings of Fact and Conclusions of Law
" " Opinion
" " Decree

[fol. 1850] IN UNITED STATES DISTRICT COURT

[Title omitted]

Equity No. 12

PRAECIPE TO CLERK—Filed November 2, 1940.

To the Clerk of the above entitled Court:

In making up the transcript of record in this case to be filed in the Supreme Court of the United States, you will please include in said transcript of record the following papers, to wit:

1. Original Bill of Complaint filed herein on February 7, 1938, and exhibits thereto annexed.
2. Supplemental Bill of Complaint filed herein on May 31, 1939, and exhibits thereto annexed.
3. Defendants' Answer to Bill of Complaint and Supplemental Bill of Complaint, filed June 21, 1939.
4. Further Supplemental Bill of Complaint filed October 19, 1939, and exhibits thereto annexed.
5. Defendants' Answer to Further Supplemental Bill of Complaint, filed November 15, 1939.
6. Motion to Dismiss Counterclaims, filed December 7, 1939.
7. Chapter 17807, Laws of Florida, 1937 (the 1937 Act), annexed to original Bill of Complaint as Exhibit "E".

[fol. 1851] 8. Chapter 19653, Laws of Florida, 1939 (the 1939 Act), annexed to Further Supplemental Bill of Complaint, as Exhibit "M".

9. Transcript of hearing before Hon. Joseph C. Hutchinson, Circuit Judge, Hon. Louie W. Strum, District Judge, and Hon. A. V. Long, District Judge, on October 19, 1939 at Jacksonville, Florida, (pages 1-85 incl.).

10. Transcript of Evidence upon the trial, held April 15, 16 and 17, 1940, pages 1-732, inclusive, together with Com-

plainants' Exhibits 1-19, inclusive, and Defendants' Exhibits A-1–A-10, inclusive, thereto annexed, as stipulated in annexed stipulation.

11. Depositions of Irving Caesar, Deems Taylor, Edgar Leslie, Fred E. Ahlert, Will Von Tilzer, Walter S. Fischer, Oscar Hammerstein, G. Schirmer, Saul Bornstein, George W. Meyer, Herman Greenberg, and Irving Berlin, pages 1-489, inclusive, and Complainants' Exhibits 1-78, inclusive, and Defendants' Exhibits A-G, inclusive, thereto annexed, as stipulated in annexed stipulation.

12. Motion to convene three Judges in accordance with Section 380, Title 28, United States Code.

13. Order convening three-Judge Court, filed herein on February 7, 1938.

14. Order of Court granting temporary injunction restraining enforcement of 1937 Act filed on April 4, 1938.

15. Order of Court granting temporary injunction restraining enforcement of 1939 Act filed October 31, 1939, and granting leave to file Further Supplemental Bill of Complaint and adding and substituting certain parties.

16. Opinion of Court on permanent injunction filed August 5, 1940.

[fol. 1852-1856] 17. Findings of Fact and Conclusions of Law filed August 5, 1940.

18. Decree appealed from, filed August 5, 1940.

19. Plaintiffs' Petition for Appeal filed herein on November 2nd, 1940.

20. Plaintiffs' Assignment of Errors filed herein on November 2nd, 1940.

21. Order Allowing Appeal filed herein on November 2nd, 1940.

22. Plaintiffs' Bond for Costs filed herein on November 2nd, 1940.

23. Citation to Defendants-Appellees and proof of service thereof, filed herein on November 2nd, 1940.

24. Jurisdictional Statement of Plaintiffs-Appellants, filed herein on November 2nd, 1940.

25. Statement directing attention of Defendants-Appellees to provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, filed herein on November 2nd, 1940.

26. Proof of Service upon Defendants-Appellees of the following:

(a) Copy of Petition for Appeal;
(b) Copy of Order Allowing Appeal;
(c) Copy of Assignment of Errors;
(d) Copy of Jurisdictional Statement;
(e) Statement directing attention of Defendants-Appellees to provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, filed herein on November 2nd, 1940.

27. Docket Entries.

28. These directions for making up the transcript of record, showing service on Defendants-Appellees.

29. Affidavit of service filed November 2, 1940.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Complainants.

[fol. 1857] IN UNITED STATES DISTRICT COURT

[Title omitted]

APPELLEES' PRAECIPE TO CLERK—Filed November 13, 1940

To the Clerk of the Above Styled Court:

In making up the transcript of the record in this case to be filed in the United States Supreme Court, you will please include in said transcript of record the following papers, in addition to those specified in Appellant's Praecipe to Clerk, to-wit:

1. Findings of Fact and Conclusions of Law, filed May 17, 1938, relating to Interlocutory Injunction Order, of April 6, 1938.

2. Transcript of the hearing held in Jacksonville, Florida, on October 19, 1939, filed December 20, 1939.

3. Supplemental Findings of Fact and Conclusions of Law, filed November 2, 1939, pertaining to Interlocutory Injunction Order, filed October 31, 1939.

4. This Appellee's Praecipe to Clerk, with proof of service attached.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Complainants.

[fol. 1858] STATE OF FLORIDA,
County of Palm Beach, ss:

This day personally appeared before me, a Notary Public duly authorized to administer oaths, Manley P. Caldwell, who being first duly sworn, deposes and says that he is one of the counsel for the complainants in the above styled cause, and that he did, on the 9th day of November, 1940, serve true copies of the above and foregoing appellees' Praecipe to Clerk by depositing the same in the United States mail, in envelopes securely sealed and with sufficient postage thereunto attached, addressed to Tyrus A. Norwood, Esq., Assistant Attorney General, Tallahassee, Florida; Lucien H. Boggs, Esq., Bisbee Building, Jacksonville, Florida, and Andrew W. Bennett, Esq., Edmunds Building, Washington, D. C., respectively counsel for the defendants.

Manley P. Caldwell.

Subscribed and sworn to before me this 9th day of November, 1940. Ruth E. Akerley, Notary Public, State of Florida. My commission expires June 30, 1943.

Receipt of copies of the above and foregoing Praecipe is hereby acknowledged this 11 day of November, 1940.

Geo. Couper Gibbs, Attorney General of the State of Fla.; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett, Counsel for the Defendents.

[fol. 1859] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO APPELLANTS' PRAECIPE TO CLERK—Filed November 13, 1940

To the Clerk of the Above Styled Court:

In making up the transcript of the record in this case, to be filed in the United States Supreme Court on the cross appeal of the complainants herein, you will please include in said transcript of record the following papers in addition to those specified in the Praecipe to Clerk filed by these complainants on November 2nd, 1940, and said Praecipe is hereby amended by the addition of said papers thereto, to-wit:

1. Findings of Fact and Conclusions of Law, filed May 17, 1938, relating to Interlocutory Injunction Order, of April 5, 1938.

2. Supplemental Findings of Fact and Conclusions of Law, filed November 2, 1939, pertaining to Interlocutory Injunction Order, filed October 31, 1939.

3. This Appellants' Amendment to Praecipe to Clerk, with proof of service attached.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Complainants.

[fol. 1860] STATE OF FLORIDA,
County of Palm Beach, ss:

This day personally appeared before me, a Notary Public duly authorized to administer oaths, MANLEY P. CALDWELL, who being first duly sworn, deposes and says that he is one of the counsel for the complainants in the above styled cause, and that he did, on the 9th day of November, 1940, serve true copies of the above and foregoing Amendment to Appellants' Praecipt to Clerk, by depositing the same in the United States mail, in envelopes securely sealed, and with sufficient postage thereunto attached, addressed to Tyrus A. Norwood, Esq., Assistant Attorney General, Tallahassee, Florida, Lucien H. Boggs, Esq., Bisbee Building, Jacksonville, Florida, and Andrew W. Bennett, Esq.,

Edmunds Building, Washington, D. C., respectively counsel for the defendants.

Manley P. Caldwell.

Subscribed and sworn to before me this 9th day of November, 1940. Ruth E. Akerley, Notary Public, State of Florida. My commission expires: June 30, 1943.

Receipt of copies of the above and foregoing Amendment to Appellants' Praecipe to Clerk is hereby acknowledged this 11 day of November, 1940.

Geo. Couper Gibbs, Attorney General of the State of Fla. Tyrus A. Norwood, Assistant Attorney General. Lucien H. Boggs, Andrew W. Bennett, Counsel for the Defendants.

[fol. 1861] In United States District Court

[Title omitted]

Amendment to Appellees' Praecipe to Clerk—Filed November 13, 1940

To the Clerk of the Above Styled Court:

In making up the transcript of the record in this case, to be filed in the United States Supreme Court, you will please include in said transcript of record the following papers, in addition to those specified in appellants' praecipe to Clerk, and in addition to those specified in the appellees' praecipe to the Clerk, to-wit:

1. Motion and affidavits for leave to file further supplemental bill of complaint, bring in new defendants, substitute certain defendants and for further temporary injunction, filed October 19, 1939.

2. This amendment to appellee's praecipe to Clerk, with proof of service attached.

Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Complainants-Appellees.

[fol. 1862] STATE OF FLORIDA,
County of Palm Beach, ss:

This day personally appeared before me, a Notary Public duly authorized to administer oaths, MANLEY P. CALDWELL, who being first duly sworn, deposes and says that he is one of the counsel for the complainants in the above styled cause, and that he did, on the 12th day of November, 1940, serve true copies of the above and foregoing Amendment to Appellees' Praecipe to Clerk, by depositing the same in the United States mail, in envelopes securely sealed, and with sufficient postage thereunto attached, addressed to Tyrus A. Norwood, Esq., Assistant Attorney General, Tallahassee, Florida; Lucien H. Boggs, Esq., Bisbee Building, Jacksonville, Florida, and Andrew W. Bennett, Esq., Edmunds Building, Washington, D. C., respectively counsel for the defendants.

Manley P. Caldwell.

Subscribed and sworn to before me this 12th day of November, 1940. Ruth E. Akerley, Notary Public, State of Florida. My commission expires: June 30, 1943.

[fol. 1863] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1864] IN SUPREME COURT OF THE UNITED STATES

No. 610

STATEMENT OF POINTS UPON WHICH APPELLANTS (DEFENDANTS BELOW) WILL RELY, AND DESIGNATION OF PARTS OF RECORD DEEMED UNNECESSARY TO THE CONSIDERATION THEREOF—Filed December 6, 1940

A—Statement of Points

1. The only portions of the 1937 Act (Chapter 17807, Laws of Florida, 1937) with the enforcement of which appellants (defendants below) are charged viz. Section 1 and the sections dependent thereon, Sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9, are valid enactments under the police power of the State of Florida to regulate monopolies and

restraints of trade, and the Court should not have declared them void.

2. Even if one or more of the sections of the 1937 Act dependent upon Section 1 as enumerated above were properly adjudged invalid, still, Section 1 declares completely the basic legislative purpose, and with the penalty provisions of Section 8 and the civil and criminal remedial provisions of Secton 9, is clearly severable from any other sections of the Act, and should have been sustained.

[fol. 1864a] 3. Sections 2-A, 2-B and 6 of the 1937 Act were clearly severable from the remaining provisions of the Act, and the Court should not have invalidated Section 1 and its dependent sections because it held Sections 2-A, 2-B and 6 unconstitutional.

4. Even if Sections 2-A, 2-B and 6 were not severable from the remaining provisions of the Act, the constitutionality of those sections is moot in this case because:

(a) They were repealed by the 1939 Act (Chapter 19653, Laws of Florida 1939), and;

(b) The defendant state officers are not charged with the duty of enforcing them.

5. Section 4-A of the 1939 Act (Chapter 19653, Laws of Florida 1939) does not interfere with the right of the individual copyright owner to license or refuse to license public performance rights in his copyrights as he may see fit. It merely regulates the terms under which combinations of two or more copyright owners may pool their copyrights for blanket licensing at a single price in the State of Florida, and so is within the police power of the State of Florida to promote competition.

6. Section 4-C of the 1939 Act is designed to promote the liberal use of music for public cultural and entertainment purposes, without the limitations imposed by the enforced payment of a percentage of the gross receipts of such entertainment industries from other sources, and so is within the police power of the State of Florida.

7. The permanent injunction granted by the District Court is in aid of monopolistic price-fixing activities practiced by the plaintiff American Society of Composers, Authors and Publishers, and should not have been granted.

[fol. 1864b] B—Designation of Portions of Record Unnecessary to the Consideration of Above Points

These appellants, pursuant to Section 13, Paragraph 9 of the rules of said Court designate the following parts of the record as unnecessary to the consideration of this case:

1. Plaintiffs' Motion for hearing on Temporary Injunction, filed February 7, 1938.
2. Findings of Fact and Conclusions of Law of the District Court, entered May 17, 1938.
3. Plaintiffs' Motion and affidavit for leave to file Further Supplemental Bill, filed October 19, 1939.
4. Defendants' objections to filing of plaintiffs' Further Supplemental Bill, filed October 19, 1939.
5. Supplemental Findings of Fact and Conclusions of Law of the District Court, entered November 2, 1939.
6. Plaintiffs' Motion to Dismiss Counterclaim, filed December 9, 1939.
7. Transcript of proceedings at hearing before District Court October 19, 1939, filed by plaintiffs December 20, 1939.
8. Citation on defendants' Appeal issued November 2, 1940.
9. Citation on plaintiffs' Appeal issued November 2, 1940.
10. Cost bond filed by defendants November 2, 1940.
11. Cost bond filed by plaintiffs November 2, 1940.

George Couper Gibbs, Attorney General; Tyrus A. Norwood, Assistant Attorney General; Lucien H. Boggs, Andrew W. Bennett, Solicitors for Appellants.

[fol. 1864c] Affidavit of Service

State of Florida,
County of Duval

Before me personally appeared Lucien H. Boggs, who being first duly sworn says that he is one of the solicitors for the appellants (defendants below) in the above entitled cause; that on November 30, 1940, he served true copies of the foregoing Statement of Points and Designation of Parts of the Record unnecessary to the Consideration of this Appeal by mailing in the United States mail chute, Bisbee Building, Jacksonville, Florida, copies thereof to the

solicitors for appellees in envelopes, postage prepaid, and addressed to them at their respective offices as follows:

Manley P. Caldwell, Esquire, Harvey Building, West Palm Beach, Florida.

Louis D. Frohlich, Esquire, Attorney at Law, 1450 Broadway, New York City, N. Y.

Frank J. Wideman, Esquire, 822 Connecticut Avenue, Washington, D. C.

Lucien H. Boggs.

Sworn to and subscribed before me this November 30, 1940. Katharine E. Walker, Notary Public, State of Florida at Large. My Commission Expires: 8/5/42. (Seal.)

[fol. 1865] IN SUPREME COURT OF THE UNITED STATES

No. 610

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF THE RECORD —Filed December 6, 1940

Appellees, pursuant to Rule 13, Paragraph 9, of the Rules of the United States Supreme Court, designate the following parts of the record to be printed in addition to those designated by appellants:

1. Findings of Fact and Conclusions of Law of the District Court, entered May 17, 1938 (Item 2 of Appellants' "Designation of Portions of Record Regarded as Unnecessary").

2. Supplemental Findings of Fact and Conclusions of Law of the District Court, entered November 2, 1939 (Item 5 of Appellants' "Designation of Portions of Record Regarded as Unnecessary").

Dated, December 4, 1940.

Thomas G. Haight, Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Plaintiffs-Appellees.

[fol. 1866] IN SUPREME COURT OF THE UNITED STATES

No. 611

STATEMENT OF POINTS UPON WHICH APPELLANTS (PLAINTIFFS BELOW) WILL RELY AND DESIGNATION OF PARTS OF RECORD DEEMED UNNECESSARY TO THE CONSIDERATION THEREOF—Filed December 6, 1940

A. Statement of Points

1. Chapter 19653, Laws of Florida, 1939, hereinafter referred to as the "1939 Act," and each and every section thereof, constitutes an invasion of appellants' constitutional rights in the following respects:

(a) It interferes with and destroys the pattern of the Copyright Law by which Congress has endeavored to carry out the purpose of Article 1, Section 8, Clause 8 of the Constitution of the United States, to insure certainty and uniformity in the field of copyright, and unreasonably interferes with the exercise by appellants of rights granted to them under the Copyright Law and discriminates against appellants in the exercise of such rights.

(b) It denies to appellants equal protection of the laws and deprives them of their property without due process of law.

(c) It interferes with appellants' liberty of contract in the State of Florida.

[fol. 1867] (d) It impairs the obligations of contracts entered into between the Society and similar societies operating in foreign countries.

(e) It interferes with treaties between the United States and foreign countries respecting copyrights and proclamations of the President of the United States recognizing the existence of certain reciprocal conditions between the United States and foreign countries in respect of copyrights.

2. The 1939 Act in its entirety and each and every section thereof, does not constitute a reasonable exercise of the police power of the State of Florida; the requirements of compiling certain data and obtaining and exhibiting to prospective licensees certified copies of such data, are not reasonably necessary to meet any alleged evil; enactment of this statute was not necessary to protect, and it does not serve, the public interest of the State of Florida.

3. The object, purpose and effect of the 1939 Act in its entirety and each and every section thereof, are to take the copyrighted musical compositions of appellants and others similarly situated for a private purpose, to wit: to benefit the 479 users within the State of Florida.

4. The 1939 Act in its entirety and each and every section thereof, discriminates against, and in fact confiscates, the copyrighted musical compositions of appellants and others similarly situated; it is contrary to, and hinders carrying out the purpose of, Article 1, Section 8 of the Constitution of the United States and will deter composers, authors and publishers from securing copyright registration in their works.

[fol. 1868] 5. The 1939 Act in its entirely and each and every section thereof, denies due process of law to appellants in that it is so vague, uncertain and indefinite that it fails to apprise appellants of what acts they must do to comply with the law and what acts they may omit or commit which would constitute a crime thereunder.

6. The 1939 Act in its entirety and each and every section thereof, violates Article 1, Sections 8, 9 and 10, Article 3, Section 2, Article 4, Section 2, and Article 6, Section 2, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and Section 1 of the Declaration of Rights of the Florida Constitution.

7. The 1939 Act in its entirety and each and every section thereof, restricts appellants in the full enjoyment of the exclusive rights granted to them by the Copyright Laws of the United States.

8. The Court erred in separating Sections 4-A and 4-C of the 1939 Act from the remainder thereof and holding the balance of the Act constitutional. The entire Act is inseparable and the Act should be held invalid in its entirety.

B. Designation of Portions of the Record Unnecessary to the Consideration of the Above Points

These appellants, pursuant to Rule 13, Paragraph 9 of the Supreme Court Rules, designate the following parts

of the record as unnecessary to the consideration of this cause:

1. Motion to dismiss counterclaim (designated as Item 6 in Plaintiffs-Appellants' Praecipe).

[fol. 1869] 2. Citation on Plaintiffs' Appeal, issued November 2, 1940 (designated as Item 23 in Plaintiffs-Appellants' Praecipe).

3. Plaintiffs' Bond for Costs, filed November 2, 1940 (designated as Item 22 in Plaintiffs-Appellants' Praecipe).

Dated, December 4, 1940.

Thomas G. Haight, Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, Manley P. Caldwell, Counsel for Plaintiffs-Appellants.

[fol. 1870] City of Washington,
District of Columbia:

This day personally appeared before me, a notary public for the District of Columbia, Frank J. Wideman, who being duly sworn, deposes and says: that he is one of the solicitors for the appellants (plaintiffs below) in the above cause; that on Thursday, December 5, 1940, he served true copy of the statement of points upon which appellants (plaintiffs below) will rely and designation of parts of record deemed unnecessary to the consideration thereof, by depositing such true copy in the United States mail in an envelope securely sealed and with sufficient postage attached, addressed respectively to the solicitors for appellees, as follows:

Hon. George Couper Gibbs, Attorney General of Florida, Tallahassee, Florida.

Lucien H. Boggs, Esq., Bisbee Building, Jacksonville, Florida.

Frank J. Wideman.

Subscribed and sworn to before me this 5th day of December, 1940. Flora A. Myers, Notary Public, District of Columbia. My commission expires Nov. 1, 1943. (Seal.)

Endorsed on cover: File No. 44,959, 44,960, N. Florida, D. C. U. S., Term No. 610. George Couper Gibbs, Individually and as Attorney General of the State of Florida, et al., Appellants, vs. Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al. Term No. 611. Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellants, vs. George Couper Gibbs, Individually and as Attorney General of the State of Florida, et al. Filed December 6, 1940. Term No. 610 O. T. 1940. 611 O. T. 1940.

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Sup Ct

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

STATEMENT AS TO JURISDICTION.

GEORGE COUPER GIBBS,
Attorney General of Florida;
TYRUS A. NORWOOD,
Assistant Attorney General of Florida;
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

No. 12

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ETC., ET AL.,

Plaintiffs,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

In compliance with Rule 12 (1) of the Supreme Court of the United States defendants, as appellants, file this, their statement disclosing the basis upon which they contend that the Supreme Court has jurisdiction upon appeal to review the decree in question.

(a) The Statutory Provision Sustaining the Jurisdiction.

Defendants rely upon U. S. C., Title 28, Section 380, as amended, to sustain the jurisdiction of the Supreme Court of the United States to review this case upon appeal. That section expressly grants such appellate jurisdiction in all cases where the enforcement or execution of a State statute

has been restrained permanently by a specially constituted 3-judge District Court as permitted by said section. Appellate jurisdiction on appeal from interlocutory injunction in this case was entertained by the Supreme Court of the United States in *Gibbs* v. *Buck*, 307 U. S. 66.

(b) The Statutes of the State of Florida the Validity of Which is Involved.

The statutes of the State of Florida the validity of which is involved are:

(1) Chapter 17,807, Laws of Florida, 1937 (General Laws, Vol. I, pp. 204-214, incl.), hereinafter referred to as the 1937 Act.

(2) Chapter 19,653, Laws of Florida, 1939 (General Laws, Vol. I, pp. 1575-1583, incl.), hereinafter referred to as the 1939 Act.

The 1937 Act is directed at monopolistic practices of combinations of copyrighted musical compositions and forbids such combinations when organized for the purpose of fixing prices for the licensing of public performance for profit of their music in the State of Florida. The only section of the statute pertinent to this action is Sec. 1 and its dependant sections, 3, 4A, 4B, 5A, 5B, 7A, 7B, 8 and 9. The defendant prosecuting officers have no duties to perform with respect to any of the remaining sections. Primarily the pertinent sections prohibit price fixing in intrastate transactions by combinations of copyright owners acting in concert.

The 1939 Act has a three fold object. It requires the registration with the State Comptroller of a list of all musical copyrights which the owner may desire to license or dispose of in Florida; it forbids blanket licensing by two or more copyright owners of music unless there is also

offered to the user the option to acquire the right to use the music on a per piece per use system at prices individually fixed by the owner; it also imposes a three per cent tax on gross receipts derived from the licensing in Florida of public performance rights of copyrighted music. The enforcement of the entire 1937 Act and Sections 4 A and 4 C of the 1939 Act was permanently enjoined by the District Court.

Copies of each of the statutes above referred to are annexed to this statement, marked Appendix "A" and Appendix "B", respectively.

(c) Date of Decree Appealed From.—August 5, 1940. Date of Presenting Application for Appeal.—November 2, 1940.

(d) The Nature of the Case and the Rulings of the Court.*

The original bill of complaint, filed February 7, 1938, was brought to enjoin the enforcement of the 1937 Act in its entirety, on the part of the Attorney General, and State's attorneys charged with the duty of making its provisions effective upon the ground that the statute was in conflict with the Federal and State Constitutions. Temporary injunction was granted by the statutory 3-judge district court. Upon appeal this interlocutory decision was affirmed by the Supreme Court. (*Gibbs* v. *Buck, supra*), the latter court, however, confining its decision to holding that there was Federal jurisdiction, and no abuse of discretion on the part of the District Court in granting the temporary injunction, leaving expressly for future determination the other questions raised by the appeal.

Mr. Justice Black in a dissenting opinion differed upon the question of Federal jurisdiction and also upon the merits of granting the temporary injunction. He stated

* This statement, being filed before preparation of transcript of record by the Clerk of the District Court, it is impossible to supply page references.

that there was no doubt of the power of the State to enact such a statute in restraint of monopoly; that there was no duty on the State officers to enforce any provisions other than those prohibiting price fixing, and that the officers had properly disclaimed any such duty, thereby making moot all questions of constitutionality of Sections 2-A, 2-B and 6; that the record showed the plaintiff Society was a powerful price fixing combination wielding the power of life and death over every business in Florida and elsewhere dependent upon copyrighted musical compositions for existence. Copy of the Supreme Court's opinion is not appended because reference thereto is not necessary to ascertain the grounds of the final decree here appealed from.

After the rendition of this decision by the Supreme Court, the 1939 Statute was enacted, dealing with the same general subject (viz. regulating the licensing in Florida of public performance rights in musical copyrights). Thereupon plaintiffs filed a "Further Supplemental Bill" seeking injunction against the enforcement of the 1939 Act in its entirety.

On hearing, the temporary injunction staying enforcement of the 1937 Act was extended by the District Court to cover the 1939 Act. Thereafter testimony was taken and the case tried by the 3-judge District Court, resulting in the entry August 5, 1940 of the final decree from which the instant appeal is taken. At the same time the District Court rendered an opinion, copy of which is annexed, marked Appendix "C".**

The final decree permanently enjoined enforcement of the 1937 Act in its entirety, but denied permanent injunction as to all of the 1939 Act except sections 4-A and 4-C.

** The District Court's opinion in connection with the final decree being complete in itself, it is deemed unnecessary to append copy of its memorandum opinion on the granting of the first temporary injunction covering the 1937 Act. No opinion was rendered when the temporary injunction was extended to cover the 1939 Act.

The fundamental question involved in this appeal is the right of the State to prohibit, or reasonably regulate, monopolistic price fixing practices within its boundaries of combinations of owners of copyrighted music in connection with the licensing of their music for public performance for profit. The District Court denied this right on the ground that the anti-monopoly provisions of the 1937 Act were inseparable from other sections of the Act not aimed at monopolistic practices, which other sections the court held unconstitutional.

Among other important questions involved is the right of a Court of Equity to lend injunctive aid to plaintiffs who admit by their own pleading, and by the evidence are shown to be, a combination for price fixing purposes seeking an injunction to assist them in perpetuating their monopoly.

(e) Cases Sustaining the Appellate Jurisdiction of the Supreme Court of the United States.

Inasmuch as the Supreme Court has already accepted appellate jurisdiction in this same case on the earlier appeal taken from the temporary injunction granted by the 3-judge District Court (*Gibbs* v. *Buck, supra*), it is deemed unnecessary to cite further authority.

George Couper Gibbs,
Attorney General;
Tyrus A. Norwood,
Assistant Attorney General;
Lucien H. Boggs,
Andrew W. Bennett.

APPENDIX "A".

(1937 Act) Ch. 17807, Laws of Florida.

An Act Declaring to be an Unlawful Monopoly and Its Purposes to be in Restraint of Trade, any Combination of Persons, Firms, or Corporations Which Determine the Amount of Money to be Paid to it or to Its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Composition, When Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify Upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare That any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made With any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Nonenforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Protection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement, Radio Broadcasting and Radio Receiving and Radio Re-Broadcasting Station Affiliated With Other Persons, Firms or Corporations Outside of the State of Florida, Against the Collection of License Fees or Other Exactions by Such Out of the State Affiliates for or on Account of any Combination Herein Declared Unlawful; to Provide all Liability for

any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription or Sound Producing Apparatus, or by Personal Performance Coming Outside of the State of Florida and Used Herein to Rest Exclusively on the Out of the State Person, Firm or Corporation Originally Sending the Same Into This State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, Under the Direction of the Attorney General, Upon the Complaint of any Party Aggrieved by any Violation Hereof to Proceed to Enforce the Penalties Hereof Against Such Combination and Any of Its Members, Agents or Representatives; to Empower any Party Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide That the Terms of This Act Shall be Cumulative; to Provide that any Part of This Act Declared Illegal Shall not Affect the Validity of the Remaining Parts Hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared un-

lawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, member, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collection or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copy-

righted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and nonenforceable in any Court within this State, and are hereby

declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or

repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or reproduction apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers,

players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation, who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical composition; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions

thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees of other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than $50.00 or more than $5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The Several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending a petition praying that the Defendant or Defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records, or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of $100.00 against

such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, imperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included therein.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

APPENDIX "B".

1939 Act

Ch. 19653 Laws of Florida.

AN ACT Relating to Public Performing Rights in Copyrighted Musical Compositions and Dramatico-Musical Compositions; Defining the Same; Regulating Licensing of Same; Prescribing Filing Fees; Making Provisions for a Resident Agent in the State; Levying a Tax on the Gross Receipts From the Licensing of Such Rights Within the State of Florida; Providing for the Enforcement of This Act; the Promulgation of Rules and Regulations, Governing the Enforcement of This Act; Appropriating the Proceeds of the Tax and Fees Levied Herein and Repealing Certain Laws in Conflict Herewith.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words, "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any

compensation on account of any such sale, license or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such compositions; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

Section 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of

the United States, cause a list of all such copyrighted material filed with his to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable

discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof; and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof.

Section 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

Section 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

Section 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing

of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any compensation for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

Section 5. At the time of filing the information required in Sections 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service of process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

Section 6. No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or all of the lists, licenses agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

Section 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax, for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940 with respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth of March of each succeeding year, with respect to the gross receipts of the preceding calendar years. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this act and may require such persons to appear before him at his office in the capitol in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days notice to such person through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice with the Comptroller shall send by "registered mail, return receipt requested".

Should the Comptroller determine that any person liable for any tax or fees under this act has made an incorrect return or has made no return at all, or has failed to pay any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge upon the Comptroller's application properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the Judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer and from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2% per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership the receiver shall make a return to the court which shall order all assets returned to the taxpayer.

Section 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such composition, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

Section 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

Section 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

Section 11. Any person in this State aggrieved by reason of any violation of this act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of this act or to require specific performance under the provisions of this act and shall be entitled to recover his costs including reasonable attorneys fees to be fixed by the court.

Section 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and other similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

Section 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists.

Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida 1937. Provided further, the revenue provisions of this Act shall take effect immediately it becomes a law and persons having contracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any data.

Section 16. If any section in this Act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 17. This Act shall take effect immediately upon its becoming a law.

Became a law without the Governor's approval.
Filed in Office Secretary of State, June 12, 1939.

APPENDIX "C".

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION.

Equity #12.

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al., *Plaintiffs*,

vs.

GEORGE COUPER GIBBS, Individually and as Attorney General of the State of Florida, et al., *Defendants.*

Opinion.

Before Hutcheson, Circuit Judge, and Long and Barker, District Judges.

HUTCHESON, Circuit Judge:

Plaintiffs are owners of musical copyrights or rights of renewal therein, which have been pooled with the American Society of Composers, Authors and Publishers, hereafter called ASCAP. Defendants are the state officers charged with enforcement of the two statutes the suit brings in question. As originally brought, the suit was to enjoin the enforcement of Chap. 17,807, Laws of Florida, 1937.[1] There

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[1] 1937 Act, Chapter 17807.

Section 1 prohibits combinations of authors, composers, publishers, owners of copyrighted vocal or instrumental musical compositions from forming any society, association, partnership, corporation or other group or entity, when the members therein constitute a substantial number of those owning or controlling copyrighted vocal or instrumental musical compositions and when one of the objects of such combination is the determination and fixation of license fees, required by such combination for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit, declares the association so formed unlawful, prohibits the collection of license fees so fixed and makes persons collecting or attempting to collect them subject to the penalties of the Act.

Section 2-A requires selling prices to be stated on sheet music or records

was a temporary injunction, an appeal and an affirmance.[2] After the enactment of Chapter 19653, Florida Laws, 1939,[3]

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and gives purchaser general public performance rights to use for all purposes on paying such price.

Section 2-B provides if selling price not so fixed, purchaser of the composition may use the composition privately or publicly without further license fee and exempts such purchaser from accountability to the copyright owner.

Section 2-C declares against purpose to give a purchaser general right to resell or distribute; or to prevent copyright holders from determining prices not in combinations forbidden in Section 1.

Section 3 declares void existing contracts contrary to the Act and makes their attempted enforcement illegal.

Section 4-A—Relieves Florida broadcasting stations from payment of licensee fee for re-broadcast of copyrighted music controlled by a combination prohibited by Section 1.

Section 4-B—Similarly forbids collection by outside station of license fees to unlawful combination.

Sections 5-A and 5-B—Counterparts of Section 4-A and 4-B, except relating to theatres, etc.

Section 6—Concerning music broadcast or emanating from without the state, makes outside source of emanation solely liable for compensation to copyright owner and deprives owner of right to collect from Florida user.

Section 7-A—Provides for service of process on agent of outside combination.

Section 7-B—Declares such an agent a part of the combination for which he acts and as such, subject to all the penalties of the Act.

Section 8—Penalty clause for violation of Act.

Section 9—Confers jurisdiction on circuit courts and designates state attorneys under Attorney General to enforce public rights and penal provisions, particularly to dissolve unlawful combinations and otherwise enforce Section 1.

Section 10-A and 10-B—Confers jurisdiction on circuit courts in private suits under the Act.

Section 11-A and 11-B—Provides for discovery of documentary evidence and penalty for failure to produce same.

Section 12—Severability clause.

Section 13—Makes act and rights thereunder cumulative to rights and remedies under existing law.

Section 14—Effective date. (Approved and effective June 9, 1937).

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[2] Gibbs v. Buck, 307 U. S. 66.

[3] 1939 Act, Chapter 19653.

Section 1. Definitions. Defines blanket license as including any device whereby public performance for profit is authorized of the combined copyright of two or more owners. The term blanket royalty or fee includes any device whereby prices for performing rights are not based on the public performance of individual copyrights.

it was extended by a supplemental bill to include that chapter in its scope and to obtain injunctive relief, temporary and permanent as to it.

Section 2. (Disclosure section.) Requires seller of public performance rights in copyrighted music to file with Comptroller a list showing name and title of composition, date and number of copyright, names of author, publisher and present owner and owner of performance rights, with provision for filing additional lists and filing fee of two cents per composition; also for filing affidavit describing rights intended to be sold and verifying the statements in the listing or registration, with name, agent, occupation, residence and authority of affiant.

Section 3. Makes such lists available for public inspection and taking copies "in order that any user * * * may be fully advised concerning the performing rights * * * and avoid being overreached * * * and avoid committing innocent infringement." Comptroller may publish lists and must give certified copies and anyone selling, licensing or otherwise disposing of performing rights, must exhibit them.

Section 4-A. Makes it unlawful "for two or more owners" of musical or dramatics musical copyrights to associate or combine together for purposes of issuing blanket public performance licenses upon a blanket royalty or fee unless each owner or such combination shall make available to each user of such composition within the state the right to perform each at a price established for each separate performance by filing with the Comptroller either as part of the list under Section 2 or separately a schedule of prices for the performing rights to each separate performance with affidavit that such price was fixed by the copyright owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of publication of schedules.

Section 4-B. Provides any person issuing a blanket license shall file verified copies of blanket performance license with Comptroller within thirty days after issuance and fixes filing fee.

Section 4-C. Prohibits the sale or license of performing rights to any musical composition for a compensation based "in whole or in part on any program not containing any such composition," and makes illegal and invalid any charge for compensation so based.

Section 4-D. Makes sale of public performance rights or collection of compensation unlawful if composition not listed as provided in Section 2.

Section 5. Performing rights owner must authorize Secretary of State to accept service of process and copy shall be mailed him by Secretary.

Section 6. No action to be brought without prior compliance with Act. Comptroller to furnish copies of any papers at same fees as clerk of circuit court.

Section 7. Imposes three per cent tax on gross receipts, provides for annual tax return, inspection and audit of books by Comptroller and provides for means of collection.

The claim of the original and supplemental bills in general was: that the statutes were confessedly aimed as ASCAP and its constituent members and were class legislation of the most indefensible kind and that in addition to violating the equal protection, liberty of contract and due process, Clauses of the Fourteenth Amendment, they violated various other constitutional provisions, Federal[4] and State.[5]

In particular the claim as to ASCAP was that it had been organized not to increase, or obtain unfair, prices for the performing rights of copyrighted musical compositions, but to protect authors, owners and publishers from the systematic piracy of their performing rights which, acting alone, they were powerless to prevent. And there was the further claim as to it that by fair and reasonable contracts

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Section 8. Makes unlawful public performance of compositions without authority of owner if he has complied with the statute.

Section 9. Makes violations misdemeanors under general law.

Section 10. Makes agents of owners subject to the statute.

Section 11. Confers on circuit courts jurisdiction or private suits.

Section 12. Confers on circuit courts jurisdiction of enforcement of public rights by state attorneys under Attorney General upon complaint of a person aggrieved.

Section 13. If prosecuting officers fail to act, aggrieved party may bring such civil action as state officers might have brought.

Section 14. Appropriates taxes above expenses to general revenue fund.

Section 15. Supersedes inconsistent laws with express saving clause as to prior lawful contracts and "any of the statutes of Florida pertaining to monopoly or restraint of trade" including but not limiting the generalities of the foregoing sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14-C, Chap. 17807, Laws of Florida, 1937. Provides for filing copies of existing contracts within thirty days and for compliance otherwise with Act within thirty days.

Section 16. Severability clause.

Section 17. Effective date. (Filed and effective June 12, 1939.)

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[4] The Copyright Clause (Art. 1, Sec. 8, Cl. 8) and the Federal Laws enacted pursuant thereto; the Impairment of Contract Clause (Art. 1, Sec. 10); the Privileges and Immunities Clause (Art. 4, Sec. 2); the Interstate Commerce Clause (Art. 1, Sec. 8, Cl. 3).

[5] The Privilege against self-incrimination (Sec. 12, Declaration of Rights); the Prohibition of cruel and unusual punishment (Sec. 8, Declaration of Rights); the Equal Protection and Liberty of Contract Clauses (Sec. 1, Declaration of Rights).

and arrangements, it had at the same time, afforded full public use of and access to copyrighted musical compositions at fair and reasonable prices, and secured to copyright owners, the benefits of the copyright law. While the claim as to the statutes in question was that they had been enacted, not in response to a public need, to make effective the general will of the people of Florida, but at the instigation of an organized group or band of radio broadcasters and other users of music in order that, the association stricken down and outlawed in Florida, they might with complete impunity, again pirate the performing rights to copyrighted musical compositions without making payment to the owners therefor. As to the 1937 statute, the claim in general was that, though put forward as an anti-monopoly statute, it was really a statute designed and enacted, in the interest and at the behest of this anti-copyrighted group, to deprive the members of the society of the protection, in Florida, of the copyright laws. In particular it was that, by at once outlawing ASCAP and providing for the performance, without compensation to them, of the copyrighted vocal or instrumental musical compositions of its members, the statute undertook in effect to nullify the copyright laws and to take plaintiffs' properties in their copyrighted compositions without compensation and without due process.

As to the 1939 statute, the claim was that its rigorous provisions for registration, its prohibitions against and restriction on blanket licensing, its prohibitions against collection of compensation when based in whole or in part on any program not containing such composition and its general provisions for filing fees, taxes, etc., are so in derogation of the rights of owners under the copyright law, and so onerous that they amount to an illegal taking for private use, that is, for the benefit of broadcasters and other users, of plaintiffs' rights in and under their copyrights.

The defense in general was a denial that the legislation was oppressively or partisanly conceived and that it operated in violation of any constitutional protection, and an assertion that it aimed at and constitutionally reached the evils of a combination to fix prices and in restraint of trade.

A combination, organized and operating to fix the prices to be paid for, and to restrain freedom of trade in, the public performance of individual copyrighted musical compositions at a fair price per use, by blanketing them together under general licenses covering many compositions of many owners, authors and composers, and refusing to license or permit the licensing individually and per use of particular compositions. In particular the defense as to the 1937 Act was: that it was an anti-monopoly Act and that taken as such it was valid; that sections 2-A and 2-B and 6, which purport to authorize the performance within the state of copyrighted musical compositions without payment by the users therefor, have been repealed by the 1939 Act; and that the remaining sections are valid and the Act as to them must stand as an anti-monopoly Act condemning and making illegal, combinations like those of ASCAP and the other plaintiffs.

As to the 1939 Act, the defense was: that it is in general an Act for disclosure, and as such, is valid under Allen *v.* Riley, 203 U. S. 347; and that its other provisions requiring blanket licenses by two or more persons and prohibiting sales or licenses at a price, based other than on a use in a program of the particular music sold or licensed, are mere regulatory measures to reach and do away with the evils of blanket licensing in all its forms.

With their contentions thus put forward, plaintiffs and defendants ring the changes on their respective arguments. Plaintiffs urge upon us that ASCAP is a beneficial, defendants that it is an evil institution; plaintiffs that the copyright laws protect them from the legislation; defendants that copyright owners may not, any more than others, form combinations to monopolize or restrain trade. If the case were as simple in its issues as each contender thinks it is, if it turned, on the one hand, simply on whether plaintiffs had rights and, on the other, as simply on whether these rights were subject to regulation, we could and would end it quite simply by saying to defendants, "The plaintiffs certainly do have rights in their copyrighted musical compositions," and to plaintiffs, "These rights are certainly not beyond reasonable state regulation."

But, the answer to the questions the suit raises is not so simply found. For conceding both plaintiffs rights and the State's power to subject them to reasonable regulation, the difficulty remains of determining whether the statutes in question are unreasonable prohibitions masking under the guise of regulation, or if regulations, whether, unduly and beyond the legitimate purpose to be served, they hamper and restrict plaintiffs' undoubted rights. In short, the question for decision comes down at last to, and is to be decided by, not a general statement of principles, for as to them there is no real dispute,[6] but a construction and interpretation of the statutes under attack, as to what they purport to do and whether they may constitutionally do that.

Both plaintiffs and defendants see plainly enough that this is so and by an analysis both of the statutes as a whole and of each section thereof, plaintiffs undertake to show their invalidity, defendants their validity. Plaintiffs pointing to the confiscatory provisions of Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, by which the 1937 Act undertakes to permit performance, in Florida, of copyrighted music without compensation, urge upon us that not only these sections but the statute as a whole is invalid because, not a reasonable regulation of, but a repressive prohibition of, dealings

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[6] They are sufficiently stated for our purpose in Buck *v.* Swanson, — F. (2d) —, dealing with a Nebraska statute of the same purport as the Fla. 1937 Act, and we need not restate them here. Other authorities not cited in Buck's case, which may be consulted are: For the plaintiffs: Lawton *v.* Steele, 152 U. S. 133; Hale *v.* Bunco, 306 U. S. 363; State ex rel. Fulton *v.* Ives, 167 So. 394; Peoples Petroleum Producers *v.* Sterling, 60 F. (2d) at 1047; McLeish *v.* Binford, 52 F. (2d) 151; Wolff *v.* Industrial, 262 U. S. at 539; Smith *v.* St. Louis S. W., 181 U. S. at 255; McFarland *v.* American Sugar Refining Co., 241 U. S. 79; Herbert *v.* Shanley, 242 U. S. 591; Buck *v.* Jewell, 283 U. S. 191; Remick *v.* American Automobile, 5 F. (2d) 411.

For the defendants: Allen *v.* Riley, 203 U. S. 347; Fox Film Corp. *v.* Boyal, 286 U. S. 123; Carbice Corp. *v.* Amer. Patents Corp., 283 U. S. 27; Straus *v.* Amer. Publishers Assn., 231 U. S. 222; Interstate Circuit *v.* U. S., 306 U. S. 208; Strassheim *v.* Daily, 221 U. S. 280; Ford *v.* U. S., 273 U. S. 593; Stephenson *v.* Binford, 287 U. S. 251; Ethyl Gasoline Corp. *v.* U. S., 60 Sup. Ct. 618-625; Tigner *v.* State, 84 L. Ed., 756; U. S. *v.* Socony, 84 L. Ed. 760.

For both: Standard Oil Co. *v.* U. S., 283 U. S. 163.

in copyrighted music, it breathes and attempts to make effective throughout the unconstitutional spirit of repression and reprisal. Outlawing ASCAP and those in association with it, and expropriating their property for the use, without compensation, of radio broadcasters and others, is, they say, in violation of every constitutional principle, operates as a kind of Bill of Attainder.

Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute.

We do not think so. In complete agreement with what was said in Buck's case as to the invalidity of Sections 2-A and 2-B, of the Nebraska Law, we find invalid the similar sections of the Florida 1937 Law. For the same reasons, that they unreasonably interfere with and in effect deprive the owners of their copyright protection, by imposing unlawful conditions, in effect a servitude, in favor of those desiring to use them, upon the performing rights in their copyrighted musical compositions, and even under named conditions completely take the copyright, by permitting use without compensation, we find Sections 3, 4-A, 4-B, 5-A, 5-B and 6, also invalid.

There remain: Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it.

It is, of course, the duty of a Court, if reasonably possible, consistent with the protection of constitutional rights, to receive all doubts as to the validity of a statute in favor of its constitutionality, sustaining it, if it can be done as a whole, or if that cannot be done, as to the part of it that is constitutional. But legislation, even though containing a separability clause, is not of the isolated sections in it, but of the law as a whole, and the function of the Court, if there are invalid sections in a statute, is to search out, not isolated valid ones, but the valid law as a whole. To do this, a Court may, especially where the Act contains a separability clause, cut and pare and trim away its diseased parts, if, when this has been done, the live spirit of the law as enacted still remains, the living tree still stands. But, law making at last is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not by lopping and paring away create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. Williams *v.* Standard Oil Co., 271 U. S. 241; Sage *v.* Baldwin, 55 Fed. (2d) 97, and cited cases. Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind, we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the "without pay" sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in Buck *v.* Swanson, supra, that the whole Act

is invalid and must fall. We are the more inclined to this view because of the inconsistent provisions in the 1939 Act, and because, while specifically providing that nothing in it shall be construed to repeal any of the statutes of the state of Florida, pertaining to monopoly or restraint of trade "including Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937", that Act by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole they must stand or fall together. In this view it is not necessary for us to determine whether as plaintiffs claim, Section 1 is invalid, for indefiniteness and uncertainty in its provision that it shall apply to combinations only where "a substantial number" of owners are concerned, nor is it necessary to determine whether defendants are right in their counter to this claim of plaintiffs, that if the statute might be regarded as indefinite in its application as to some, it is certanly not so in its application to plaintiffs, for they admit that they own or control substantially all of the playable copyrighted musical compositions, and they may complain of the statute, not as it applies to others but only as it applies to themselves.

When it comes, however, to the 1939 Act we think the matter stands differently, for having a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and, except as to Sections 4-A and 4-C, which are not germane to that purpose, having gone about effecting that purpose in a reasonable way, the Act as a whole is valid and may stand with those sections stricken from it. These sections constitute clear invasions of plaintiffs' rights under federal laws for which no warrant or justification can be found in the exercise of the state's police power. They may not stand.

As to 4-A, it seriously invades the rights of copyright owners to sell or license or refuse to sell or license as they please, and by its compulsion, opens to the public the unlimited right to use copyrighted material upon terms the owner must fix generally in advance, and under conditions which are not only unreasonable in fact but are in their

nature beyond the power of the state to impose. A copyright owner has a right to sell or withhold from sale the matter of, and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state.

The defendants seem to recognize that this would be so if the condemned provision were not coupled in the statute with a provision permitting dealing in copyrighted music under blanket licenses. They seem to think that the permission of the statute for two or more owners to combine in a blanket license authorizes the state to impose unreasonable restrictions upon that joining.

This will not at all do. It is not unlawful for one or more copyright owners, merely to pool their compositions for one royalty for them as pooled. Standard Oil Co. *v.* United States, 283 U. S. 263. Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do does not authorize it to impose unconstitutional restrictions upon that doing. "But a state may not impose any condition which requires the relinquishment of a right guaranteed by the constitution." Saga *v.* Baldwin, 55 Fed. (2d) at 969. The copyright laws guarantee to owners of musical compositions protection against the use thereof without their consent.

The state of Florida may not, therefore, as a condition to their being allowed to sell in Florida, a right they already have under the Federal constitution and laws, compel them to throw open to general public use the performing rights to their compositions at a price fixed in advance.

Section 4-C is for the same reason invalid. It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud and imposition. In attempting to prevent individuals from contracting for the use of their copyrighted music upon any price bases they and their customers may select, the Act goes clearly beyond and is wholly outside the reasonable exercise of the police power. People's Petroleum *v.* Sterling, note 6 *supra*. The prohibition of the section against basing the price upon programs in which a particular piece of music is not performed is a completely arbitrary one and as such, it could not stand if the subject of the prohibition were uses unprotected by copyright. For, the end and aim of the prohibition is to limit the right to sell or license copyrighted musical compositions to contracts based solely upon performances per piece of each particular piece of music and to prohibit contracts arrived at on any other basis however reasonable and well adapted to the needs of and acceptable in the business generally, of selling and licensing performing rights in copyrighted musical compositions. If the statute dealt with contracts for the hiring of, work and labor, or personal services, of animals or things and by its prohibition prevented, wages and salaries from being fixed except on the basis of piece work, the hire of horse, car or boat from being fixed, except upon the basis of each particular use, or journey, we think it would be admitted that such a statute would be invalid as an invasion of the right and liberty of contract, and not at all a reasonable exercise of the police power of the state. Certainly the state is in no better, the owner of a copyright in no worse position as to rights protected by copyright, "While the copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga *v.* Inter Ocean Newspaper Co.,

215 U. S. 182, 'The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.'

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. *v.* Post Pub. Co. (D. C. Mass.) 27 Fed. (2d) 556; American Tobacco Co. *v.* Werckmeister, 207 U. S. 284;" Buck *v.* Swanson, note 6 *supra*.

For the reasons herein stated, the injunction prayed for will be granted against the enforcement of the 1937 Act and as to Sections 4-A and 4-C in the 1939 Act; as to the remainder of the 1939 Act, it will be denied.

(S.) J. C. HUTCHESON, JR.,
U. S. Circuit Judge.

(S.) AUGUSTINE V. LONG,
U. S. District Judge.

(S.) WILLIAM J. BARKER,
U. S. District Judge.

Filed August 5, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 611

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellants,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

STATEMENT AS TO JURISDICTION.

FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
MANLEY P. CALDWELL,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION

Equity No. 12

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, etc., et al.,

Complainants,

vs.

GEORGE COUPER GIBBS, Individually and as Attorney General of the State of Florida, et al.,

Defendants.

(a) Statutory Provisions Sustaining the Jurisdiction.

The complainants rely upon Judicial Code, Section 238 (U. S. C. Tit. 28, Sec. 345), and Judicial Code, Section 266 (U. S. C. Tit. 28, Sec. 380), respectively, as amended, as sustaining the jurisdiction of the Supreme Court of the United States to review the above entitled cause upon appeal, the decree appealed from having been made by a specially constituted three-judge court.

(b) The Statute of the State of Florida, the Validity of Which is Involved.

The statute of the State of Florida, the validity of which is involved in this appeal, is the Act of June 12, 1939, being Chapter 19653 of the Laws of Florida, 1939, General Laws, Volume 1, pages 1575-1583, inclusive. A copy of this stat-

ute is hereby annexed as Appendix "A" and will be referred to herein as the 1939 Act. Its provisions are summarized below.

(c) The Decree Sought to be Reviewed Insofar as the Same Denied a Permanent Injunction as to a Part of the 1939 Act.

The decree appealed from was made and entered August 5, 1940. The petition for appeal was presented November 2, 1940.

(d) The Nature of the Case and of the Rulings of the Court.

This action was brought by several owners of copyrighted musical compositions in their individual capacities as well as in their joint capacities as members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"), to enjoin the enforcement of a statute of the State of Florida on the ground that such statute is in conflict with the copyright provisions of the Federal Constitution (Article 1, Section 8, Clause 8) of the Copyright Act of 1909, as amended, enacted thereunder (Act of March 4, 1909, 35 Stat. L., pp. 1075-1088, as amended; U. S. C. Tit. 17) and that it deprives complainants of their property without due process of law and denies equal protection of the laws. The original bill of complaint was filed on February 7, 1938. This bill sought to enjoin a law enacted by the State of Florida in 1937, hereinafter referred to as the "1937 Act" (Chapter 17807, Laws of Florida, 1937, General Laws, Volume 1, pp. 204-214, inclusive).

On April 17, 1939, this Court affirmed an order of the United States District Court for the Northern District of Florida, granting a temporary injunction restraining enforcement of the provisions of the 1937 Act (307 U. S. 66). Thereafter the 1939 Act which is involved in this appeal,

was passed (Appendix "A" hereto annexed). Subsequently, on October 19, 1939, complainants filed a further supplemental bill of complaint to enjoin enforcement of the 1939 Act on the ground that the 1939 Act was in conflict with the same provisions of the Federal Constitution and the Copyright Act of 1909, as amended, which have been set forth above in reference to the 1937 Act.

On October 30, 1939, a specially constituted District Court, consisting of Honorable Joseph C. Hutcheson, Jr., Circuit Judge, Honorable Augustine V. Long, District Judge, and Honorable Louie W. Strum, District Judge, granted a temporary injunction restraining enforcement of the 1939 Act *pendente lite.*

Thereafter, the issues were tried before a court consisting of Honorable Joseph C. Hutcheson, Jr., Circuit Judge, Honorable Augustine V. Long, District Judge, and Honorable William J. Barker, District Judge. After the conclusion of the trial, the decree appealed from was entered on August 5, 1940. The said decree invalidated the 1937 Act in its entirety and also invalidated Sections 4A and 4C of the 1939 Act. The decree, however, upheld the remaining sections of the 1939 Act, to wit: Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, on the ground that such sections had a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and that the State of Florida had gone about effecting that purpose in a reasonable way in the sections of the 1939 Act other than Sections 4A and 4C.

Complainants appeal from so much of the decree of August 5, 1940 as sustains Sections 1, 2, 3, 4B, 4D, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the 1939 Act.

Complainants contended upon the trial and contend now that the entire 1939 Act, including the sections other than 4A and 4C, as well as those two sections, deprives them of

their rights under the Federal Constitution, as set forth above, and also deprives them of certain rights under the Constitution of the State of Florida, which are not necessary to be stated as a basis for the jurisdiction of the Supreme Court of the United States.

Complainants contend that the 1939 Act imposes unreasonable burdens upon the exercise of rights granted to them under the Federal Copyright Act; that the statute interferes with exclusive rights granted to complainants under their copyrights, thus infringing Article 1, Section 8, Clause 8 of the Federal Constitution; that the main purpose of the statute was to prevent complainants from issuing blanket licenses for the use of their copyrighted works and to compel them to issue licenses solely in the manner and upon the terms prescribed in Sections 4A and 4C of said 1939 Act; and that the sections which have been upheld were subsidiary to that main purpose of the act as expressed in Sections 4A and 4C thereof; that no evil was shown to exist which might support the requirement of Section 2 of the 1939 Act which bars complainants from licensing the performing rights of their copyrighted works in the State of Florida unless the works are registered in that State, such registration giving the registration number of the work as registered in the Copyright Office of the United States. This would bar copyright owners from licensing their copyrighted works in Florida, unless such works have been registered in the Copyright Office. This would impose a burden upon the enjoyment of rights granted by the Federal Copyright Act, which rights Congress has vested in copyright owners without the necessity of registration as a condition precedent. *Washingtonian Pub. Co.* v. *Pearson,* 306 U. S. 30.

In invalidating Sections 4A and 4C, the court said:

> "When it comes, however, to the 1939 Act we think the matter stands differently, for, having a valid purpose to compel disclosure to protect music users against

imposition in the matter of copyrighted music and, except as to Sections 4-A and 4-C, which are not germane to that purpose, having gone about effecting that purpose in a reasonable way, the Act as a whole is valid and may stand with those sections stricken from it. These sections constitute clear invasions of plaintiffs' rights under Federal laws for which no warrant or justification can be found in the exercise of the state's police power. They may not stand.

"As to 4-A, it seriously invades the rights of copyright owners to sell or license or refuse to sell or license as they please, and by its compulsion, opens to the public the unlimited right to use copyrighted material upon terms the owner must fix generally in advance, and under conditions which are not only unreasonable in fact but are in their nature beyond the power of the State to impose. A copyright owner has a right to sell or withhold from sale the matter of, and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state.

"The defendants seem to recognize that this would be so if the condemned provision were not coupled in the statute with a provision permitting dealing in copyrighted music under blanket licenses. They seem to think that the permission of the statute for two or more owners to combine in a blanket license authorizes the state to impose unreasonable restrictions upon that joining.

"This will not at all do. It is not unlawful for one or more copyrighted owners, merely to pool their compositions for one royalty for them as pooled. Standard Oil Co. v. United States, 283 U. S. 263. Section

4-a does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do does not authorize it to impose unconstitutional restrictions upon that doing. 'But a state may not impose any condition which requires the relinquishment of a right guaranteed by the constitution'. Sage *v.* Baldwin, 55 F. (2d) at 969. The copyright laws guarantee to owners of musical compositions protection against the use thereof without their consent. The state of Florida may not therefore, as a condition to their being allowed to sell in Florida, a right they already have under the Federal constitution and laws, compel them to throw open to general public use the performing rights to their compositions at a price fixed in advance.

"Section 4-c is for the same reason invalid. It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud and imposition. In attempting to prevent individuals from contracting for the use of their copyrighted music upon any price bases they and their customers may select, the Act goes clearly beyond and is wholly outside the reasonable exercise of the police power. People's Petroleum *v.* Sterling, note 6 supra. The prohibition of the section against basing the price upon programs in which a particular piece of music is not performed is a completely arbitrary one and as

such, it could not stand if the subject of the prohibition were uses unprotected by copyright. For, the end and aim of the prohibition is to limit the right to sell or license copyrighted musical compositions to contracts based solely upon performances per piece of each particular piece of music and to prohibit contracts arrived at on any other basis, however reasonable and well adapted to the needs of and acceptable in the business generally, of selling and licensing performing rights in copyrighted musical compositions. If the statute dealt with contracts for the hiring of, work and labor, or personal services, of animals or things and by its prohibition prevented, wages and salaries from being fixed except on the basis of piece work, the hire of horse, car or boat from being fixed, except upon the basis of each particular use, or journey, we think it would be admitted that such a statute would be invalid as an invasion of the right and liberty of contract, and not at all a reasonable exercise of the police power of the state. Certainly the state is in no better, the owner of a copyright in no worse position as to rights protected by copyright, 'While the copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga *v.* Inter Ocean Newspaper Co., 215 U. S. 182'" The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. *v.* Post Pub. Co. (D. C. Mass.) 27 Fed. (2d) 556; American Tobacco Co. *v.* Worckmeister, 207 U. S. 284; Buck *v.* Swanson, note 6 *supra.*"

Complainants urge that the same considerations apply to the other sections of the 1939 Act.

(e) Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

Buck v. *Gallagher*, 307 U. S. 95 (Probable jurisdiction noted October 10, 1938, 305 U. S. 569);
Clark v. *Poor*, 274 U. S. 554;
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245;
Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16.

(f) Simultaneously with the filing of complainants' petition for appeal herein defendants will present a petition for appeal from so much of said decree of August 5, 1940, as invalidated the 1937 Act and Sections 4A and 4C of the 1939 Act. Complainants' cross appeal, together with defendants' appeal, will, therefore, bring before this Court for adjudication the validity of the entire 1937 Act and the entire 1939 Act.

FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
MANLEY P. CALDWELL,
Counsel for Complainants.

APPENDIX "A."

HOUSE BILL 1103 AND SENATE BILL 635 EFFECTIVE MAY 1939

A Bill to be Entitled:

AN ACT Relating to Public Performing Rights in Copyrighted Musical Compositions and Dramatico-Musical Compositions; Defining the Same; Regulating Licensing of Same; Prescribing Filing Fees; Making Provisions for a Resident Agent in the State; Levying a Tax on the Gross Receipts from the Licensing of such Rights within the State of Florida; Providing for the Enforcement of this Act; the Promulgation of Rules and Regulations, Governing the Enforcement of this Act; Appropriating the Proceeds of the Tax and Fees Levied Herein and Repealing Certain Laws in Conflict Herewith.

Be it Enacted by the Legislature of the State of Florida:

Section 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

Section 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, cause a list of all such copyrighted material filed with him to be published once a year or oftener in

a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule or prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable

to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof; and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof.

Section 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

Section 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

Section 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-

musical composition to make any charge or to contract for or collect any compensation for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

Section 5. At the time of filing the information required in Section 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service of process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

Section 6. No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

Section 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax, for

the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940, with respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth day of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March of every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this Act and may require such persons to appear before him at his office in the Capitol, in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days notice to such person through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested".

Should the Comptroller determine that any person liable for any tax or fees under this Act has made an incorrect return or has made no return at all, or has failed to pay any

tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge upon the Comptroller's application properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer and from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2% per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership, the receiver shall make a return to the court, which shall order all assets returned to the taxpayer.

Section 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such composition, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

Section 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

Section 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions

or acts in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

Section 11. Any person in this State aggrieved by reason of any violation of this Act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of this Act or to require specific performance under the provisions of this Act and shall be entitled to recover his costs, including reasonable attorneys fees to be fixed by the court.

Section 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this state, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and other similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and

imposed are deducted, the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this Act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

Section 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists.

Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807. Laws of Florida, 1937. Provided further, the revenue provisions of this Act shall take effect immediately it becomes a law and persons having contracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any date.

Section 16. Any section in this Act, or any part of any section that shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 17. This Act shall take effect immediately upon its becoming a law.

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Supreme Court of the United States

October Term 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,
Appellants

—vs.—

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.
Appellees.

No. 611

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.
Appellants

—vs.—

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANTS (Defendants Below) In Case 610—and—APPELLEES in Case 611

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Supreme Court of the United States

October Term 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,

Appellants

—v.—

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,

Appellees

No. 611

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,

Appellants

—v.—

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,

Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR APPELLANTS in Case 610 and APPELLEES in Case 611

Opinion Below

The opinion of the United States District Court for the Northern District of Florida is reported in 34 Federal Supplement, 510. This is the second appearance of the case in this Court, the previous opinion being reported as *Gibbs v. Buck*, 307 U. S. 66.

NOTE: Emphasis in quoted matter in this brief is supplied unless otherwise indicated.

Jurisdiction

Jurisdiction rests upon U. S. Code, Title 28, Section 380. Paragraph 1 of Rule 12 has been complied with and this Court has noted probable jurisdiction.

Statement of the Case

This suit was originally brought to enjoin the enforcement of Chapter 17807, Laws of Florida 1937, and was extended by supplemental bill to attack Chapter 19653, Laws of Florida 1939, copies of which statutes are appendices "A" and "B" to this brief. For a complete analysis of the provisions of these two statutes see notes to opinion in *Buck v. Gibbs,* 34 F. Supp. 510.

The appellees in Case 610 and appellants in Case 611 were the plaintiffs in the Court below and will be referred to in this brief as "plaintiffs." They are the authors, composers or publishers of musical copyrights which have been pooled for licensing of performing rights with plaintiff. American Society of Composers, Authors and Publishers. Appellants in Case 610 and appellees in Case 611 were the defendants in the case below and will be referred to as "defendants." They are the State officers charged with enforcement of the two statutes.

It was alleged in the original and supplemental bills of complaint (R. 1, 111) that the statutes were class legislation aimed at the defendants; that they violated the copyright clause, Art. I, Sec. 8; impairment of contract clause, Art. I, Sec. 10, and the Interstate Commerce clause, Art I, Sec. 8, and the Fourteenth Amendment of the Constitution of the United States; and that they also violated Sections 1, 8 and 12 of the Declaration of Rights of the Florida Con-

stitution, which provide against self-incrimination, cruel and unusual punishment and equal protection and for liberty of contract.

The defendants contended by their motions and answer (R. 78, 100, 179, 182) that since the plaintiffs were a self-confessed price-fixing monopoly engaged in restraint of trade, the Court should not have granted any injunctive relief in aid of those same illegal activities; that the statutes represent a valid exercise of the State police power to regulate and prevent the evils of combinations fixing prices and unreasonably restraining trade; that the 1937 Act was principally an anti-monopoly act and as such was valid; that Sections 2-A, 2-B and 6 which purport to authorize the performance within the State of copyrighted musical compositions without payment by users therefor were repealed by the 1939 Act; that the 1939 Act was principally enacted to compel disclosure of ownership in order to protect music users against imposition in the matter of copyrighted music.

The original bill of complaint was filed with a motion for a temporary injunction. Defendants filed motion to dismiss the bill (R. 78) on the ground that there was lack of federal jurisdiction and on the grounds generally set forth above. The Court granted the interlocutory injunction and denied the motion to dismiss on the ground that there was doubt as to the constitutionality of the 1937 Act, and its immediate enforcement might produce irreparable injury. Defendants appealed to this Court, which affirmed the lower court on the grounds that there was a sufficient showing of federal jurisdiction and no abuse of discretion in granting a temporary injunction. All other questions were expressly reserved for final hearing. (307 U. S. 66.)

Mr. Justice Black in a minority opinion stated that there was no doubt of the power of the State to enact such a statute in restraint of monopoly; that there was no duty on the defendants to enforce any provisions other than those prohibiting price-fixing; that the officers had properly disclaimed any duty to enforce Sections 2-A, 2-B and 6 and thereby made moot all question of the constitutionality of those sections; that on the record the plaintiff Society was a powerful, price-fixing combination:

> "* * * that actually wields the power of life and death over every business in Florida and elsewhere dependent upon copyrighted musical compositions for existence." *Gibbs v. Buck,* supra, at page 82.

The Court granted an interlocutory injunction against the enforcement of the 1939 law and entered its supplemental findings of fact and conclusions of law (R. 182). Defendants filed their answers to the bill and further supplemental bill (R. 100, 185) in which the defenses hereinabove set forth were alleged.

The case thereupon came on for trial and evidence was taken before the three judges at Gainesville, Florida, (R. 463-1082); also the depositions of certain witnesses were introduced at the trial (R. 191-463).

After hearing the evidence and arguments of counsel, the court entered its findings of fact and conclusions of law (R. 1082), and rendered an opinion in which it held that Sections 2-A, 2-B, 6 and 4-A, 4-B, and 5-A and 5-B of the 1937 laws were unconstitutional, and since these provisions were not severable from the remaining provisions of the law, the whole statute was invalid.

The court did not discuss the evidence as to the price-fixing monopoly and restraint of trade in which the plaintiffs were shown to be engaged, nor did it discuss the constitutionality of the anti-monopoly provisions of the 1937 Act. It upheld the constitutionality of the 1939 Act with the exception of Sections 4-A and 4-C-, these being stricken because the court was of the opinion that they violated plaintiff's rights under the copyright laws, and were not a reasonable exercise of the police power of the State.

A final decree (R. 1104), granting permanent injunction as to the 1937 Act in its entirety, but only as to Sections 4-A and 4-C of the 1939 Act, was entered by the Court. From that decree both plaintiffs and defendants appealed. (R. 1106, 1113.)

Specification of Errors Intended to Be Urged

Defendants urge that the court below erred:

(1) In failing to find and hold that the plaintiffs were a price-fixing monopolistic combination engaged in restraint of trade, not entitled to injunctive aid in furtherance of those activities (Assignment 7, R. 1108);

(2) In failing to hold and find that Section 1 and the other sections of the 1937 Act not found to be void per se were separable and valid, Despite the invalidity of the other sections (Assignments 4, 5, and 6, R. 1108).

(3) In refusing to hold that all questions as to the constitutionality of Sections 2-A, 2-B and

6 of the 1937 Act were moot inasmuch as the defendants had no duties to perform with respect said sections, and in failing to find and hold that those sections had been repealed by Chapter 19653, Laws of Florida, 1939 (Assignments 8 and 9, R. 1108);

(4) In holding Section 4-A of the 1939 law unconstitutional, and in failing to recognize that it does not interfere with the right of the individual copyright owner to license or refuse to license his copyrights as he sees fit, but merely regulates the terms under which two or more owners of copyrights may pool their compositions for blanket licenses; and that the statute constitutes a reasonable exercise of the police power of the State of Florida (Assignments 11, 13, 15, R. 1109).

(5) In holding Section 4-C of the 1939 Act unconstitutional, and in failing to recognize that it was enacted in the public welfare because designed to promote the liberal use of music without the limitation imposed by the enforced payment of a percentage of the gross receipts of the users (Assignments 12, 14, 15, R. 1109).

Summary of Argument

Defendants' contentions are as follows:

I.

The Court should not have granted injunctive aid to the plaintiffs because they came into court with "unclean hands."

Under this point of the argument, it will be shown that plaintiffs are by the record in this case shown to be a price-fixing monopoly engaged in restraint of trade, and that the injunctive relief sought is in aid of those same illegal activities and should have been denied under the "clean hands" doctrine.

II.

The provisions of the 1937 Act were severable, and the Court should not have struck down the whole act merely because it found certain sections void.

Under this point, it will be shown that the provisions of the 1937 Act are not an integrated whole, but are separable in effect and by legislative declaration; one that of the purposes of the Act was to prevent price-fixing monopolies from operating in the State; that the anti-monopoly provision, Section 1, and the sections for enforcement thereof, evince a legislative intent entirely distinct from the sections which the court held unconstitutional *per se*, and should not have been invalidated on the ground of inseparability.

That Sections 2-A, 2-B and 6 are clearly separable because: (1) they were repealed by Chapter 19653, Laws of 1939; (2) defendants have no duties to perform with regard to them; (3) their purpose is wholly unrelated to the anti-monopoly provisions of the act.

That Sections 4-A, 4-B, 5-A, and 5-B are separable from the other provisions of the act because they are merely subordinate and supplementary to Section 1.

III.

Section 1 of the 1937 Statute and its dependent sections represent a valid exercise of the police power of the State of

Florida, for the prevention of monopoly and unreasonable restraints of trade.

Under this point of the argument, it will be demonstrated that the sections of the act, which the court did not declare void *per se*, represent a constitutional exercise of the police power of the state, directed to the protection of its citizens from the activities of combinations attempting to monopolize public performance rights in copyrighted music.

IV.

Section 4-A of the 1939 Act constitutes a valid regulation of price-fixing combinations.

Under this point, it will be shown that since the state has the right to prohibit altogether price-fixing combinations, it has power to make a lesser regulation by requiring combinations of two or more owners of music to offer users the option to take a license on a per piece basis fixed by the individual owner; that this section does not apply to the individual copyright owner acting alone, but only when two or more act in a combination.

V.

Section 4-C of the 1939 Statute is not invalid because it limits compensation for licensing the use of musical copyrights to programs actually using the music.

This point will deal with the practice of charging the entertainment industries for the use of copyrighted music on the basis of a flat percentage of gross receipts, regardless of whether the licensor's music was much or little, or at all used. It will be shown that this arrangement

constitutes a pernicious restraint of trade, because the users of the music, being compelled to pay the licensors on their gross income regardless of the use of the music, are deprived of all incentive to develop or use competing music or other competing forms of entertainment; that this is the evil which Section 4-C is designed to prevent.

Argument

1. INJUNCTIVE AID TO THE PLAINTIFFS SHOULD NOT HAVE BEEN GRANTED BECAUSE THEY CAME INTO COURT WITH "UNCLEAN HANDS," SEEKING AID IN PERPETUATING THEIR MONOPOLISTIC ACTIVITIES.

In 1937, and for many years prior thereto, there existed in the State of Florida a deplorable situation affecting the users of copyrighted music for public performance for profit. The publishers of copyrighted music had combined with the renowned and outstanding authors and composers of music into combinations or associations for the express purpose of fixing prices for the licensing of rights of public performance for profit of their copyrighted music. The users were subjected to various kinds of discriminations in the rates charged for the use of music by the combinations or associations. They were forced to buy performance rights in all or none of the copyrighted music which the various combinations controlled or claimed to control. They could not deal directly with any separate copyright owner for the use of the music which that copyright owner might control, but all negotiations for the purchase of performance rights had to be carried on with the price-fixing combination who forced the purchaser to purchase the right to use all the music which the combination controlled at a price fixed and determined by the combination, not by the copyright

owner, although the prospective purchaser may have had no desire to use the music of more than one copyright owner, and not all of that.

To remedy this situation, the Legislature of Florida enacted the 1937 Statute (App. "A") and later supplemented and modified this statute by enacting the 1939 Statute (App. "B").

At the time of the enactment of the 1937 Statute and thereafter there were several minor combinations of owners of copyrighted music licensing performance rights in Florida and elsewhere in the United States, but domination in the licensing field was maintained by the American Society of Composers, Authors and Publishers (hereafter called the "Society"), one of the plaintiffs herein. So great has been this domination and so vicious have been the restraints imposed by the concerted action of the members of the Society acting through the Society, that the United States Department of Justice on August 30, 1934, commenced equity proceedings against the Society for injunctive relief under the Sherman Anti-Trust Laws, which action still is pending, (*U. S.* v. *American Society of Composers, Authors and Publishers*, District Court of U. S. for Southern District of N. Y. Equity No. 78-388). This culminated, on February 5, 1941, in the institution of criminal prosecutions by the filing of a criminal Information for violations of the Sherman Act (*U. S. v. American Society of Composers, Authors and Publishers*, District Court of U. S. for Eastern District of Wisconsin, Criminal No. 4492).

The historical resume given above is fully supported by the record references furnished in the next succeeding section of this brief.

Plaintiffs' Monopolistic Activities in Violation of the Sherman Act

That plaintiff Society is a price fixing combination operating in restraint of trade is incontrovertibly demonstrated by plaintiffs' pleadings and by the evidence in this case.

1. At the time of enactment of the 1937 act, plaintiff Society admitted having approximately 123 publisher members, approximately 1,000 composer and author members (bill par. 17, R. 16) and an additional 44,000 composers, authors and publishers represented by the Society under its agreements with foreign societies, (bill par. 20, R. 17), all of whom bound themselves together for the declared purpose of fixing prices for the right to perform their combined music publicly for profit (bill Ex. D., Art of Asso., Art. 1, Sec. 1 (g), R. 51). By 1939, the admitted publisher members had increased to 131, with some 163 additional publishers owned or controlled by the publisher members, and some 1477 composer and author members. (Further Supp. Bill Ex. Q., R 155-178). However, tabulations made from the Society's own publications disclose that the Society's publisher members and subsidiaries totaled at least 311 and that the foreign publishers coming under the Society's control through affiliation contracts with foreign societies totaled at least 3513 (Def. Tr. Ex. A-3 and A-4, R. 542-543, 958-964).

2. With rare exceptions, the copyright owner of musical compositions is the publisher and not the composer and author (Bill, pars. 8-14, R. 8-15 and Ex. A thereto, R. 37; pltfs tr. Ex. 7 and 8, R., 927-935; pltf's dep. Ex. 7, R. 274, 990 A; Test. pltf's witnesses R. 290, 441). By the terms of the plaintiff's deposition exhibit 7 entitled "Stan-

dard Uniform Popular Songwriters Contract" and endorsed by the Society and the songwriters and publishers associations respectively, the writer "sells, assigns, transfers and delivers to the publisher, its successors and assigns, a certain heretofore unpublished original musical composition," etc. (R. 990 A). Consequently plaintiffs' repeated references to composers and authors in such manner as to imply that they are the copyright owners should be totally disregarded. The power of the Society to dominate and to fix prices has been derived primarily from the publishers as it is only published music which is normally available for public performance (BUCK Test. R. 798, 803). Unpublished manuscripts usually are not available for public performance purposes (R. 803.)

3. The management of the Society was, and is, vested exclusively in a self-perpetuating Board of Directors, consisting of 24 persons; 12 of whom represent publisher members; 6 represent composer members and 6 represent author members. Each director is elected to serve for a period of three years and is eligible for re-election. The terms of eight members of the Board expire each year and their successors are elected annually by the remaining members of the Board. The directors have exclusive and absolute control of the management and of all activities of the Society, including the power to fix prices, the distribution of the proceeds to members, the appointment of all committees, officers and employees. (Bill, Ex. D. Art of Asso. Art. 4, Sec. 1; Art. 5, Sec. 1-2; R. 53, 54). Pursuant to the power "to fix the rate, time and manner of payment of royalties for the performance of all works registered with the Society" (Art. of Asso. Art. 5, Sec. 2; R. 54), the plaintiff Society issues to businesses using music, only

blanket licenses conferring upon the user the right to perform publicly for profit all of the copyrighted musical compositions in the "vast reservoir" pooled in the Society. (Bill, Pars. 20-23; R. 17-21), and the blanket license fee is "fixed and determined" by the Society. (Bill, Par. 23, R. 20.)

4. The power of the combination exerted through the Society has been so great that the majority of the radio broadcasting stations of the United States, and all but one in the State of Florida, have been compelled to accept a license conract to perform the Society-controlled music, wherein the stations have been compelled to pay to the Society a fixed annual sustaining fee plus 5 percent of the gross receipts of the stations from all programs including those in which no music controlled by the Society is used, such as: sport events, news broadcasts, dramatics, and others. (Bill Ex. "F" R. 70, 1005-1007; Def. Test. TISON, R. 577-578; MITCHELL, R. 583-584; GILLIN, R. 870.) Political broadcasts, and newspaper-controlled radio stations however, are given special concessions. No percentage charge is made against political broadcasts, and newspaper controlled stations were given discriminatory license fees, in that no charge was made against income derived from programs which did not use the Society's music and a smaller sustaining fee was required, as will appear in more detail hereafter. (Def. Ex. A-7, R. 583, 1006-A, C.)

This power to fix prices has been applied to all other users of music in classified uniform contracts with prices determined by the Society. (Bill Ex. G and H, R. 74 and 75; pltf's dep. Ex. 20 to 34 inc., R. 406 to 411, 1008-1038.)

5. As pointed out above, the Society's dominating

power to fix prices has been obtained primarily through the publishers, since unpublished manuscripts usually are not available for public performance purposes. By admission of the Society's own witnesses, the Society controls "substantially all of the music in a form suitable for public performance for profit" (SCHIRMER, R. 357); it controls three to four hundred thousand copyrights—70 percent of the copyrighted music in the United States—95 percent of the popular music. (BUCK, R. 798, 803, 806-807.) To like effect was the testimony of plaintiffs' witness MILLS (R. 522) and defendant's witnesses (BELVISO, R. 561; TISON, R. 580; MITCHELL, R. 583; GILLIN, R. 867-686, 871, 872, 878).

The truth of the admissions on cross-examination by plaintiffs' witnesses and the testimony of defendant's witnesses is demonstrated by the statistical exhibits and by figures stipulated in the record, which discloses that approximately one-half of the average total of 25,000 musical compositions, both published and unpublished, registered annually with the United States Register of Copyrights are recorded in the names of the publisher members of the Society and publisher members of its foreign affiliates. (R. 542-544, 558-559, Def. Tr. Ex. A-3 and A-4, R. 958-965), though plaintiffs' witness MILLS testified that the Society did not control more than 2500 to 3000 of the annual registrations (R. 506). These tabulations covered specimen years at random during the period from 1913 to 1933, and disclosed the *minimum* copyright entries for those years which are controlled by the Society, since no effort was made to tabulate the entries made by the 56,000 (R. 501) composer and author members of the Society and foreign affiliates. Moreover,

the average 25,000 annual registrations of copyrights included both published and unpublished copyrights, whereas the copyright entries for the publishers are primarily published copyrights. Therefore, the Society's actual control of music available for public performance represents substantially more than the approximate 50 percent disclosed by the tabulations.

When it is considered that there are only some 480,656 published copyrights plus some 80,422 renewals of expired copyrights (a total of 561,077) registered with the Register of Copyrights during the past 28 years, the statutory life of a copyright (Def. Tr. Ex. A-5, R. 543, 965), and when the admissions of the plaintiff Buck (Society's President) that the Society controls between three and four hundred thousand copyrights are considered, the dominating power of the Society is apparent. This domination is corroborated further by the defendants' trial Ex. A-1 (R. 537-539, 953-954B) which disclosed that 2644 music publishers who are *not* members of the Society had registered with the Register of Copyright only 24,927 published musical compositions during the 30-year period from July 1, 1909 to Nov. 27, 1939. The list of these 2644 non-member publishers was compiled from a list prepared by plaintiff Society in 1937 which included "all publishers who registered themselves as such with the Copyright Office in Washington, D. C." (MILLS R. 509; pltf's Ex. 1, R, 918.)

6. The power created in plaintiff Society by vesting in it the exclusive public performance rights to this "vast reservoir" of music (bill par. 20, R. 18) which contains "substantially all of the music in a form suitable for public performance for profit" (SCHIRMER, R. 357), has

constituted an instrument for evil over every business dependent upon modern copyrighted music for existence. It has been used:

(a) To establish arbitrary discrimination in license fees between comparable and competing radio stations located in the same city, i. e. Tampa, Fla. (TISON, R. 577-578; MITCHELL, R. 583-584). WDAE, *owned by a newspaper*, was only required to pay to the Society a sum equal to 5 percent of the income derived from programs using the music controlled by the Society (R. 583), and this gave WDAE a saving in license fees during 1937 to 1939 of $5,111.18 over what it would have paid had it been required to pay on the same basis as its competitor, WFLA (R. 584). On the other hand, WFLA, *not newspaper owned*, was compelled to pay 5 percent of its gross income to the Society, although from 25 percent to 35 percent of that income was derived from programs in which no music controlled by the Society was used. (R. 577);

(b) To divert music written by non-members of the Society into the control of its publisher members by the requirement undisclosed in the by-laws that a composer or author will not be admitted to membership in the Society until he has had at least five compositions *published by publisher members of the Society.*

This fact was testified to unqualifiedly by Deems Taylor, of the Membership Committee of the Society (R. 233). Claude Mills, Chairman of the Administrative Committee, attempted to evade it when the Court interrogated him at final hearing (R. 515-516); later he denied it on cross-examination (R. 517). However, when confronted by a letter stating that the five publishers who accepted the applicant's compositions must be publisher members

of ASCAP, he was obliged to admit that the letter was written and signed by him (R. 519-520).

The importance of this requirement of author and composer membership is fundamental to a proper understanding of what the Society really is. Already it has been pointed out that, with few exceptions, it is the publisher, not the author or composer, who owns the copyright. By limiting the eligibility for membership of authors and composers to those whose compositions are published by one or more publisher members of the Society the publisher members are put in a position to control the society and fix its policies.

Also, by dangling the bait of possible future membership in the Society before the eyes of the non-member authors and composers, the publisher members are enabled to have offered to them a large proportion of the new music composed. All of the public performance income from these compositions flows into the Society's treasury, and the non-member author or composer gets nothing. In this way, the Society catalogue has continued to pyramid to the prejudice of non-member publishers and to the prejudice of fair competition.

Moreover, though the non-member composer and author has surrendered his writings to publisher members of Society, he has no assurance he ever will be admitted to membership, as his admission is left to the arbitrary discretion of the Society's Board of Directors. That eligible composers and authors are denied membership is disclosed by the testimony on cross-examination of plaintiffs' witness Taylor, of the Membership Committee. (R. 234).

Thus, if one looks at realities instead of form, at facts instead of words, the Society is stripped of its mask and is seen to be a powerful and monopolistic association of publishers, who, as window dressing, keep up the front of an association for the protection of the poor composer and author.

(c) To enforce the Society's demand that it be paid a blanket fee from all commercial users of music, in the case of radio 5 percent of the station's gross income, whether or not the music controlled by the Society is used. In 1935, James W. Baldwin, then Managing Director of the National Association of Broadcasters, held powers of attorney from more than 300 of the then existing radio stations in the United States. (R. 569.) Acting under order of the National Association of Broadcasters, Mr. Baldwin endeavored to obtain from the Society a form of license wherein the license fee would be based on the amount of the Society-controlled music which was used. This effort failed. On or about January 11, 1936, the Society notified all stations that they must sign five-year extensions of the then existing contracts before January 15 or thereafter be subjected to infringement suits (R. 568-569). These extended contracts were in force at the time of the trial herein and continued in force until midnight December 31, 1940.

(d) To destroy the incentive of the users of music to perform any music which is not controlled by the Society, thereby depriving non-members of the Society of the principal means of exploiting the sale and distribution of sheet music to the general public. The evidence clearly established the fact that the Society's standing levy of 5 percent of all broadcasting income, whether or not the So-

ciey's music is used, destroys the incentive of all but the few privileged stations afforded the discriminatory newspaper conract to use the music of non-members, and thereby destroys the opportunity of non-members to operate successfully in competition with the Society or its publisher members.

This is demonstrated by the experience of Warner Bros. Picture Corporation during the first six months of 1936, when it attempted to operate in competition with the Socety. The failure of that attempt, in spite of the vast resources of Warner Bros., was developed in the cross-examination of the Society's witness, Edwin H. Morris.

Morris testified as follows: He was vice president and general manager of all the Warner Bros. music subsidiaries and was a director of the Society. Warner Bros. owned Harms, Inc., M. Witmark & Sons, Remmick Music Corp., New World Corp., T. B. Harms Company, and Shubert Music Pub. Co. (R. 693). Those companies owned 20 percent to 22 percent of all music performed publicly for profit (R. 696), and for the year 1935 received from the Society approximately $300,000 (R. 693). They "withdrew from the Society at the end of 1935 *in an effort to set up our own performing rights bureau*" (R. 693), and returned as members July, 1936, because Mr. Warner decided *"that he could not make it a paying proposition."* (R. 696.) Prior to January 1, 1936 the Warner Bros. music was available to all users under their Society license, but the Society did not reduce its license fees to compensate users for the loss of that important part of its repertoire (see five-year renewal agreement of January, 1936, attached to plaintiffs' bill exhibit F, R. 70-73 and Ex. 17-L., R. 1006-A-1006-C). That renewal agreement was accepted

upon the Society's ultimatum of January 11, 1936 (BALDWIN, R. 568-569), because there was no other recourse (TISON, R. 576-577; GILLIN, R. 871).

During the six months in which Warner Bros. attempted to compete with the Society, the performance of Warner Bros. music was very small (MORRIS, R. 696-697), and the sale of sheet music by the Warner Bros. subsidiaries dropped to less than one-third (R. 702-703).

The sheet music sales figures before, during the after that six months effort at competition speak eloquently. During the first six months of 1935, the sales amounted to $696,782.90. During the last six months of 1935, the sales were $715,000. For the first six months of 1936 when they attempted to compete with the Society, the total sales were only $229,000. But immediately on their return to Society membership in July, 1936, sales jumped to $616,000 for the last six months of 1936 (R. 702-703).

If the great organization of Warner Bros., with its extremely large catalogues of music backed by the promotion power of its motion picture affiliates could not compete successfully against the Society and its publisher members, what chance does an ordinary music publisher have? It demonstrates the truth of Morris's statement on direct examination that under the existing system, Warner Bros. Society membership represents "the difference between staying in business and going out of business." (R. 691-692.)

Thus the evils and restraints on commerce and on freedom of individual action caused by plaintiffs' exercise of their vast monopolistic power, establish as flagrant and vicious a violation of the Sherman Anti-Trust Laws as have ever been presented to the Courts. It tells the story

of a price-fixing monopoly in plaintiff Society which through the concerted action of its members created in the Society the power of life or death over entertainment industries dependent upon copyrighted music for existence. No excuses for the creation and wielding of such power legally are available to the plaintiffs. The law applicable to the facts long has been well estabished by the decisions of this Court, yet these time-worn excuses probably will be advanced by plaintiffs.

The lawful individual monopolies granted by the patent and copyright statutes cannot be unitedly exercised to restrain competition, to effect a monopoly, or to fix prices.

Straus v. *American Publishers Assn.* 231 *U. S.* 222, 234-5.

United States v. *Interstate Circuit Inc. et al.* 306 *U. S.* 208.

Ethyl Gasoline Corp. v. *United States*, 309 *U. S.* 436.

The power to fix royalties created by combination is tantamount to the power to fix prices.

Standard Oil Co. (Ind.) et al. v. *United States* 283 *U. S.* 163, 174.

The power to fix prices includes the power to control and dominate, and whether reasonably exercised or not, when acquired by concerted action of individual corporations or persons in pooling their individual powers, per se violates the Sherman Anti-Trust Act.

United States v. *Trenton Potteries Co. et al.*, 273 *U. S.* 392.

The fact that the practice may have developed as the result of lengthy experimentation amongst parties to a conspiracy producing results contrary to the Sherman Act cannot give legality to their actions.

Paramount Famous Lasky Corp. et al. v. *United States* 282 *U. S.* 30, 43.

Eastern States Retail Lumber Dealers Assn. v. *United States* 234 *U. S.* 600, 613.

Neither good motives nor good primary intentions are material when results already accomplished by the acts of conspirators are involved.

Standard Sanitary Mfg. Co. v. *United States,* 226 U. S. 20, 49.

United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 340.

Anderson v. *Shipowners Assn. of Pacific Coast,* 272 U. S. 359, 400.

Thomsen v. *Cayser,* 243 U. S. 66, 36.

Bedford Cut Stone Co. v. Stone Cutters' Assn., 274 U. S. 37, 55.

Duplex Printing Press Co. v. Deering 254 *U. S.* 443, 467, 468.

Thus, the excuses offered by plaintiffs are of no avail, and the Society stands proven by the record as a combination in restraint of interstate commerce—commerce in sheet music, in music conveyed by radio. Not only that, but it has come into equity, asking injunctive aid to enable it to perpetuate these same restraints.

Public Policy Demands That the Court Give No Aid to Plaintiffs in the Present Suit

The principle for which defendants contend is

based on the maxim that "he who comes into equity must come with clean hands." The situation here fits the limitation of the rule as stated in 1 *Pom. Eq. Jur.* (3rd Ed.) Sec. 399:

> "The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction; it does not extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern."

It is freely conceded that even those attempting to perpetuate a monopoly do not thereby become general outlaws to such extent that such monopolistic combinations may not recover on contracts which do not form a part of the monopolistic plan. In the case at bar, however, it is self-evident that the relief sought is for the express purpose of perpetuating the monopolistic plan under which the plaintiffs now operate. In fact the bill has no other object. Far from disputing this statement, plaintiffs asserted in their brief (p. 22) filed in the lower court in support of their motion for a preliminary injunction:

> "In the case at bar the injury to the collective rights of the complaints is undisputed, certain and inevitable. *The Society must abandon all its contracts with its licensees in the State because they are expressly declared unlawful and are nullified by Sections 3 of the Statute.*"

Defendants have urged since the inception of this litigation that a court of equity ought not lend its aid to these plaintiffs in the furtherance of their monopolistic practices, but the court below disregarded defendants' contentions. **Yet, in a similar case before a specially constituted three-judge Federal Court in the District Court of the United States for the Western District of Washington wherein the same plaintiffs brought an action against State officials** (*Buck v. Gallagher*) **to enjoin the enforcement of the statute enacted by the Legislature of Washington, the Court on December 24, 1940 dismissed plaintiffs' action on the express grounds that plaintiffs constituted a combination in violation of the Sherman Anti-Trust Law and, as such had no standing in a court of equity.** This decision is as yet unreported, but copies of the opinion, findings and decree are attached as Appendices "C-1", "C-2" and "C-3".

The equitable maxim is directly applicable to one who invokes the aid of a court of equity in enforcing or protecting an agreement in unreasonable restraint of trade or tending to monopoly. 1 *Pom. Eq. Jur.* (3rd Ed.) Sec. 402, citing:

> *American Biscuit Co. v. Klotz*, 44 F. 721;
> *Pacific Costal Tel. Cable Co. v Western Union Tel. Co.* 50 F. 493;
> *Chicago Gas Light Co. v. Gas Light Co.* 121; *Ill.* 530,

In *American Biscuit & Mfg. Co.* v. *Klotz*, supra, Klotz had sold his bakery in New Orleans to American Biscuit Co., in exchange for stock of the Biscuit Company. Under the agreement Klotz became manager of the plant. Charg-

ing that certain frauds had been perpetrated upon him with regard to the stock paid for his sale of the plant, Klotz repudiated the contract and held possession of the bakery adversely to the Biscuit Company. The Biscuit Company brought suit for injunction and receiver. Klotz defended by answer and cross bill asking for rescission of the contract.

After announcing that the equities for the appointment of a receiver under such circumstances ordinarily would be with the plaintiff, the Court declined to do so (p. 723) because of:

> "* * * an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties."

The court then pointed out that the evidence disclosed an "attempt to monopolize" within the meaning of the Federal and Louisiana statutes against monopolies (p. 725), and that:

> "Aside from this, the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right but of judicial discretion."

Because of these considerations the Court denied the appointment of a receiver.

This case was never appealed, but it has been frequently cited, and in *McConnell v. Camors-McConnell Co.* (CCA

5, 1907), 152 F. 321, the syllabus of the Klotz case is quoted and the holding followed.

In the McConnell case, supra, the Circuit Court of Appeals denied to the plaintiff (a subsidiary of United Fruit Co.) the right to judicial aid in enforcing a contract, the purpose of which was to further a monopoly of foreign commerce in tropical fruits. In a strongly worded opinion by Circuit Judge McCormick, the Court said (p. 332):

> "The State may and will bring, in its courts, actions and suits to enforce its statute laws and its public policy against them, when necessity requires, to the extent that time and opportunity permit. But the harvest is great, the laborers are few, and time is short. These parties are wonderfully strong. Age does not impair their strength. They perennially recruit it from the highest ranks of the legal profession, with veteran experts in strategy and tactics, both grand and elementary. There are necessary delays in litigation, inherent weaknesses in its best machinery, obstructions will supervene, and all these elements are capitalized to the last extent of their earning capacity, by these highly organized unnatural persons, who decide and act with the promptness and prescience of the most superior human intellect. Direct proceedings by the state are overtaxed. *The courts, especially the courts of equity, should* not pose always as the fabled goddess, but *keep an eye single to these exigent conditions and aid the state, as they rightly may, by withholding help or grace from graceless and hurtful dealings.*"

In *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* (CCA 6, 1906) 148 F. 939, plaintiff sued for money due for wall paper sold and delivered to defendants. The appeal was based on the action of the trial court in sustaining against demurrer a special defense that the goods sued for were sold to it under certain agreements in aid of restraint of trade. In sustaining the ruling of the lower court, the opinion by Judge Lurton, later Mr. Justice Lurton of this Court, said (p. 950):

> "The defense which we sustain here is not for the sake of William Voight & Sons. The averment that they paid 50 per cent more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public. There, at last, like all burdens, it must rest. *The defense here sustained is good only because it is only possible to protect the public by refusing all assistance in carrying out an illegal agreement.*"

This decision of the Circuit Court of Appeals was affirmed by this Court, 212 U. S. 227. The Court, speaking through Mr. Justice Harlan, said (p. 262):

> **"In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."**

To like effect see *Chicago, M. & St. P. Co. v. Wabash, St. L. & P. Ry Co.* (C. C. A. 8, 1894), 61 F. 993.

In *McMullen v. Hoffman*, 174 U. S. 639, two bidders for a municipal contract had secretly agreed that while ostensibly putting in separate bids, if either were awarded the contract, its benefits should be shared equally between them.

The suit was for an accounting against the successful bidder after he had declined to pay his confederate the latter's alleged share of the profits. After a full analysis of the facts and authorities bearing on the subject, this Court held that the cause of action, arising as it did out of a contract in restraint of trade, could not give rise to any enforceable rights in favor of the plaintiff.

Therefore, the application of the "clean hands" maxim to plaintiffs who have so misued their copyright monopoly should appeal with great force to the equitable discretion of the Court.

II. THE PROVISIONS OF THE 1937 ACT WERE SEVERABLE, AND THE COURT SHOULD NOT HAVE STRUCK DOWN THE WHOLE ACT MERELY BECAUSE IT FOUND CERTAIN SECTIONS VOID.

The lower court held Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 unconstitutional, and that because these sections were not severable from the main provisions of the

Act, the constitutionality of which was not discussed, the whole act was void.*

The court declared the Act inseparable despite Section 12, which provides as follows:

> "Section 12. If any section, subsection, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included therein."

In defining the effect of such a provision, the Supreme Court of Florida, in the case of *Liggett Co.*, vs. *Lee*, 109 Fla. 477, said:

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*NOTE: There is considerable doubt as to what the Court really held as to Section 3 of the Act, due to the following language in the opinion (R. 1100): "We find Sections 3, 4-A, 4-B, 5-A, 5-B and 6 also invalid. There remains: Sections 1, 2-C and 3, et seq." Section 3 invalidated all existing contracts made with any combination declared unlawful under Section 1 of the Act. The court must have inadvertently declared Section 3 invalid per se—if it did so at all—because there is no question as to the validity of such a provision. See: Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548; New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650; Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372; Stephenson v. Binford, 287 U. S. 251, 276; Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 434-5.

At any rate the validity of Section 3 would seem now to be moot, as all license agreements in existence at the date of enactment of the 1937 Act expired Dec. 31, 1940 (R. 33, 70).

> "Such legislative declarations as are contained in section 15 serve notice on the courts of a legislative intent to uphold separable portions of an act partically invalid which would have been eliminated in passage if the Legislature had been advised of the invalidity. The test to determine workability after severance, and whether the remainder of the act should be upheld, *rests on the fact of whether or not the invalid portion is of such import that the valid part would be incomplete or would cause results not contemplated by Legislature.* If the objectionable part of the act can be severed in such a way that the Legislature would be presumed to have enacted the valid portion without the invalid part, the failure of the latter will not render the entire statute invalid."

The effect of such a provision under the decisions of this Court is:

> That such a saving clause creates a presumption of separability; that this presumption must be overcome by considerations which establish the clear probability that the Legislature would not have been satisfied with the statute unless it had included the invalid part.
>
> See: *Charles C. Steward Machine Co. v. Davis*, 301 U. S. 548.
>
> *Carter v. Carter Coal Co.*, 298 U. S. 238.

When these rules are applied to the statute in question, it becomes clear that the Court was in error in declaring this statute inseparable.

As will be hereinafter demonstrated, the principal and fundamental purpose of the Act was to prevent the operation in this state of price-fixing monopolistic combinations dealing in performing rights of copyrighted music. This purpose is expressed in the sections not per se found invalid by the Court, while the purpose of 2-A, 2-B and 6, allowing copyrighted music to be used without compensation under certain circumstances is wholly foreign to the anti-monopoly provisions of the Act. The purpose of 4-A, 4-B, 5-A, 5-B is merely to add additional deterrents to the operation of such combinations in Florida, and is only in a trivial and subordinate sense supplementary to the broad purpose as declared in Section 1 of the Act.

Sections 2-A, 2-B and 6 are clearly separable because:

(1) They were repealed by Chapter 19653 Laws of Florida, 1939; thus the Legislature itself separated those sections from the remainder of the Act.

(2) Defendants have no duties to perform with regard to them;

(3) They are wholly unrelated to the anti-monopoly sections of the Act.

Section 15 of the 1939 Act provided for the repeal of all inconsistent acts and further provided:

"Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sec-

tions 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937."

Sections 2-A, 2-B and 6 were omitted in listing the portions of the 1937 Act kept in force by the above-quoted proviso of the 1939 Act, therefore they fall within the repealing clause of Section 15. This becomes doubly evident upon comparison of these three sections (App. "A") with Section 4-A and other sections of the 1939 Act (App. "B") which provide a different system for licensing public performance rights.

Section 2-A required that there should be placed upon every musical composition (i. e., such as sheet music, phonograph records, etc.) a selling price "determined for all uses and purposes"; that when the purchaser acquired the same within the State of Florida and paid the specified selling price, then the purchaser, ipso facto, acquired the right of public performance of that piece of music through any medium he might wish to use, without further license fee.

Section 2-B provided that if the price was not placed upon the musical composition, then the purchaser might use it for public performance for profit without further license fee. In other words, considering these two sections of the 1937 act together, the selling price at the time of the original sale of the physical piece of sheet music or record, whether or not specified thereon as provided in Section 2-A, carried with it full public performance rights. Hence the copyright owner, by these sections, was divested of the performing rights by sale of the sheet music or record, and thereafter he had no performing rights to license to that purchaser, either acting alone or in concert with other copyright owners.

On the contrary, Section 4-A of the 1939 act authorizes blanket performing licenses apart from sale of sheet music or records, even by combinations of two or more copyright owners, provided only, in the case of a combination of owners, that the licensee is given the option to acquire all or such portion of the "pooled" performing rights as he desires, at prices fixed on a "per-use" basis by the respective copyright owners. Thus the method of licensing public performances under Section 4-A of the 1939 Act is an entirely different system from that formerly required by Sections 2-A and 2-B of the first act whereby the licensing for public performances was acquired by payment for the sheet music or record. The two systems are incompatible.

The inconsistency of the 1939 statute and Sections 2-A and 2-B of the prior act is further shown by the reference to blanket licenses and to program licenses contained in Sections 4-B and 4-C of the 1939 Act, neither of which is compatible with Sections 2-A and 2-B of the 1937 Act.

Section 6 of the 1937 Act is likewise wholly inconsistent with provisions of the 1939 Act. Section 6 provided, in substance, for collection at the source of all license fees for music emanating outside the state. Thus, for instance, in the case of a national chain hookup, the national chain from which the music emanated would have to pay the entire license fee, leaving the local broadcaster free of any license fee for the use of the music. It requires no argument to demonstrate the incompatibility of that provision with the permission given by Section 4-A and related sections of the 1939 Act to collect license fees from users in the State of Florida, whether or not rebroadcasted in Florida by connection with a national hookup.

Further, Section 8 of the 1939 Act makes it unlawful for any person without the consent of the copyright owner to perform any musical composition publicly, provided the owner has complied with the provisions of the act. If, therefore, the copyright owner has listed his music as provided in Section 2 of the 1939 Act, even if he never combines with any other copyright owner so as to bring him within the provisions of Section 4-A, still, by Section 8, it becomes unlawful for a user of music in Florida to perform music for profit without the owner's consent.

For these reasons, in addition to the specific omission of Sections 2-A, 2-B and 6 in the saving clause of the 1939 Act, the legislature plainly intended to repeal, and did repeal these three sections.

Even had they not been repealed by the 1939 Act, still they present only moot questions in the instant case. *No duty is laid upon the defendant state officers to enforce these sections.* Their duties are limited by Section 9 to prosecutions of combinations under Section 1, and Mr. Justice Black so held in his minority opinion when this case was previously before the Court (307 U. S. 79). Any litigation which could arise under them, 2-A, 2-B or 6, of the 1937 Act, would involve only private rights between the copyright owners and users of the music. No music users are parties to this suit. In recognition of that fact, at the final hearing of the case and at the October hearing, the Attorney General expressly disclaimed on the part of the state enforcement officers any duty or intention to enforce the three sections mentioned.

The fundamental purpose of the 1937 Act was to prohibit price-fixing monopolies dealing in performing rights of copyrighted music from operating in this State. Sec-

tions 2-A, 2-B and 6, in no way relate to that subject; they affect and apply to all owners of performance rights of copyrighted music, regardless of whether or not they are members of any price-fixing combination. This separability of application surely denotes the severability of these sections from the remaining portions of the Act.

Thus, we have two legislative declarations that the 1937 Act should be held by the Courts to be severable and an analysis of these sections demonstrates that they have a separate, distinct and entirely independent purpose from the remaining sections of the Act. Surely, the Court was in error in declaring the whole act void, merely because these sections were void.

The constitutionality of Sections 4-A, 4-B, 5-A and 5-B will not be argued at this point in the brief, but only their severability from the main anti-monopoly provisions of the Act.

Section 4-A relieves Florida broadcasting stations from payment of license fee for rebroadcasts of copyrighted music controlled by combinations prohibited by Section 1. Section 4-B similarly forbids collection by out-of-state stations of license fees for unlawful combinations. Sections 5-A and 5-B are exact counter-parts of Section 4-A and 4-B, except that they relate to theaters and places other than radio stations performing copyrighted music for profit. It is plain from these sections of the statute that they are additional deterrents or added punishment to combinations prohibited by Section 1; they are only in a trivial manner connected with the broad fundamental purpose of Section 1, which was to prohibit price-fixing combinations in this state; they only have a subordinate

purpose and surely, if they are unconstitutional, the saving clause in the Act would cause the residue to stand.

See: *Highland Farm Dairy v. Agnew*, 300 U. S. 608, 614, where this Court said:

> "Moreover, if a provision so subordinate were at any time to fail, the saving clause in Section 16 would cause the residue to stand."

The lower court, in its opinion (R. 1101) characterized these sections of the Act, viz. 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, as the "without pay" sections. This manner of describing them itself implies that they had a separate and distinct purpose from Sections 1, 3, 7, 8, 9, 11, 12, 13 and 14 of the Act, which constitute the anti-monopoly and enforcement provisions of the statute.

Thus, the District Court, itself, recognized that the Act had two separate, severable, independent and distinct purposes—the fundamental purpose being to make unlawful and prohibit the operation in this state of price-fixing combinations dealing in copyrighted music; the other being to allow users of copyrighted music for profit under certain specified conditions to use music without paying for it. If the "without pay" sections are stricken, we have a complete workable anti-monopoly statute independent of the other sections remaining, which was certainly the fundamental purpose of this Act contemplated by the Legislature. If the Legislature had intended—as was held below—to make the Act stand or fall in its entirety, it was a useless gesture to place the severability clause in the 1937 Act, or to save from repeal all except Sections 2-A, 2-B and 6 by the repealing clause in the 1939 Act. When this legislative declaration is considered together

with the fundamental purposes of the sections of the Act, not per se declared void, and the fact that the sections declared per se void, have separate and distinct purposes from the other sections, it indicates that the legislative intent was to pass an anti-monopoly statute, regardless of the sections which the Court declared per se void. And when this intent is considered, together with the presumption of severability created by the insertion of the saving clause therein, it is manifest that the Court erred in declaring the whole statute void because it found that certain sections unrelated to the main purpose of the Act were invalid.

Apply the test prescribed by this Court in *Carter v. Carter Coal Company*, supra:

Suppose while the bill was pending before the Legislature, a motion to strike sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 had prevailed. Since most of these sections did not relate to the main purpose of the Act at all—and those that do, only in a subordinate and unimportant way—it is illogical to assume that the Legislature would have refused to pass that part of the statute which protects the people of the State of Florida from the activities of price-fixing monopolies merely because it was unable to also enact the "without pay" sections. Especially is this true in view of the presumption of severability which must be applied to the statute.

III. SECTION 1 OF THE 1937 STATUTE AND ITS DEPENDENT SECTIONS, (3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9) REPRESENT A VALID EXERCISE OF THE POLICE POWER OF THE STATE OF FLORIDA IN THE PREVENTION OF MONOPOLY AND RESTRAINT OF TRADE.

As shown above, the District Court did not hold the anti-monopoly provisions of the 1937 Act invalid *per se*, but struck them down because it considered them inseparable from other provisions of the statute which it declared unconstitutional. In fact, the power of the State reasonably to regulate the use of copyrights within its borders was expressly recognized in the lower court's opinion (R. 1098, 1102).

Nevertheless, defendants do not rest merely upon the implication that these anti-monopoly provisions are *per se* valid, and instead will meet squarely the attack made by plaintiffs below.

SECTION 1. This section strikes the keynote of the whole statute. It declares unlawful any combinations of authors, composers, publishers, or owners of copyrighted music, constituting a substantial number of persons owning such copyrighted compositions in the United States—if the object of such combination is to declare or fix license fees or other compensation for the use or rendition of copyrighted music for public performance for profit.

It forbids the collection of license fees fixed by such combination from any person, firm or corporation within the State of Florida, including radio broadcasting stations, theatres, moving picture houses, hotels, restaurants, clubs, dance halls, et cetera; forbids the collection of such license fees in any court within the State; makes any such

collection or attempted collection a separate offense; denounces such price-fixing as in restraint of trade, and declares the collection or attempted collection to be an intra-state transaction.

Sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9 are all by express language made dependent upon Section 1, that is to say that those sections are made operative only with respect to unlawful combinations as defined in Section 1. If the Legislature did not have power to enact Section 1, the nine sections above mentioned would necessarily fall with it. Therefore, it is unnecessary to analyze the provisions of these dependent sections in this portion of the brief, especially as the entire text of the statute is available in Appendix "A."

We do not understand that plaintiffs contend the State of Florida lacks in general the power to regulate restraints of trade. That has been settled by repeated decisions.

Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 107;

International Harvester Co. v. Missouri, 234 U. S. 199, 209;

Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412, 425-6;

Nebbia v. New York, 291 U. S. 502, 529;

National Cotton Oil Co. v. Texas, 197 U. S. 115, 129;

Puerto Rico v. Shell Co., 302 U. S. 253, 260-1;

Central Lumber Co. v. South Dakota, 226 U. S. 157, 161.

Rather, it seems to be plaintiffs' contention that because of the fact that federal copyrights are created by an Act of Congress, no state legislature is competent to prescribe *any* regulation concerning them.

That contention is untenable. To assert it is to overlook the fact that Congress, acting under Article I, Section 8 of the Federal Constitution, merely created a new statutory property right in the respective owners of literary and musical works which remained subject to state police power, like other property. Neither the Federal Constitution nor Congress has ever bestowed upon the holders of copyrights any right to combine for price-fixing purposes.

The Constitution simply provides: (Art. I, Sec. 8, Cl. 8): Cl. 8):

> "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their **respective** writings and discoveries."

Congress, if it could do so, has never attempted to extend the constitutional grant by conferring any rights upon patent or copyright owners to act in concert for any purpose, much less price-fixing. Where Congress, in exercising a constitutional power, has not shown an intention to cover the field completely, a state is free to act.

> *Carey v. South Dakota*, 250 U. S. 118; 122;
> *Savage v. Jones*, 225 U. S. 501, 533;
> *M. K. & T. Ry Co. v. Haber*, 169 U. S. 613, 623.

Congress has not extended its legislation into the field of regulating commercial transactions representing contracts to license or sell patent or copyright rights. And so it was held that a suit based on a contract for the sale of a patent is not one "arising under the patent laws of the United States."

Albright v. Teas., 106, U. S. 613.

By repeated decisions of this Court, it is settled that a state in the exercise of the police power may enact reasonable regulations affecting commercial dealings in patents and copyrights within its borders:

Allen v. Riley, 203 U. S. 347;
Patterson v. Kentucky, 97 U. S. 501;
John Woods & Sons v. Carl, 203 U. S. 358;
Ozan Lumber Co. v. Union County Nat. Bank, 207 U. S. 251;
Carbico Corp. v. American Patents Corp., 283
Fox Film Corp. v. Doyal, 286 U. S. 123.

In *Allen v. Riley*, supra, it was held that a state has the power, at least, until Congress legislates on the subject, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens against fraud; and a requirement of the Kansas statute that before the sale or barter of a patent right, an authenticated copy of the letters patent and the authority of the vendor to sell the right patented shall be filed in the office of the clerk of each county within which the rights are intended to be sold, is not an unreasonable regulation.

The Court said (203 U. S. 356, 357):

"* * * Possibly Congress might enact a statute

> which would take away from the States any power to legislate upon the subject, but it has not as yet done so. *It has simply provided that every patent, or interest therein, shall be assignable in writing, leaving to the various states the power to provide for the safeguarding of the interests of those dealing with the assumed owner of a patent, or his assignee.* To deal with that subject has been the purpose of the acts passed by the various States, among them that of the State of Kansas, and we think that it was within the powers of the State to enact such statute."

In *Patterson v. Kentucky*, supra, the Court held that the State might constitutionally prohibit the sale of dangerous oils, even when manufactured under a patent from the United States, saying in part (97 U. S. 506):

> *"* * * the right which the patentee or his assignee possesses in the property, created by the application of a patented discovery, must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few."*

Can it be thought that the power of a state to protect its citizens against the formidable iniquities of price-fixing combinations is any less potent than its power to protect them against fraud *(Allen v. Riley)*, or against physical injury *(Patterson v. Kentucky)*?

Copyright owners and patent owners are protected by

the same clause of the Federal Constitution, and under language which places them upon a complete parity. Thus, patent decisions herein cited are equally applicable to copyrights. (So held in *Straus v. American Publishers Ass'n*, supra.)

Not only has Congress not attempted to bestow upon copyright owners any right to combine their copyrights for price-fixing purposes, but this Court has expressly recognized the fact that patents and copyrights are no more than other kinds of property immune from anti-monopoly legislation.

In *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20, 49, it is stated:

> "* * * Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

And in *Straus v. American Publishers Ass'n* 231 U. S. 222, 234, 235:

> "So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. *No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly*, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in un-

> lawful restraint of trade and tending because of the agreements or combinations entered into, to build up and perpetuate monopolies."

To like effect, see *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 32; *National Harrow Co. v. Hench*, 83 F. 36, 38.

In *United Shoe Machinery Co. v. United States*, 258 U. S. 451, a case under the Clayton Act, the Supreme Court expressly recognized the right of a state to exercise its police power in the field of regulation of the use of patents.

As said by Mr. Justice Brandeis in *Standard Oil Co.* (Ind.) *v. United States*, 283 U. S. 163, 174:

> "* * * *The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition.*

A recent pronouncement of this Court on this subject is *Interstate Circuit v. United States*, 306 U. S. 208, holding that the owners of copyrighted motion picture films could not lawfully by concerted action use their copyrights to restrain competition.

But it is said by plaintiffs that in order to invoke the police power of the state, there must be an evil to curb; that in this case there was no "evil" because the result of the Society's operations is good. Consequently, they assert, the legislation was not "enacted in the public interest." This Court will not be interested in weighing the charges made by plaintiffs in their effort to impugn the motives of the legislature in enacting the statute. As was said in *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 126:

"But we will not speculate as to the motives of the state, and will assume—the statute, neither upon its face or by its necessary operation, not suggesting a contrary assumption—that the state has in good faith sought, by its legislation, to protect or promote the interests of its people."

In *Merrick v. N. W. Halsey & Co.* 242 U. S. 568, the "Blue Sky" Law of the State of Michigan was under attack. A part of the attack on the statute was that the business to which it applied "neither requires nor justified, nor is suspectible of, administrative or executive control for the purpose of preventing a wrong or injury by one individual to another." (p. 585.) The Court said (p. 585, 586):

"* * *it is for the state to judge in such circumstances, and the judgment and *its execution would have to be palpably arbitrary to justify the interference of the courts.*"

"* * * we cannot stay the hands of government upon a consideration of the impolicy of its legislation." (p. 586.)

"Engel v. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190, was not decided because fraud was incidental to the business of banking by individuals or partnerships, *but because fraud could be practiced in it,* and hence it could be licensed. Nor was it decided in Allen v. Riley, 203 U. S. 347, 51 L. Ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137, that the transfer of patent rights was of itself illegal, or that any particular transfer would be deceptive, but that some transfers

> might be; and so a statute of Kansas which required any person selling or offering to sell such rights to conform to certain requirements was declared valid." (p. 588.)

In this case the legislature was acting to curb a "known evil" *(Allen v. Riley,* supra), namely, the price-fixing practices prevailing in the licensing of copyrighted music for profit which are fully set forth in Point 1 of this brief.

The power of a state to enact such legislation is also squarely presented in the case of *Buck v. Swanson,* 33 F. Supp. 377 which has been set for hearing on appeal at the same time the instant case is argued. In that case the 3-judge court in Nebraska stated that the legislature of that State did have power to prohibit monopolistic practices in the licensing of performance rights in copyrighted music, and found that such practices were actually in operation. It held, however, just as did the District Court in the case at bar, that the statute was inseparable and for that reason only, it struck down the entire statute.

The anti-monopoly sections under the 1937 Florida Statute place no restriction whatever upon the right of the individual copyright owner to do as he likes with his copyright. He may grant or withhold licenses for public performances at will, and if he grants them may impose whatever terms he sees fit. And so these regulations are entirely in harmony with the federal constitution which merely directs Congress to secure "to authors * * * the exclusive right to their *respective* writings" *(Const.* Art. I, Sec. 8, Cl. 8).

IV. SECTION 4-A OF THE 1939 ACT CONSTITUTES A VALID REGULATION OF PRICE FIXING COMBINATIONS.

Section 4-A declares unlawful combinations of "two or more owners" of musical or dramatico-musical copyrights for purpose of issuing blanket public performance licenses, *unless* such combinations file with the Comptroller either as part of the list under Section 2 or separately a schedule of prices for the performing rights for each separate performance (or per piece), with affidavit that such price was fixed by the copyright-owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of schedules.

There is a definite line of demarcation between this Section of the 1939 Act and Section 1 of the 1937 Act. Section 1 of the 1937 Act attached its prohibition only to combinations of "a substantial number" while Section 4-A of the 1939 Act attaches its prohibition to combinations of "two or more." However, in as much as Section 1 of the 1937 statute was expressly preserved in effect by Section 15 of the 1939 Act, it is readily seen that the permission granted by Section 4-A to combine extends only up to the point where the "two or more" constitutes "a substantial number." If they do constitute a substantial number, the permission is withdrawn and the combination falls under the denunciation of Section 1 of the 1937 Act.

But with that limitation, Section 4-A is an anti-monopoly provision, in just as real a use of the term as is Section 1 of the 1937 law; and like the earlier statute it

strikes directly at price-fixing. The restraint is imposed upon the owners who combine "for the purpose of issuing blanket licenses * * * upon a blanket royalty or fee covering more than one, or all of such compositions," and unless that purpose is present the section does not apply.

The correctness of this interpretation is corroborated by the definition of the terms "blanket license" and "blanket royalty or fee" contained in Section 1 of the 1939 Act.

The fact that Section 4-A is an anti-price-fixing provision was completely overlooked by the District Court. In its conclusions of law (R. 1091) it found that Section 4-A was invalid "as an arbitrary interference with liberty of contract and with the rights granted under the copyright laws." Its opinion says (R. 1102-1103):

> "*Section 4-A does not concern itself with price fixing or with combinations for price fixing;* it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. *There is no conceivable public policy against such action by two or more owners* and therefore no valid exercise of police power involved in a statute putting limitations on such trading. *So long as persons do not unlawfully combine to fix prices,* and the section in quetion does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do does not authorize it to impose unconstitu-

> tional restrictions upon that doing. 'But a state may not impose any condition which requires the relinquishment of a right guaranteed by the constitution.' Sage v. Baldwin, 55 Fed. (2d) at 969."

This fundamental misconception was undoubtedly the occasion for the striking down of the section by the District Court.

(1) In the regulation of restraints of trade within its territory there is no doubt of the power of the state to prohibit a combination of "two or more" for price-fixing purposes.

Many, if not most, of the state statutes dealing with this subject do prohibit combinations of "two or more persons" and in our study of the subject we do not find that any of these statutes have been invalidated for that reason.

Section 1 of the Kansas Anti-Monopoly Act of March 8, 1897, forbade combinations of two or more persons for the carrying out of restrictions to trade or commerce. A combination of five buyers of wheat in Rush County, Kansas, to fix the purchase price at which the grain was bought were convicted, and the conviction was upheld in *State v. Smiley*, 65 Kan. 240. The decision of the Kansas Supreme Court was upheld by this Court in *Smiley v. Kansas*, 196 U. S. 447. In the course of its opinion the Kansas Court quoted from *United States v. E. C. Knight Co.*, 156 U. S. 1, 16, to the following effect:

> "* * * in order to vitiate a contract or combination it is not essential that the result should be the complete monopoly; it is sufficient if it really tends to that end, and deprive the public of the advantages which flow from free competition."

And in *Grenada Lumber Company v. Mississippi*, 217 U. S. 433, a Mississippi anti-trust act was upheld which defined "trust and combine" as a "combination, contract, understanding or agreement between two or more persons * * * in restraint of trade."

(2) Having the power to prohibit completely such price-fixing combinations, the legislature may subject them to lesser regulation, *Old Dearborn Distributing Co. v. Seagram Distilleries Corp.*, 299 U. S. 186.

That is exactly what the Florida Legislature did in Section 4-A, where it permitted combinations not large enough to fall under the ban of Section 1 of the 1937 Act to operate, provided the proposed licensee was given the option to take a license on a per piece basis from each of the individual copyright owners in the combination, at prices fixed by the individual owner.

(3) It is an axiomatic principle of constitutional law that no one is privileged to attack a statute on grounds that do not affect him. That principle has been recognized so often by this Court as to render citation of authority unnecessary. Among the many cases so holding is *Smiley v. Kansas*, supra, which quoted with approval a pronouncement of the Supreme Court of Kansas on that subject.

Plaintiffs in the instant case, for that reason, are disqualified to complain of Section 4-A. Under Point 1 of this brief it is fully demonstrated that the plaintiff Society is composed of "a substantial number" of authors, composers, publishers, and owners of copyrighted musical compositions"—to such an extent in fact as to give the

Society the power to dominate the business of licensing the performance of such compositions for profit. Thus, plaintiffs are of such size as to fall under the prohibitory provisions of Section 1 of the 1937 Act, and are in no position to avail themselves of the qualified permission to combine contained in Section 4-A of the 1939 Act.

For these reasons it is clear that the District Court erred in invalidating Section 4-A.

V. SECTION 4-C OF THE 1939 STATUTE IS NOT INVALID BECAUSE IT LIMITS COMPENSATION FOR LICENSING THE USE OF MUSICAL COPYRIGHTS TO PROGRAMS ACTUALLY USING THE LICENSED MUSIC.

Section 4-C of the 1939 Act forbids the collection of compensation for the use of musical performing rights if it is based in whole or in part upon programs not containing the music charged for. There is no doubt of the fact that it vitally affects the plaintiff Society's present mode of doing business, since none of its licenses are based upon payment for the music actually used. (R. 70, 74. 75.)

The District Court found Section 4-C bad, saying (R. 1103):

> "It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud * * * The prohibition of the section against basing the price upon programs in which a particular piece of music is not performed is a completely arbitrary one and as such, it could not stand if the subject

of the prohibitions were unprotected by copyright."

The Court then went on to say (R. 1104) that a similar restriction on a contract for the hire of a horse, car or a boat would be invalid "as an invasion of the right and liberty of contract."

(1) In so holding, the lower court completely overlooked the fact that the public entertainment business has reached a stage of nationwide development which affects it with a public interest. *(Motion Picture Patents Co. v. Universal Film Co., supra, pp.* 502, 517.)

The public has an interest in leaving that business free to devise the best and most practicable programs available, without the burden of licensing fees based upon the proportion of gross receipts such as the Society now enforces. The inevitable effect of a flat percentage charge on gross receipts is to force the industry to use to the maximum the music of the licensor charging the flat percentage fee, because it costs it nothing, except what the licensee is already obligated to pay; whereas, to use the music of other copyright owners, even though it might be of a superior quality and cultural value, or to use non-musical material, would necessitate the payment of additional expense, thereby lessening the net income of the business.

Viewed in this light, Section 4-C is, in substance, merely a regulation to promote healthy competition among holders of musical copyrights *and all possessors of material suited to public entertainment,* whether musical or not. In effect, the percentage levied by the Society on gross receipts forces music users into involuntary partnership

with the copyright owners, who have no direct interest in serving the public. In so doing, it deprives non-member publishers, composers and authors of a market for their performance rights, and thus stifles competition.

(2) Section 4-C takes no property and impairs no right given by the copyright law.

The right which a copyright holder has is that of excluding others from making, using, or vending the copyrighted composition without his permission, but as to compensation therefor, the property right is less extensive than the common law property right in a horse or other chattel. This is because of the nature of the statutory right which is dependent upon its constitutional origin.

The Constitution gave Congress power only to secure to authors and inventors the exclusive right to "their *respective* writings and discoveries." (Art. I, Sec. 8, Cl. 8.)

The right to charge for use of a copyright or patent, as defined by the Supreme Court, does not embrace a right to compensation for the use of *other* than the protected work or invention. The principle recently has been reiterated by this Court in *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 456, as follows:

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using or selling his invention. R. S. 4884, 35 U. S. C. S. 40, 35 U S. C. A. S. 40. *The extent of that right is limited by the definition of his invention*, as its boundaries are marked by the specifications and claims of the patent. *Motion Pictures Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, 510.

> "He may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices, processes or material which lie outside of the monopoly of the patent licensed, * * * *or condition the license so as to control conduct by the licensee not embraced in the patent monopoly.* * *

The same has been held uniformly as to various trade practices or schemes to exact additional compensation under a patent or copyright since the decision in *Motion Picture Patents Co. v. Universal Film Co.*, supra, definitely establishing the principle, where the Court said (243 U. S. 517);

> "* * * under color of its patent the owner intends to and does derive its profit, *not from the invention on which the law gives it a monopoly,* but from the unpatented supplies with which it is used, and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to *fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.*"

In that case the patent owner based his charge partly on the sizes of theatres in which his patented films were used, as does the plaintiff Society (R. 74).

So, the Constitution and federal statute *do not confer any right on a copyright holder to demand or receive compensation based in part upon the use of other music or entertainment material, whether or not they be copy-*

righted. He has no right to collect compensation for use of a particular copyrighted musical composition based upon a percentage of gross receipts from programs in which his composition is not used.

Therefore, Section 4-C of the 1939 Act does not conflict with the Fourteenth Amendment or other part of the Constitution by taking property or a right of the plaintiffs conferred by the copyright act, because the plaintiffs have no property right in any program not using their music.

Thus analyzed, Section 4-C is merely an exercise of police power within the state's legitimate sphere and is justified for the reason expressed by this Court in the Motion Picture Patents case, supra, at page 519:

> "A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes."

The appropriateness of the Florida regulation is illustrated by the consent decree entered by the U. S. District Court, Eastern District of Wisconsin, February 3, 1941, in *United States v. Broadcast Music Inc.*, copy of which is attached as Appendix "D." That is a suit brought by the Government under the Sherman Act to enjoin

certain restraints of trade practiced by defendant. Paragraph II (3) of the decree provides that the defendant's license may only be based upon a percentage of revenue, *at the licensee's option, and even then, the amount payable must bear a reasonable relation to the per program basis.* As Broadway Music Inc. is a competitor of the plaintiff Society, the decree does not become effective until 90 days after a similar decree has been entered against the Society.

Conclusion

In this brief defendants have shown:

That plaintiffs are a price-fixing combination "unitedly exercising" the individual monopolies granted them by law "to restrain competition" *(Standard Oil Co.* (Ind.) *v. United States,* supra); that the injunction which they obtained was sought for the avowed purpose of perpetuating these same monopolistic practices, and for that reason, should have been denied;

That the main anti-monopoly provisions of the 1937 statute are within the police power of the State, and, being severable from the sections which the District Court adjudged unconstitutional, should have been sustained;

That sections 4-A and 4-C of the 1939 Act are also clearly within the police power.

The decree of the lower court should be corrected accordingly, since on this appeal the whole case is before the Court, and it should render such decree as under all the circumstance may be proper. See *United States v. Rio*

Rio Grande Irrigation Co. 184 U. S. 416, 423; *Ridings v. Johnson,* 128 U. S. 212-218; *Patterson v. Alabama,* 294 U. S. 600-607.

Respectfully submitted,
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APPENDIX "A"

(1937 ACT)

CH. 17807 LAWS OF FLORIDA

AN ACT Declaring to be an Unlawful Monopoly and Its Purpose to be in Restraint of Trade, any Combination of Persons, Firms, or Corporations Which Determine the Amount of Money to be Paid to it or to Its Members for the Privilege of Rendering Privately or Publicly for Profit Copyrighted Vocal or Instrumental Musical Composition, When Such Combination is Composed of a Substantial Number of All Musical Composers, Copyright Owners, or Their Heirs, Successors or Assigns; to Require Each Composer and Each Author of Vocal or Instrumental Copyrighted Musical Compositions to Act Independently of any Combination as Herein Declared Unlawful in Determining License Fees and Other Rights; to Require the Author, Composer and Publisher to Specify Upon the Musical Composition the Selling Price Thereof, Including Public Performance for Profit; to Declare That any Purchaser Thereof, Who Pays Such Price Therefor Shall Have the Right to Render Such Music Privately or Publicly for Profit; to Declare All Existing Agreements Requiring License Fees or Other Exactions for the Privilege of Rendering Copyrighted Musical Compositions Publicly for Profit, Made With any Combination, Firm or Corporation Herein Declared Unlawful, to be Void and Nonenforceable; to Permit the Present Owners, Possessors and Users of Such Copyrighted Music to Render the Same Privately or Publicly for Profit Without Interference by Such Unlawful Combination; to Provide for the Protection of Theatres, Moving Picture Houses, Hotels, Places for Education and Public Performance or Amusement,

Radio Broadcasting and Radio Receiving and Radio Re-Broadcasting Station Affiliated with Other Persons, Firms or Corporations Outside of the State of Florida, Against the Collection of License Fees or Other Exactions by Such Out of the State Affiliates for or on Account of any Combination Herein Declared Unlawful; to Provide all Liability for any Infringement of Copyrighted Musical Compositions Conveyed by Radio Broadcasting, Air, Wire, Electrical Transcription or Sound producing Apparatus, or by Personal Performance Coming Outside of the State of Florida and Used Herein to Rest Exclusively on the Out of the State Person, Firm or Corporation Originally Sending the Same Into This State for Use Herein; to Provide Penalties for the Violation Hereof; to Empower the State's Attorney, Under the Direction of the Attorney General, Upon the Complaint of any Party Aggrieved by any Violation Hereof to Preceed to Enforce the Penalties Hereof Against Such Combination and Any of Its Members, Agents or Representatives; to Empower any Party Ag-Aggrieved by any Violation Hereof to Proceed in His Own Right Hereunder; to Define the Legal Procedure Required to Carry Out the Provisions Herein; to Provide for the Recovery of Costs, Expenses and Attorney's Fees; to Provide That the Terms of This Act Shall be Cumulative; to Provide that any Part of This Act Declared Illegal Shall not Affect the Validity of the Remaining Parts Hereof.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership,

corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public peformance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio rebroadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, member, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder;

and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intrastate transaction within this State, and shall be subject to the terms and penalties of this Act.

SECTION 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio rebroadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and

all uses of such musical compositions for private and public performance for profit.

SECTION 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private or public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

SECTION 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions, provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

SECTION 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations

and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

SECTION 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

SECTION 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and

is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 5-A. Any person, firm or corporation who own, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or in-

strumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

SECTION 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical composition; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State

against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

SECTION 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner of proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from

suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanted; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal perfomance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manner set forth in this section, shall be considered, for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

SECTION 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed as official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might

otherwise be made upon such combination within this State.

SECTION 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees of other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

SECTION 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a fine of not less than $50.00 or more than $5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

SECTION 9. The Several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof,

and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combinations as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

SECTION 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such action.

SECTION 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff

may file with the Clerk of the Court in which such action is pending, a petition praying that the Defendant or Defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorney or attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

SECTION 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records, or data, and within the time provided in said order, the Court shall adjudge such Defenant or Defendants guilty of contempt and shall assess a fine of $100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order, and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payments of costs and attorney's fees.

SECTION 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been include therein.

SECTION 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

SECTION 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State June 10, 1937.

APPENDIX "B"

1939 ACT

CH. 19653 LAWS OF FLORIDA

AN ACT Relating to Public Performing Rights in Copyrighted Musical Compositions and Dramatico-Musical Compositions; Defining the Same; Regulating Licensing of Same; Prescribing Filing Fees; Making Provisions for a Resident Agent in the State; Levying a Tax on the Gross Receipts From the Licening of Such Rights Within the State of Florida; Providing for the Enformement of This Act; the Promulgation of Rules and Regulations, Governing the Enforcement of This Act; Appropriating the Proceeds of the Tax and Fees Levied Herein and Repealing Certain Laws in Conflict Herewith.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, assocation or corporation; the words, "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

SECTION 2. It shall be unlawful for any person to

sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following: The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such compositions; and the affidavit shall set

forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

SECTION 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, causes a list of all such copyrighted material filed with him to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing right.

SECTION 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such asso-

ciation unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compostions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof; and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner changes

in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies, and may be published by him in the same manner as provided in Section 3 hereof.

SECTION 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

SECTION 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

SECTION 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public

performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any composition for the use or performance of any such competition that has not been listed with the Comptroller as provided in Section 2.

SECTION 5. At the time of filing the information required in Section 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service to process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

SECTION 6. No person shall be entitled to commence or maintain any action or preceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or

all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

SECTION 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax, for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940 with respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this act and may require such persons to appear before him at his office in the Capitol in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days notice to such person

through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested."

Should the Comptrolled determine that any person liable for any tax or fees under this act has made an incorrect return or has made no return at all, or has failed to pay any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge upon the Comptroller's application

properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the Judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer and from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2 per cent per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership the receiver shall make a return to the court which shall orders all assets returned to the taxpayer.

SECTION 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such composition, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

SECTION 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided eleswhere in the laws of this state.

SECTION 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representa-

tive or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

SECTION 11. Any person in this State aggrieved by reason of any violation of this act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of this act or to require specific performance under the provisions of this act and shall be entitled to recover his costs including reasonable attorneys fees to be fixed by the court.

SECTION 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of having been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

SECTION 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as here-

in provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and other similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

SECTION 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated th entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

SECTION 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act. and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists. Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effectve date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14, of Chapter 17807, Laws of Florida 1937. Provided further, the revenue provisions of this Act shall take effect immediately it becomes a law and persons have con-

tracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this Act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any data.

SECTION 16. If any section in this Act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

SECTION 17. This Act shall take effect immediately upon its becoming a law.

Became a law without the Governor's approval.

Filed in Office Secretary of State, June 12, 1939.

APPENDIX "C-1"

United States District Court
For The Western District of Washington
Southern Division

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, et al., *Complainants,*

—vs.—

PHIL H. GALLAGHER, as State Treasurer of Washington, et al., *Defendants.*

IN EQUITY CAUSE NO. 606

Before: HANEY, Circuit Judge, and BOWEN and BLACK, District Judges.

HANEY, Circuit Judge.

This is a suit to enjoin enforcement of a Washington statute on the ground of its unconstitutionality. The cause has been submitted on an application for a permanent injunction.

Briefly stated, the statute attacked declares it to be unlawful for separate copyright owners to pool the copyrights in order to fix prices, collect fees, or issue blanket licenses for the use of such copyrights, except where the licenses are issued assessing rates on a "per piece" system of usage. The detailed provisions of the statute need not be discussed.

The bill prayed for a permanent injunction restraining defendants from taking any act of proceeding under the statute, and for a decree declaring such statute unconstitutional. It is alleged in the bill that on February 13,

1914, a small group of composers, authors and publishers organized a voluntary unincorporated non-profit association under the laws of New York, which they designated as the American Society of Composers, Authors and Publishers, hereafter called the Society, for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members. It was further alleged that there are approximately 123 publisher members of the Society and about 1000 writer and composer members of the Society; that such members assign their respective exclusive right of public performance for profit in their respective musical compositions; that similar organizations exist in foregn countries, and the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all members of such foreign societies; and that the Society's blanket license permits the licensee to use many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies.

It appears that the members assign to the Society the exclusive right of public performance, and the Society then has the exclusive right to permit by licenses, licensees to use or not to use the compositions of the Society's members, to fix the price for licenses, to sue for infringement, and in general, to manage the right of public performance in the same manner as the owner of the copyright.

The motion to dismiss on behalf of the defendants, was based on several grounds, one of which was: "That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must

bring the case within the recognized rules of equity relating to injunctions, and that complainants have not done so." The motion to dismiss filed by intervener, K. M. O., Inc., states a number of grounds, one being that the plaintiffs are not entitled to equity because they were monopoly. Although no answers have been filed, we may treat the motions to dismiss as answers. Intervener Lockhart argues the monopoly question, but his motion to dismiss does not present such question. We treat his motion as an answer and amended so as to present the question.

Regarding the completeness of the monopoly of the Society, it is said in *Buck v. Swanson* (D. C. Neb. 33 F. Supp. 377, 386:

> "* * * Of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theatres, the society has control of about 85 per cent or 90 per cent and also has control of from 50 per cent to 75 per cent of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff society because there is no place where no person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society."

Mr. Justice Black in *Gibbs v. Buck*, 307 U. S. 66, 81, says:

"* * * This combination apparently includes practically all (probably 95 per cent) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination."

In the instant case, the testimony of the operators of two of the largest radio broadcasting stations in Washington was that it would be impossible to operate such stations without the music controlled by the Society. The Society has neither submitted evidence, nor made argument to the country.

On the hearing for an injunction pendente lite, we dismissed the cause for lack of jurisdiction. *Buck v. Case*, 24 F. Supp. 541. On appeal our decree was reversed with directions to take evidence on the jurisdictional question. *Buck v. Gallagher*, 307 U. S. 95. Subsequently, we referred the cause to a special master for the taking of evidence on the question, and directed him to make findings. The special master found facts disclosing jurisdiction in the court below. Believing that the evidence supports such findings, we sustain them as not being clearly erroneous.

Plaintiffs contend that the Washington statute is unconstitutional for a number of reasons, and rely on *Buck v.*

Swanson (D. C. Neb.), 33 F. Supp. 377, *Buck v. Harton* (D. C. Tenn.), 33 F. Supp. 1014, and *Buck v. Gibbs* (D. C. Fla.), 34 F. Supp. 510, holding somewhat similar statutes unconstitutional. Before passing on that question, it is necessary to determine whether or not plainiffs may invoke the aid of a court of equity. If a party "has been engaged in an illegal business and has been cheated, equity will not help him." *Wheeler v. Sage*, 68 U. S. (1 Wall.) 518, 529. In other words, before plaintiffs may invoke the aid of a court of equity, they must come into court with clean hands. *Keystone Co. v. Excavator Co.*, 290 U. S. 240, 244. If the Society exists in violation of the Sherman Anti-Trust Act, it, and the members composing it, are not entitled to a decree for its benefit.

Section 1 (15 USCA Sec. 1) of the Sherman Anti-Trust Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combinations or conspiracy, shall be deemed guilty of a misdemeanor. * * * "

Section 2 (15 USCA Sec. 2) of such act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * * "

Whatever the distinction between these two sections may be, * the Supreme Court has recently said that Congress, by the act in question, "extended the condemnation of the statute to restraints effected by any combination in the form of trusts or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of good or services which were characteristic of restraints deemed illegal at common law." *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 498. The "effects" mentioned were "business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." Id., p. 493. Such effects were brought about by "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." (Id., p. 497.)

There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. Likewise, it has restricted substantially all competition in the sale of such right, because it has all such rights. Since the interstate commerce feature is conceded to be present, the Society clearly violates the act in question *(United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 223) unless the right to publicly perform for profit is not embraced within the act. Upon that point the act says nothing expressly about rights or com-

* C. E. Stevens Co. v. Foster & Kleiser Co., 9 Cir. 109 Fed. (2nd) 764, 77.

modities. The statute is aimed at "restraints" of trade and commerce, and not at the "subjects" of the trade or commerce. Rights may be and often are the subject of trade or commerce, and the Sherman law limits restraints of trade in "rights" as well as commodities. Standard *Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49. The restraint here is the power acquired by the assignments of the Society's members, to deal in a right acquired by copyrights, and thus we have a contract or combination in restraint of trade. *Straus v. Am. Publishers' Assn.*, 231 U. S. 222, 234.

Plaintiffs contend that if the activity of the Society "affects" trade or commerce, it promotes rather than restraints it." Here, we are not concerned with such question. Congress has decided that if such a combination has acquired power to fix prices, it is an illegal combination in restraint of trade. Plaintiffs further contend that the power to fix prices, as here, is not the odious "price-fixing" condemned by the act in question. They say that while a gallon of oil is the same no matter who sell it, musical compositions are not gallons of oil, but each of them is different. As we have said before it is immaterial what the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particular nature may be purchased by prospecive users. We think that is sufficient under the statute.

Buck v. Swanson (D. C. Neb.) supra, *Buck v. Horton* (D. C.), supra, and *Buck v. Gibbs* (D. C. Fla)., supra, do not involve the point here taken.

Let the bill be dismissed.

BERT EMORY HANEY,
Circuit Judge.
JOHN C. BOWEN,
District Judge.

I concur in the result.

LLOYD L. BLACK,
District Judge.

APPENDIX "C-2"

United States District Court
For The Western District of Washington
Southern Division

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, et al.,

Complainants,

—vs.—

PHIL H. GALLAGHER, as State Treasurer of Washington; BELLE REEVES, as Secretary of the State of Washington, et al.,

Defendants.

KMO, INC., Intervening defendant, JOHN G. LOCKHART, Intervening defendant.

IN EQUITY
NO. 606
FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter coming on to be heard this 9th day of January, 1941; and it appearing from the records and files herein that counsel for all parties hereto have been served with copies of the notice hereto attached, and of these Findings of Fact and Conclusions of Law; and it appearing from the records and files herein that various motions have been made to dismiss plaintiffs' complaint on the ground and for the reason that the plaintiffs, in their main purpose and operations, violate laws of the United States dealing with monopolies and restraint of trade, and oral arguments having been made, and briefs filed by the vraious parties hereto, and the court having fully considered the matter, makes the following Findings of Fact:

I.

That the plaintiff American Society of Composers, Authors and Publishers, hereinafter called the "Society" is a voluntary, unincorporated association organized under the laws of New York, for the purpose of licensing users of music to perform publicly for profit copyrighted works of its members; that the Society is composed of apprximately 123 publishers of music and 1000 writers and composers; that all members have assigned to the Society the performing rights to all works owned by them; that societies having power to license performing rights of works owned by their members exist in foreign countries and have empowered plaintiff Society to license to perform all works composed and written by more than 44,000 members of said foreign soceties; that all corporate and individual plaintiffs are members of the plaintiff Society; that the members have assigned to the Society the exclusive right of public performance of their copyrighted works, and the Society then has exclusive right to permit, by license, licensees to use or not to use the compositions of the Society's members, to fix the prices for licenses, to sue for infringement, and in general to manage the right of public performance in the same manner as the owner of a copyright.

II.

That the defendants and intervenors have filed motions to dismiss plaintiffs' suit; that said motions have been treated by all the parties hereto as answers; that said motions and answers have raised the following questions:

(1) Do plaintiffs in their main purposes and functions, violate Sections I and II (15 USCA Secs. and 2) of the Sherman Anti-Trust Act?

(2) If plaintiffs are violating the Sherman Anti-Trust Ace are they thereby prohibited from obtaining the aid of a Court of equity in attacking a law of the State of Washington which places restrictions upon plaintiffs' activities?

III.

The Court finds that plaintiffs' plan of operation, as set forth in their complaint and the exhibits attached thereto, and as shown by plaintiffs' evidence, does violate Sections 1 and 2 of the Sherman Act; that plaintiffs have such a monopoly of music available to commercial users of music that, according to the evidence in this case, said users cannot operate their various places of business without having available music controlled by plaintiffs; that, according to the evidence in this case, it is impossible to operate radio stations in the State of Washington without having available music controlled by the Society; that the plaintiff Society has the power to, and has, fixed prices for the works of its members; that the public performance of music by commercial enterprises is a subject of trade and commerce; that plaintiffs in their operations unreasonably restrain the interstate trade and commerce of the members of the Society and the interstate trade and commerce of licensees of the Society.

That the Society exercises the power to fix prices for the right to publicly perform compositions of its members for profit; that it has restricted substantially all competition in the sale of such rights; that the interstate commerce feature was conceded by plaintiffs to be present in the issues of this case; that the Society clearly violates the Act in question. (Sections 1 and 2 of the Sherman Anti-Trust Act, 15 USCA.)

And from the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

That plaintiffs are operating in direct violation of the laws of the United States, to-wit: Sections 1 and 2 of the Sherman Anti-Trust Act (15 USCA 1, 2); that plaintiffs do not come into Court with clean hands and are not entitled to obtain the aid of a court of equity in seeking the relief prayed for in the complaint; that a decree should be entered dismissing plaintiffs' suit.

DONE IN OPEN COURT THIS 9th Day of January, 1941.

Circuit Judge
JOHN C. BOWEN,
LLOYD C. BLACK,
District Judges.

Presented by:
CLARK R. BELKNAP,

Attorney for Intervener Lockhart.

APPENDIX "C-3'
United States District Court
For The Western District of Washington
Southern Division

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, et al.,
Complainants,

—vs.—

PHIL H. GALLAGHER, as State Treasurer of Washington, et al.,
Defendants.

K M O INC., intervening defendant, JOHN G. LOCKHART, intervening defendant.

IN EQUITY NO. 606 DECREE

This matter coming on to be heard this 9th day of January, 1941; and it appearing from the records and files herein that counsel for all parties hereto have been served with copies of the notice hereto attached and of this Decree, and the Court heretofore having entered Findings of Fact and Conclusions of Law holding that plaintiff's cause of suit should be dismissed,

THEREFORE IT IS HEREBY ORDERED, ADJUDGED AD DECREED BY the court that plaintiffs' suit be and the same is hereby dismissed and that defendants and intervenors have judgment for their costs and disbursements to be taxed.

DONE IN OPEN COURT this 9th day of January, 1941.

JOHN C. BOWEN,
LLOYD C. BLACK,
District Judges.

Presented by:
CLARK R. BELKNAP,
Attorney for Intervenor Lockhart.

APPENDIX "D"

In The District Court of the United States For The Eastern District of Wisconsin January Term, 1941

Civil Action
File No.

UNITED STATES OF AMERICA,

Plaintiff,

—vs.—

BROADCAST MUSIC, INC.

Defendant.

This cause came on to be heard on this day of January, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, B. J. Husting, United States Attorney for the Eastern District of Wisconsin, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendant being represented by its counsel, and having appeared and filed its answer to the complaint herein.

It appears to the Court that defendant, Broadcast Music, Inc., has consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendant has violated any law.

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendant, Broadcast Music, Inc., and its acceptance by plaintiff it is unnecessary to proceed with the

trial of the action, or to take tesimony therein, or that any adjudication be made of the facts.

Now, therefore, upon motion of plaintiff, and in accordance with said consent, it is here

ORDERED, ADJUDGED AND DECREED

1. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against defendant, Broadcast Music, Inc., under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II. Defendant, Broadcast Music, Inc., its officers, directors, agents, servants, employees and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the acts or things hereinafter in the paragraph II prohibited:

(1) Defendant, Broadcast Music, Inc., shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or otherwise on behalf of any copyright or other owner of the performing right, or pursuant to any understanding or agreement with such owner to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendant. Nothing contained in this sub-paragraph (1)

shall be construed as preventing defendant, Broadcast Music, Inc., from acquiring or asserting exclusive performing rights (a) in any musical composition of which said defendant shall also own or acquire the copylight; (b) in any musical composition in the United States of America; (c) in any musical compositon as a purchaser, assignee or licensee (but not as agent, trustee or otherwise on behalf of another) in consideration of the payment or agreement to pay, as the sole compensation for such performing rights, a fixed sum stated in the contract of purchase, assignment or license; or (d) in any musical composition, as a purchaser, assignee or licensee (but not as agent, trustee or otherwise on behalf of another) in consideration of the payment or agreement to pay, as the sole compensation for such performing rights, an amount determinable by reference to the number of licensed performances of such composition at a fixed per performance price and basis stipulated in such contract.

(2) Defendant, Broadcast Music, Inc., shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discrimination within the meaning of this subparagraph; and provided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(3 Defendant, Broadcast Music, Inc., shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions

for radio broadcasting, a license fee of which any part shall be (a) based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) an amount which does not vary in proportion either to actual performances, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing bases, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

With respect to any existing or future performing license agreement with a radio broadcaster, defendant, Broadcast Music, Inc., shall not if required by such broadcaster, refuse to offer either or both of the following bases of compensation which may be specified by the broadcaster:

(I.) In respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;

(II.) In respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed; or, at the option of

defendant, the payment of a percentage of the revenue derived by the licenses for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon one or more of the foregoing per program bases, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall establish, in good faith, a relationship between such per program basis and such other basis, justifiable by applicable business factors, so that there will be no frustration of the purpose of this sub-paragraph to afford radio broadcasters alternative bases of license compensation.

(4) Defendant, Broadcast Music, Inc., shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, in so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate license for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded on an electrical transcription or other decordation intended

for broadcasting purposes, said defendant shall not refuse to license the public performance for profit by designated radio broadcasting stations of such composition by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the license, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.

(6) Defendant, Broadcast Music, Inc., shall not, in connection with any offer to license by it the public performance for profit of musical compositions, refuse to offer a license, at a price or prices to be fixed by said defendant, for the performance of such individual musical compositions or catalogues of musical compositions the use of which shall be requested by the prospective licensee.

(7) Defendant, Broadcast Music, Inc., shall not assert or exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in its licensed catalogue in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant from restricting performances of a musical composition in order reasonably to protect the value of the public performance for profit rights therein or to protect the dramatic per-

forming rights therein or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such compostion.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, Broadcast Music, Inc., and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, Broadcast Music, Inc., whether by purchase, merger, consolidation, reorganization or otherwise. None of the restraints or requirements herein imposed upon the defandant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with paragraph II of this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, Broadcast Music, Inc., made to the principal office of said defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possessions or under the controll of said defendant, relating to any of the matters contained in this decree, (b) subject to the reasonable convenience of said defendant and without restraint or inteference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regard-

ing any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcemnt of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of he Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. The provisions of sub-paragraph (4) of paragraph II of this decree shall not become effective until nine months after the effective date of the other provisions of said paragraph.

None of the provisions of paragraph II of this decree shall become effective until 90 days after plaintiff shall have delivered to defendant, Broadcast Music, Inc., a certified copy of a consent decree or other final decree of a court of competent jurisdiction not subject to further review by which restraints and requirements in terms substantially identically with those imposed herein shall be imposed up American Society of Composers, Authors and Publishers; provided, however, that if said defendant shall be of the opinion that the restraints and requirements so imposed against American Society of Composers, Authors and Publishers are not substantially identically with those imposed herein, and shall apply to the Court within 20 days after receipt of a certified copy of said decree, for a determination of that question, no provision of said paragraph II shall become effective until the Court shall have determined that such restraints and requirements are substantially identical with those imposed herein.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court at any time after the delivery to the defendant of a certified copy of a decree against American Society of Composers, Authors and Publishers complying with the provisions of paragraph V hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof upon any ground for the enforcement or compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or denying such applications so made as justice may require and the right of the defendant to make such application and to obtain such relief is expressly granted.

United States District Judge.

APPELLANTS'

REPLY BRIEF

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,
Appellants

—vs.—

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.
Appellees.

No. 611

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.
Appellants

—vs.—

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR APPELLANTS (Defendents Below) In Case 610—and—APPELLEES in Case 611.

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Supreme Court of the United States

October Term, 1940

No. 610

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,
Appellants,

—v.—

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,
Appellees.

No. 611

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, et al.,
Appellants,

—v.—

J. TOM WATSON (GIBBS) Individually and as Attorney General of the State of Florida, et al.,
Appellees.

REPLY BRIEF FOR APPELLANTS (DEFENDANTS BELOW) IN CASE 610 AND APPELLEES IN CASE 611.*

FOREWORD

Plaintiffs' brief is a lengthy one, occupying 94 pages ex-

*Emphasis in quoted matter in this brief is supplied unless otherwise indicated. Appellants in Case 611 and appellants in Case 610 will be referred to according to the position which they occupied in the lower court as "plaintiffs" and "defendants" respectively. Reference to "plaintiffs' brief" and "defendants' brief" will denote the opening briefs already on file in this Court. The word "Society" will denote the plaintiff American Society of Composers, Authors and Publishers.

clusive of the 159-page Appendix. Much of their brief proper is repetitive, and it would be impossible without extending this brief to undue length to reply to every assertion or argument with which defendants take issue.

Therefore, this reply brief will concern itself only with such of the facts and arguments as are deemed essential to a proper understanding of the case. One fallacy in plaintiffs' brief has been reiterated so many times, that, in order to conserve the time of the court, it is best dealt with on the threshold:

A very large part of plaintiffs' argument is devoted to discussion of facts and legal principles which relate only to Sections 2-A, 2-B and 6 of the 1937 Act. In some instances one or more of these sections are specifically referred to, but in many places, the reference arises only by inference. At pages 31-35 inclusive of defendants' main brief, it is demonstrated that these three sections of the 1937 Act were repealed by the 1939 Act; that consideration of these sections is also moot in the instant case because the defendants, as enforcement officers of the State of Florida have no duties to perform concerning them. Relying upon the arguments made in their main brief, defendants will not attempt to deal with any contentions advanced by plaintiffs with regard to these sections other than in some of the instances where plaintiffs have referred to one or more of these sections by inference only, to point out that those are the sections involved.

The full text of these sections is printed in Appendix "A" to defendants' main brief (Secs. 2-A and 2-B, pp. 61, 62; Sec. 6, pp. 66, 67). However, for the court's convience in identifying reference to them in plaintiffs' brief,

we digest the three sections briefly below:

Section 2-A in substance provides that all authors, composers and publishers selling any musical composition in Florida in whatever form published, printed, manufactured or prepared for use must cause to be specified thereon its selling price; that when a purchaser acquires the composition and pays the specified selling price, the purchaser may render or permit to be used or rendered such composition by players, orchestras, bands, radio apparatus, electrical transcriptions, music records or otherwise, either privately or publicly without further license fees or exactions, the initial selling price being deemed to be full compensation for all such renditions.

Section 2-B provides that if any author, composer or publisher fails to affix the selling price on a musical composition and collect the same in the time and in the manner provided in Section 2-A, then any person in Florida who has purchased such composition may use it for private or public performance for profit without further license fee and shall be free from liability in any infringement or injunction suit or suits instituted by the copyright proprietor.

Section 6 deals with radio stations, theaters, moving picture houses and similiar places of entertainment in Florida which are affiliated with concerns outside of the State originating the performance of copyrighted music, whether the original rendition of such music is by radio, sound production instrumentalities, or by furnishing persons to sing or play such music in the state. With respect to such concerns it places the entire responsibility and liability for the use of copyrighted music upon the affiliate outside the

state who originates the broadcast or other performance. It forbids the owner from suing for copyright infringement, loss or damage within this state because of the Florida performance, remitting him to make his collection from the outside affiliate.

Thus it is readily seen that these three sections are not limited to *combinations* of copyright owners, as are Section 1 and the sections of the 1937 Act dependent on Section 1. They are intended to apply with equal force to *all* copyright owners. Also it is apparent that any controversies which these three sections might evoke, would be controversies between *private parties* only, with which the defendant State enforcement officers would not be concerned. See Section 9 of the 1937 Act (def. br., pp. 68, 69), confining the duties of the state prosecuting officers to enforcing the Act against combinations as defined in Section 1.

Plaintiffs' brief does not refute the proofs overwhelmingly shown in the record (def. br. 11-22) that the Society constitutes a price-fixing combination in restraint of trade, but it tenders various excuses for its illegal operations such as: necessity for cooperative licensing (p. 8); blanket license only feasible method (p. 11); that blanket license is granted at low cost to user (p. 16) etc. However, these excuses can not justify plaintiffs' illegal price-fixing activities. See decisions of this court cited in defendants' brief, page 22.

Plaintiffs have directly referred to a letter written by Assistant Attorney General Norwood to Judge Foster (R. I, 96, 97) at pages 30, 46, 55, 56, and also made other references to this letter by implication in their brief. They

argue from this letter that the defendants have threatened to prosecute the Society under the 1937 Act if it attempts to bring infringement suits in the State of Florida.

This letter was pleaded *in extenso* in paragraph 8 of the Supplemental Bill (R. I, 96, 97) and referred to in paragraph 10 (R.I, 98). It is alleged that defendant, Attorney General Gibbs who succeeded Judge Landis would prosecute the complainants if they brought suits for infringement in the Federal Courts. In defendant Gibbs' answer to the Supplemental Bill the writing of the letter is admitted but the other allegations of threats are denied (R. I, 108). At the time of the writing of the letter, Cary D. Landis was Attorney General of Florida. He was succeeded by George Couper Gibbs, who was in turn on January 8, 1941 succeeded by J. Tom Watson. There is no proof in the record that Gibbs while Attorney General threatened to prosecute the plaintiffs if they instituted infringement suits. There is neither pleading nor proof of such threats by the incumbent Attorney General Watson.

Surely in the absence of such allegation and proof this court will not assume that either Gibbs or Watson will interfere with the rights of plaintiffs to sue for infringement specifically granted by the federal copyright law, particularly since the Florida statute does not attempt to make it unlawful for any owner of copyrights to sue for *infringement*. Suits of this character do not violate the eleventh amendment to the Federal Constitution because they are personal to the officers threatening to enforce the legislation. (Ex parte *Young*, 209 U. S. 123.)

COMMENTS ON PLAINTIFFS' "QUESTIONS PRESENTED"

(Ptf. br. pp. 2, 3.)

The questions as stated by plaintiffs include some that are moot and others that plaintiffs do not even argue.

Question 1 (*b*). This question attacks by inference Section 4-A of the 1939 Act. It is unfairly stated, because that section (def. br. pp. 74-76) makes no requirement whatever as to how individual copyright owners should license their music.It regulates only blanket licensing by a combination of "two or more."

Question 1 (*d*). This question is not presented by the record in the instant case, since it assumes that the Society's method of doing business is the "only way that has been found to be commercially feasible." There is no evidence in the record that the Society has tried any other licensing method. It is interesting to note however, that the Society now professes its willingness to embark upon a different system of licening, as shown by its consent to the decree entered against it in the Southern District of New York, March 4, 1941, in *United States* v. *American Society of Composers, Authors and Publishers,* a copy of which is attached as Appendix "A" to this brief.

Question 1 (*e*) *and* (*f*). These questions deal with Sections 2-A, 2-B and 6 of the 1937 Act, which as stated in the "Foreword" to this brief and demonstrated in defendants' main brief (pp. 31-35), are moot in the instant case.

Question 2. This question likewise is moot. So far as this record shows, all of the Society's license contracts expired December 31, 1940 (R. I, 33, 70).

Question 5. The record presents no such question. At no time have plaintiffs urged by pleading or argument any transgression of the commerce clause of the Federal Constitution by either of the Florida statutes. They argue no such question in their present brief.

ERRORS AND INACCURACIES IN PLAINTIFFS' "STATEMENT OF THE CASE"

(Ptf. br. pp. 4-44)

The weakness of plaintiffs' arguments is emphasized by the frequently confusing and exaggerated statements in which they indulge in this portion of their brief—statements, which unless references are checked with the record, can serve only to mislead. Any attempt to point out all such exaggerated and misleading statements would unduly burden the time of the court, but a few of the more glaring examples should suffice to establish plaintiffs' lack of accuracy. Page references will refer to the corresponding pages of their brief unless otherwise indicated.

(*Page* 8). Under the caption "Cooperative Licensing Is Necessary Because of Divided and Diverse Ownership of Perfoming Rights," plaintiffs apparently seek to minimize the dominating position of the publishers (see defendants' main brief pp. 16-18). In the first sentence they state that

> "Publishers are made members of the Society because as a rule the copyrights are in their names (R. II, 798)."

Read in connection with what follows, particularly the positive statement that

> "The so-called 'small rights' ** are generally owned jointly by the writer and publisher to be administered through the Society" (citing various record pages)

one is led to believe that the publishers hold the copyrights as trustees. And this in spite of plaintiffs later admission (p.9) that the publishers dispute the writer's claim to co-ownership.

Moreover, one naturally assumes that the record citations referred to as supporting the statements are the best evidence, that is, the written contracts themselves, and that such contracts actually do support the positive statements of fact.

But when one examines the record citations, one learns differently. The first citation (R. II, 798) is to the testimony on cross-examination of plaintiff Buck, President of the Society, himself a writer with years of experience. But what does Mr. Buck say on page 789? We quote:

> "Q. Let us get this straight about publishers members. There are one hunderd and twenty-five members that are designated as publisher members; *they are the part of your organization that actually own the copyrights?*"
>
> "A. They do, yes, in the majority of cases, * * *. That copyright is taken out by the publisher and that is why the publisher must be in the American Society."

The record shows that the statement of co-ownership in the small performing rights is based on the self-serving

statements of several of plaintiffs own witnesses which are not supported by the testimony of other of plaintiffs' witnesses or by the written contracts which plaintiffs introduced in evidence. Plaintiffs' writer witness Leslie (R. I, 245, 251-3) based his contention on an alleged *verbal* agreement made with his publisher in 1914; Ahlert (R. I, 264-5, 270, 272) and Meyer (R. I, 392) testified to the co-ownership theory by answering leading questions, but produced no written contracts. There was a striking failure on the part of *publisher* members, a number of whom testified for the plaintiffs, to confirm the supposed joint ownership of the small rights.

The written contracts introduced by plaintiffs support Buck's statement that the publishers actually own the copyrights. Exhibit "A" to the bill (R. I, 37) specifically vest in the publisher "the rights during the full life of the copyright to authorize or permit the performance of the musical compositions." Exhibit 8 (R. II, 932) reserves to the composer the stage performing rights, but grants to the publisher "all other performing rights." Exhibit 7 (R. II, 990A) and Exhibit "A" (R. II, 1072A), the "Standard Uniform Popular Song-writers Contract" forms, approved in 1932 and 1939 respectively by the Society, the Song Writers Protective Association and the Music Publishers Protective Association, constitute an outright assignment of the copyrighted composition "and all rights of whatsoever nature thereunder existing."

The single exception to the control of small performing rights by the publisher shown by the record is in the case of the Victor Herbert compositions. Herbert reserved the ownership of the copyrights and merely granted to his

publishers the right to print and sell sheet music (R. II, 935-942).

(*Pages* 9 *and* 10). Under the caption "How the Society Functions," plaintiffs state that the eligibility for membership in the Society of a composer "depends upon his having written and regularly published at least five of his compositions." What they failed to state was that the required publication must be made *by publisher members of the Society*. The importance of that part of the requirement is strikingly shown by the efforts of plaintiffs' witness Mills to conceal it during his testimony at the trial (R. I, 517, 519, 520) although it had already been frankly almitted by plaintiffs' witness Taylor (R. I, 233). The effect of this requirement in increasing the monopolistic power of the Society is shown in defendants' main brief (pp. 16-18).

(*Page* 11). Here, in discussing the Society's mode of licensing, plaintiffs assert that payment on the basis of each individual performance is "admittedly" impossible (R. II, 787). From the use of the word "admittedly" would arise a natural inference that defendants conceded the truth of the statement. Such is far from being the case. The record reference furnished by plaintiffs is merely to a self-serving declaration of plaintiff Buck, President of the Society.

Likewise they completely avoid mention of the fact that the Society never has attempted to use a license contract wherein payment of license fees would be on the basis of each individual performance, though many of plaintiffs' own witness admitted on cross-examination that this meth-

od was used by them in licensing symphonies, grand rights, and the right to record on moving picture films, electrical transcriptions, etc. (Caesar, R. I, 205-217; Taylor, R. I, 232-233; Von Tilzer, R. I, 292; Fischer, R. I, 329; Schirmer 357-358; Bornstein, 374.) Certainly the problems presented in the licensing of such rights are no less complicated than those involved in the licensing of ordinary performing rights.

Moreover, defendants' witness Belviso, Manager of the Music Division of the National Broadcasting Company, who was duly qualified and accepted by the Court as an expert on the availability and licensing of music, testified that in quite a number of instances, he negotiated for and obtained the right to use material directly with the copyright holders on a "per piece or per use basis" and that usually there was no difficulty in fixing the price for the use or per piece arrangement (R. I, 562-563).

(*Pages* 11-16). Here again under the heading "The Blanket License Is the Only Feasible Method of Licensing the 'Small Right'," adding further to the confusion already created, plaintiffs seek to justify their licensing system. They state (pp. 11, 12):

> "There are two possible methods of licensing performing rights; one is on a basis of the separate licensing of each composition for each separate performance; the other is a blanket license which permits the licensee to perform any composition in the licensor's repertoire without designating specific compositions in advance of the performance or securing separate licenses therefor."

Plaintiffs do not define what is meant by the terms "blanket license" and "blanket basis." The implication is that the terms are used interchangeably to describe the Society's method of licensing in force up to December 31, 1940, which has always been to make some sort of a flat charge to all licensees of either a fixed sum per year, a fixed percentage of gross income per year or both, whether the Society's music was used or not. They state (p. 13) that "the alternative to issuing blanket licenses would be a system of licensing each composition separately for each performance", implying that the choice lies solely between these two methods.

We suggest that this argument of plaintiffs is not based either on the impossibility or impracticability of any other method, but solely upon the unwillingness of plaintiffs to open the door of price competition and thereby weaken their domination "*** that actually wields the power of life and death over every business in Florida and elsewhere dependent upon copyrighted musical compositions for existence." (Mr. Justice Black, *Gibbs* v. *Buck*, 307 U. S. 66, 82.)

That "unwillingness" to comply with the Florida Statutes is the key to plaintiffs' opposition is revealed in so many words by the testimony of their own witness such as Caesar, R. I, 209; Taylor, R. I, 228-229; Leslie, R. I, 258.

Why not further alternative methods of licensing by agreement under which the licensee is permitted for a stated period to perform any compositions in the licensor's repertoire paying to the licensor a license fee based on either: (1) A stated sum for each copyright composition in licensor's repertoire which actually is performed by the

licensee; (2) A stated sum for each program in which one or more of the licensor's copyrighted compositions are performed; or (3) A stated percent of income derived by the licensee from each program in which one or more of licensor's copyrighted compositions are performed*?

These are the methods which good business men generally have used in collecting royalties or license fees. They are the methods which plaintiffs have used in the licensing of grand rights and recording rights. They are the methods which the plaintiff composers and authors use with the plaintiff music publishers in collecting royalties on sheet music sales, phonograph records, electrical transcriptions, motion picture recordings, etc.

Such methods of licensing would require licensees to keep adequate records of performances for the purpose of accounting to the licensors for the license fees due. The fact that in the past few licensees have kept such records is no excuse for a continuation of the Society's past licensing method. Under that method no useful purpose would have been served by keeping the record.

If it is true as claimed in plaintiffs' brief that their past "blanket basis" of licensing "small rights" is the only feasible method, then why did they enter into the Consent Decree referred to on page 76 of their brief (*U. S. v. American Society of Composers, Authors and Publishers*, U. S. D. C. S|D N. Y., March 4, 1941, (copy attached as Appendix "A" to this brief)? The Consent Decree, in addition to

*NOTE: This method was used by the Society for 8 years to a limited extent in the discriminatory form of contract made available to certain broadcasting stations owned by newspapers (R. II, 1007A to C incl.)

prohibiting other past practices of the Society such as the self-perpetuating Board of Directors, prohibits the Society from refusing to issue licenses on a per piece basis or on a per program basis, (1) or (2) or (3) above. It compels the plaintiff Society to make available to broadcasting stations either a per piece or per program basis of fee payments. True, *on the request of the licensee,* the Society is permitted to issue a blanket license such as heretofore used, but the fee payments of such blanket license must bear an ascertainable business relation to the fees charged on the per piece or per program basis required by the decree.

And why did they plead *nolo contendere* to the Criminal Information charging them with violations of the anti-trust laws filed against them in Wisconsin, thereby confessing themselves "guilty" for the purposes of that case, and subjecting them to fines actually imposed aggregating $35,000 and to possible jail sentences as well (*U. S.* v. *American Society of Composers, Authors and Publishers,* U. S. D. C. E|D Wisconsin, filed February 5, 1941, sentence pronounced March 13, 1941; copy of Information attached as Appendix "B" to this brief.) Surely, if they had exercised the public performance rights given them by the Copyright Act in the *only way* in which those rights could be made effective, no court would have inflicted such punishment upon them.

Again we suggest that it is not the impossibility or impracticability of license payments based on the music actually used which motivates plaintiffs' claims that the past blanket license method enforced by it is the only feasible method, but that plaintiffs are motivated solely by

their unwillingness to license in any manner which will open the door to competition and thereby reduce their monopolistic and dominating power over the entertainment industries.

(*Page* 15). Plaintiffs lay great stress on the fact that "practically all licensing of this kind, whether by the Society or by other organizations, is conducted on a blanket license basis." They mention various other licensing units, including Broadcast Music Inc., recently created by the broadcasting industry. They fail to state that Broadcast Music Inc., entered into a consent decree similar to that of plaintiffs referred to above (*United States* v. *Broadcast Music Inc.*, U. S. D. C. E|D, Wisconsin, February, 1941, copied in def. br. 97-105 as Appendix "D").

The facts stated in this paragraph of plaintiffs' brief refute the charges elsewhere made in plaintiffs' brief (see especially pp. 68-72) to the effect that the statutes are "Bills of Attainder" directed against the plaintiffs. With other organizations conducting their business along the same lines as plaintiffs, it can not be supposed that the Florida Legislature was legislating merely against the plaintiff Society.

(*Page* 22-26). In this section of their brief, plaintiffs charge the users of music with "organized efforts to destroy plaintiff Society as means of securing free use of right of public performance for profit." They mention various litigations in court, bills introdnced in the Federal Congress and in State Legislatures, including statutes enacted by State Legislatures.

We suggest that if these charges are true, the fact

strongly emphasizes the need for legislative intervention to remedy the harsh and oppressive use by plaintiffs of their monopolistic power. Legitimate business operations ordinarily would not be subjected to such attacks. And further, the lack of success in most of the alleged efforts of music users to obtain legislative protection speaks eloquently of the extensive power wielded by the plaintiff Society.

(*Page* 26). Plaintiffs' need of supporting evidence must indeed be great when they assert in the last paragraph of Section VII that "the users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrigthed music," and cited R. II, 848, in support thereof. The record reference is to a letter written by one single dance hall proprietor in the State of *Nebraska* who was resentful of the fact that the Society's local agent told him he had to pay what the agent demanded and that he could make him pay $1,000 if he wanted to instead of the $250 per year which he was paying (R. II, 835, 838, 854, 855). There is no other similar testimony in the record.

Of course, all this discussion overlooks completely the fact that courts do not gauge the constitutionality of legislation by the supposed motives of private individuals advocating its passage by the legislative body.

(*Pages* 26 *and* 27). Here the plaintiffs, attempting to escape the charge that the Society represents a combination that has dominated the industry, lay down the proposition that it "controls only a small part of the available music."

In so doing, they furnish references to numerous large catalogues of music which are owned by non-members of the Society. But the question is, not how many other music compositions are in existence, but how many of them are commercially available?

The latter question need not be argued because it has been abundantly proved out of the mouths of plaintiffs' own witnesses Buck, Schirmer and Mills as well as certain of defendants' witnesses including Belviso, music director for National Broadcasting Corporation, that *the Society controls an overwhelming proportion of all music available for commercial use in the United States* (def. br. pp. 13-16).

In this section of their brief plaintiffs also refer to Broadcast Music Inc., organized by the broadcasters to compete with the Society, and ask the court to take judicial notice of the refusal of the radio net works and the affiliated stations to renew their licenses from the Society which expired December 31, 1940. About this it need only be said that Broadcast Music Inc., is a new enterprise organized in 1940 and released for competition with the plaintiff Society only with the expiration of the latter's licenses January 1, 1941. No evidence of the extent of its operations or the availability of its music is before this court, and the case must be judged by the many years' control which the Society has exercised over the entertainment industries dating back for nearly 20 years.

Small wonder that the broadcasters have endeavored by organizing this new corporation to loosen the economic fetters by which they were bound!

(*Pages* 28-43). Here plaintiffs make their own argumentative analysis of the two Florida Statutes with much collateral matter thrown in. With most of this defendants are naturally in disagreement, and it is unnecessary to detail the numerous points of controversy, for they will be otherwise apparent to the court from a study of the briefs and consideration of the oral arguments. Therefore, in considering the few comments made by defendant below, the court will realize that with reference to the remainder of this section of plaintiffs' brief, silence does not give consent.

(*Page* 28). Plaintiffs here quote Conclusion of Law No. 1 of the court below (R. II, 1089-1090) to the effect that the 1937 Statute was not necessary to meet any alleged evil; that its enactment does not serve the public interest of the State of Florida; that the object of the statute is to take plaintiffs' copyrighted music for a "private purpose" viz., to benefit the "410 users" within the State of Florida.

With all due respect to the eminent court which entered these Conclusions, defendants insist that there is not one scintilla of evidence in the record to support such an indictment of the Florida Legislature. On the contrary, the record speaks abundantly of the monopolistic practices which were prevailing in Florida as elsewhere at the time of the enactment of the 1937 Statute. Full detail of these facts, all of which the Legislature must be presumed to have known, is found in plaintiffs' main brief (pp. 11-21).

And why that court, even if it saw fit to find that the statute was not enacted in the public interest, should have concluded that it was enacted for the benefit of "410 users", we are at a loss to understand.

(*Page* 31). Here in paragraphs (2) and (3), Sections 2-A and 2-B of the 1937 Act are attacked. As pointed out in the "Foreword" to this brief, these sections are now moot, as well as Section 6 (p. 32, par. (10); pp. 33, 34 par. 11 (d)).

On this same page (31), paragraph (5) refers to the Society's "*existing* contracts" as declared void by Section 3 of the 1937 Act. So far as this record shows, the Society has no "existing contracts," and this court can not be expected to take judicial notice of what licenses the Society may have issued since December 31, 1940.

(*Page* 35). In paragraph (e), plaintiffs attack Sections 11-A and 11-B of the 1937 Act. It is obvious from a bare inspection of these sections (def. br. pp. 69, 70) that they are purely procedural. There is no reason to doubt that when and if these sections are invoked in a suit actually pending, the court having jurisdiction of the case will administer these provisions with due regard for the constitutional rights of the defendants in that case.

(*Page* 39). In discussing 4-A of the 1939 Act, plaintiffs state that before issuing "any blanket license" the person issuing it must file schedule of prices with affidavit of the copyright owner, etc. Attention is directed to the fact that the whole of Section 4-A (ptf. br. pp. 74-76) is limited in its operation to cases where two or more copyright owners combine "for the purpose of issuing blanket licenses *** upon a blanket royalty or fee" covering music owned or controlled by the members of the combination. Section 4-A imposes no restriction whatever upon the manner in which the individual copyright owner not forming part of such a combination may license his music.

ARGUMENT

I. Plaintiffs Show No Reason Why They Should Not be Barred of Relief By the "Clean Hands" Doctrine Because of Their Monopolistic Practices (ptf. br. pp. 90-92).

In defendants' main brief (pp. 9-22), there is made a complete factual analysis of the price-fixing activities of plaintiffs which operate directly in restraint of trade, impede the flow of interstate commerce with regard to radio broadcasting, sales of sheet music and other articles of commerce, and flagrantly violate the Sherman Anti-Trust Act. This demonstration is followed (pp. 22-28) by citation of authorities establishing that the "clean hands" maxim applies to just such a situation as this where the aid sought is in furtherance of the monopoly. Attached as Appendix "C-1" to defendants' brief (pp. 84-91) is the unreported decision of the three-judge District Court for the Western District of Washington in *Buck* v. *Gallagher* entered December 23, 1940, dismissing for this reason the bill of the plaintiffs filed to restrain the enforcement of a statute of the State of Washington in many respects similar to the Florida statute here involved. (See also ptf. br. App., pp. 147-153.)

This court will naturally inquire what showing plaintiffs have made to offset all this. We submit that the answer to this question is, "precisely nothing."

On the factual side, there is nothing in their 94 pages of brief or in the record to contradict the price-fixing activities of the combination represented by plaintiff Society, or the pernicious effects which those operations have produced upon the public entertainment industries in Florida and elsewhere; nothing to contradict the effect of defend-

ants' authorities showing that equity should not lend its aid to perpetuate these restrictions of trade.

Plaintiffs refer (p. 90) to the decision of this court affirming the temporary injunction (*Gibbs* v. *Buck*, 307 U. S. 66) as though the court had decided the invalidity of the "clean hands" defense. Upon examination of the opinion it is seen that it did no such thing, either expressly or by inference. The majority opinion (307 U. S. 68-79) did not deal with this defense at all. It decided no more than that (1) there was federal jurisdiction, and (2) that there was no abuse of discretion on the part of the lower court in granting the preliminary injunction. As to the action of the lower court in over-ruling the motion to dismiss, this court said (p. 76):

> "Whether to grant or refuse a motion to dismiss *before answer* is largely a matter of discretion for the court below."

After the first appeal was disposed of, answers were filed presenting this specific defense (R. I, 108-9, 188) which have been overwhelmingly supported and nowhere contradicted by the record (def. br. p. 11-22). The lower court failed to deal with this defense in its Findings of Fact and Conclusions of Law (R. II, 1082-1092) or in its opinion (R. II, 1092-1104), and the question stands wide open for this court to decide.

Plaintiffs cite (p. 91) *Standard Oil Company (Ind.)* v. *U. S.*, 283 U. S. 162 as though it gave them a clean bill of health for their price-fixing operations. They have seriously misinterpreted that decision. It dealt with a peculiar state of facts where there were overlapping patents and

the pooling was accomplished to prevent litigation between the owners. In the course of its opinion this court said (283 U. S. 174):

> *"Where domination exists,* a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act."

It further found (pp. 176-179) that the facts in that case disproved the existence of monopoly or restriction of competition.

A different situation is presented by the case at bar where the license fee imposed is not based upon the use of the copyrighted music, but upon a flat percentage of the licensee's receipts or other equally arbitrary standards, thereby restraining competition through depriving the user of all incentive to use other music or other kinds of entertainment programs. (See *Motion Picture Patents Co.* v. *Universal Film Co.*, 243 U. S. 502, 517; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456.)

The point raised by plaintiffs at page 92 to the effect that violation of the anti-trust acts are no defense to an *infringement suit* is conceded as an abstract proposition of law. Obviously it has no applicability to the instant case.

II. The Plaintiffs Have Failed to Show That the Provisions of the 1937 Act Were Inseparable, and Failed to Overcome the Presumption of Separability Created by the Saving Clause Therein (ptf. br. pp. 93-94).

The defendants at pages 28-37 of their main brief have

demonstrated that the lower court was in error in striking down the entire 1937 Act because it found that Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 were unconstitutional, and that these sections were inseparable from the remaining provisions of the Act.

At page 93 of their brief, the plaintiffs attempt to show that the 1937 Act is inseparable and that the court's act invalidating the entire 1937 Act because it found certain sections unconstitutional was correct. Their argument is clearly erroneous and illogical because it ignores:

(1) The presumption of severability created by the saving clause, Section 12 of the 1937 Act.

(2) The legislative interpretation of severability of the Act in Section 15 of the 1939 Act which repealed all inconsistent laws but expressly saved from the repealing clause all of the 1937 Act except Sections 2-A, 2-B and 6.

(3) The separate and distinct purpose of Section 1 and its dependent sections, the anti-monopoly provisions, not found per se unconstitutional by the lower Court from Sections 2-A, 2-B, 4-A, 4-B, and 6, the "without pay" provisions which were held to be per se unconstitutional by the lower Court.

(4) The fact that Sections 4-A, 4-B, 5-A and 5-B are only additional deterrents to price-fixing combinations violating Section I of the Act, and are thus subordinate and incidental to the fundamental purpose of the Act, which was to prohibit the operation of price-fixing combinations in the State of Florida.

(5) The fact that the defendants have no duties to per-

form with respect to Sections 2-A, 2-B and 6 of the 1937 Act.

(6) The fact that, if the sections which the Court held per se unconstitutional viz: 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 are eliminated, the remaining provisions of the Act still constitute a complete anti-monopoly statute.

III. The Enactment of the Statutes Was within the Police Power of the State of Florida and Plaintiffs Have Failed to Show the Contrary (ptf. br. pp. 75-78).

In defendants' main brief (pp.38-46), it has been shown that, notwithstanding the fact that federal copyrights have their origin in the Federal Constitution, this court has recognized the right of the states to enact reasonable measures for the protection of their citizens against known evils practiced in the use of such rights. The leading case of *Allen* v. *Riley*, 203 U. S. 347, is there analyzed and shown to be pertinent because the protection of the citizens of a state against monopolistic practices is a function of state governments, no less than is the protection of its citizens against frauds with reference to ownership.

That there was shown a known evil to curb is amply demonstrated in defendants' main brief (pp. 11-22 incl.). The demonstration there made has been in no wise offset by any facts or arguments in plaintiffs' brief.

In the effort to take their case out of the police power of the state, plaintiffs at page 75 reiterate their contention that the statutes were not enacted in the public interest, but "to benefit the 410 users within the State of Florida,"

citing in support thereof a Conclusion to that effect found by the lower court (R II, 1089-90). The fact that the lower court entered this Conclusion without any basis in the record or in law to support it has already been dealt with (supra, p. 18), and there is no need to argue it again, as it is in the teeth of the evidence and the pleadings in this case.

Again (pp. 76, 77) plaintiffs state that "the statutes are designed to prohibit a lawful enterprise," citing in support certain cases of inferior courts in the States of New York and Washington, and of British courts containing commendatory language as to some of the functions of the Society and the British Society. Suffice it to say that these cases do not involve the question at bar.

At page 77, plaintiffs say:

> "The evidence is conclusive that without such collective action the exclusive right of public performance for profit, vested in the copyright owner, becomes an unenforceable and valueless right, existing in theory only, and robbed of all commercial value. The individual copyright owner standing alone is helpless and hopeless. Necessity compels copyright owners to act collectively in order to exercise the exclusive right of public performance for profit. A statute which prevents them from acting collectively confiscates this right."

There is no warrant whatever for this statement. There is not one word in either of the Florida statutes which prevents individual copyright owners from associating themselves together for the purpose of detecting and prosecut-

ing infringements, or obtaining the necessary information upon which they might individually fix license fees on a competitive basis. As this record shows, most of the commercially available musical copyrights are owned by large and successful publishing houses (e. g. Carl Fisher Inc. whose music currently published is listed in eleven printed catalogues; R. II, 991). Such business houses certainly would not be lacking in means to determine the proper basis upon which to offer licenses for ordinary "small rights" any more than they are to determine the basis for dramatico-music rights, sound film tract rights or other licenses which they enter into without the assistance of the Society.

And so, the quotation from *Allen* v. *Riley,* supra inserted at page 79 of plaintiffs' brief to the effect that state legislation which "would result in a prohibition of the sale of the species of property within its borders" would be unconstitutional is entirely inapplicable to the Florida statutes.

At page 78 of plaintiffs' brief, they state that the legislation was "certainly not necessary to accomplish the purpose of destroying any alleged *monopoly because earlier Florida statutes * * * * amply provide for the regulation and punishment of combinations in restraint of trade.*" Here we pause to inquire just what interpretation plaintiffs put upon the earlier Florida anti-monopoly statutes (C.G.L. Fla. Secs. 7944-7954). At page 67 plaintiffs analyze the case of *Brock* v. *Hardie,* 114 Fla. 670, saying:

> "It is also pointed out in that case (p. 697) that combinations which do not deal in any article of merchandise, manufacture, trade or commerce, are not within the condemnation of the Florida

anti-trust laws."

Which of these inconsistent interpretations do plaintiffs ask this court to adopt, their own interpretation that the earlier statutes *do* protect the Florida public against monopolies in the licensing of intangible rights in copyrighted music, or the decision of the Florida Supreme Court that these earlier statutes *do not* cover that field?

IV. The Statutes Do Not Deny the Equal Protection of the Laws to Owners of Copyrighted Music (ptf. br. pp. 60-68, 73-75).

At pages 60-64, plaintiffs complain of discrimination because the statutes do not regulate the owners of musical works not copyrighted but merely protected by the common law.

It suffices to point out that material differences in the factual situation justify fully the action of the Legislature in classifying and regulating the licensing of musical copyrights. As said by Mr. Justice Frankfurter in *Tigner* v. *Texas*, 310 U. S. 141, 147, 149:

> "The Constitution does not require things that are different in fact or opinion to be treated in law as though they were the same. * * * Here again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy."

To like effect see numerous decisions of this court illustrative of the reasonableness of the classification made by the Florida statutes including:

Carroll v. *Greenwich Ins. Co.*, 199 U. S. 401.
International Harvester Co. v. Missouri, 234 U. S. 199.
Radice v. *New York*, 264 U. S. 292.

The owners of uncopyrighted musical works have not, to the knowledge of anyone, combined to fix prices or for other purposes, and there is no indication of any intention to do so.

For the same reason there is no merit in plaintiffs' contention (p. 73) that the 1937 Act discriminates in favor of copyright owners residing outside of the United States because it imposes no regualtion upon them. Certainly it was competent for the Legislature to determine that there was no serious jeopardy to the public interest from the operations of foreign musical copyright holders, or, at least, it could determine that the activities of copyright holders in the United States presented a distinct evil, requiring regulation. It is a matter of common knowledge that most of the music used in public performances for profit is controlled by American copyright owners. The Legislature in its discretion simply found that the operations of foreign copyright owners in Florida did not immediately require regulation.

Nor is there any merit in plaintiffs' contention (p. 65) that the penalties imposed for violation of the statutes here under consideration are far more severe than those imposed under other Florida anti-monopoly laws.

The penalties imposed by Section 8 of the 1937 Act are seen by plaintiffs' own statement to be identical with those imposed by the earlier anti-monopoly acts, and in view

of the decision of the Supreme Court of Florida in *Brock* v. *Hardie*, supra, cited at page 67 of plaintiffs' brief, that the earlier anti-monopoly laws do not cover intangibles such as public performance rights, the penalties can not be cumulative as argued by plaintiffs on page 65.

Plaintiffs' complaint as to sections 11-A and 11-B (pp. 66-7) is premature, as these sections are procedural merely, and in the absence of any actual case depriving a defendant of his constitutional right, it will be assumed that the court having jurisdiction of the case will protect him.

V. The Florida Statutes Create No "Arbitrary Presumption of Guilt" and The McFarland Case Is Not in Point (ptf. br. pp. 68-72).

Here plaintiffs attack the 1937 Statute because (pp. 70, 71) it makes illegal price-fixing combinations constituting a substantial number of composers, authors and publishers. They digest the case of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, charging that the Florida statute creates the like arbitrary and unconstitutional presumptions of guilt.

This attack, too, is unfounded. Upon examining the McFarland case, it becomes clear that the feature of the Louisiana legislation there declared obnoxious to constitutional safeguards was the creation of legislative presumptions of guilt which had no real relationship to the offense denounced and were unreasonable as arbitrary legal proof. That statute was notably bad in creating a presumption of monopoly from the mere fact that the defendant had paid in Louisiana a less price for sugar than it paid elsewhere. Such fact was declared not to be reasonable proof of a monopoly and incapable even by legisla-

tive declaration of taking the place of proof necessary to conviction.

In the instant case neither of the Florida acts attempted to create any such extreme presumptions or any evidentiary presumptions.

Section 1 of the 1937 Act upon which plaintiffs rely in attempting to apply the McFarland case simply declares a combination of a substantial number of copyright holders for the purpose of fixing prices to be in restraint of trade. Far from being similar to the "presumption" clauses of the Louisiana statute in the sugar case, the language of the Florida Act is closely analogous to that long employed and upheld in the Sherman Act as well as in many other federal and state statutes.

In *United States* v. *Trenton Potteries Co.*, 272 U. S. 392, and numerous other cases decided before and since, this court has recognized price-fixing as a hall-mark of monopoly, and so the Legislature was creating no presumption, but merely recognizing one which already existed.

VI. The Objection That the State Statutes Impair Obligations under Existing Contracts Is Unfounded (ptf. br. p. 83).

At this place in their brief, plaintiffs complain of Section 3 of the 1937 Act because it renders void existing contracts by Florida music users with combinations declared unlawful under Section 1 of the Act.

As heretofore pointed out, the question is moot so far as this case is concerned because plaintiff Society's license agreements expired December 31, 1940 (R. I, 33, 70) and there is no evidence as to what contracts, if any, may

have been entered into since that time.

Pretermitting this point however, there is no doubt of the lawfulness of such a provision:

Atlantic Coast Line R. Co. v. *Goldsboro*, 232 U. S. 548
New Orleans Gas Light Co. v. *Louisiana Light Co.*, 115 U. S. 650
Union Dry Goods Co. v. *Georgia Public Service Corp.*, 248 U. S. 372
Stephenson v. *Binford*, 287 U. S. 251, 276
Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398, 434-5

CONCLUSION

Plaintiffs urge:

(1) That the bill, supplemental bill and further supplemental bill should be dismissed by application of the "clean hands" doctrine, because equity should not lend its aid to perpetuate the plaintiffs' price-fixing activities in restraint of trade—just as was done by the 3-judge Court in the Western District of Washington, to enjoin enforcement of the Washington statute (def. br. App. "C-1", "C-2", "C-3", pp. 84-95); or, in the alternative,

(2) That the anti-monopoly provisions of the 1937 Act and Sections 4-A and 4-C of the 1939 Act be adjudged to be within the police power of the State of Florida, and not subject to the other constitutional attacks levied by plaintiffs.

Respectfully submitted,

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LUCIEN H. BOGGS,

ANDREW W. BENNETT,
Counsel for Defendants,

APPENDIX "A"

In the District Court of the United States for the Eastern District of Wisconsin

No. 449 Q (CRIMINAL)

UNITED STATES OF AMERICA

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL., DEFENDANTS

INFORMATION

At the January, 1941, Term of the District Court of the United States for the Eastern District of Wisconsin, held at Milwaukee, Wisconsin, in said District, comes the United States of America, acting through B. J. Husting, United States Attorney in and for said District, and leave of the Court having first been obtained, informs the Court as follows:

I

Description of defendants

1. That American Society of Composers, Authors and Publishers, hereinafter referred to as "Society", an unincorporated membership association of music composers, authors and publishers, having its principal office at 30 Rockefeller Plaza, New York, New York, is made a defendant herein.

2. That the following individuals, who have been or are now officers or directors of Society as indicated after their names, actively engaged during the period covered by this Information in the management, direction and control of the affairs and polices of the Society, and in particular of those affairs and policies which are covered by this Infor-

mation, who have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged, are likewise made defendants herein.

1. Gene Buck, President and Director.
2. Louis Bernstein, Vice President and Director.
3. Otto A. Harbach, Vice President and Director.
4. George W. Meyer, Secretary and Director.
5. Gustave Schirmer, Treasurer and Director.
6. Fred E. Ahlert, Director.
7. Saul Bornstein, Director.
8. J. J. Bregman, Assistant Secretary and Director.
9. Irving Caeser, Assistant Treasurer and Director.
10. Max Dreyfus, Director.
11. George Fischer, Director.
12. Walter Fischer, Director.
13. Raymond Hubbell, Director.
14. Jerome Kern, Director.
15. Edgar Leslie, Director.
16. Jack Mills, Director.
17. Herman Starr, Director.
18. John O'Connor, Director.
19. J. J. Robbins, Director.
20. Oley Speaks Director.
21. Deems Taylor, Director.
22. Will Von Tilzer, Director.
23. John Mercer, Director.
24. Oscar Hammerstein II, Director.
25. E. C. Mills, Chairman Administrative Committee.
26. John G. Paine, General Manager.

The following corporations which have had divers officers and agents and representatives on the Board of Di-

rectors of the Society:

Shapiro, Bernstein & Co., Inc., Organized and duly authorized to do business under the laws of the State of New York;

Irving Berlin, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Bregman, Vocco & Conn, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Chappell & Co., Inc., Organized and duly authorized to do business under the laws of the State of New York;

T. B. Harms Company, Orangized and duly authorized to do business under the laws of the State of New York;

J. Fischer & Bros., Organized and duly authorized to do business under the laws of the State of New York;

Carl Fischer, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Mills Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Words & Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Robbins Music Corporation, Organized and duly authorized to do business under the laws of the State of New York;

Leo Feist, Inc., Organized and duly authorized to do business under the laws of the State of New York;

Miller Music, Inc., Organized and duly authorized to do business under the laws of the State of New York;

G. Schirmer, Inc., Organized and duly authorized to do business under the laws of the State of West Virginia;

Boston Music Company, Organized and duly authorized to do business under the laws of the State of West Virginia;

Willis Music Company, Organized and duly authorized to do business under the laws of the State of Ohio;

Harms, Inc., Organized and duly authorized to do business under the laws of the State of New York;

M. Whitmark & Sons, Organized and duly authorized to do business under the laws of the State of New York;

Remick Music Corporation, Organized and duly authorized to do business under the laws of the State of New York;

Harry Von Tilzer Music Publishing Co., Organized and duly authorized to do business under the laws of the State of New Jersey

are made defendants herein.

3. That all members of the Society, in addition to those made defendants herein, are expressly named as co-conspirators herein.

II

The society

4. That defendant Society, an unincorporated association, was organized in or about the year 1914, by the leading publishers, composers and authors of musical compositions in the United States, for a period of ninety-nine (99) years from the date of its organization; that the purposes for which it was organized were, among other things, to grant licenses and collect royalties for the public performance of the works of its members, to allot and distribute the royalties collected, and to accumulate and maintain a reserve fund to be used in carrying out any of the objects of the Society; that its membership at the time of the filing of this Information consists of approximately 140 publishers and 1,200 composers and authors and includes the owners of the copyrights of a substantial amount, more than 75 percent, of all the copyrighted musical compositions demanded by the public of the United States for entertainment purposes at the time of the filing of this Information and for a number of years prior thereto; that the management of defendant Society is vested exclusively in a self-perpetuating board of directors consisting of 24 persons, 12 of whom represent publisher members, 6 represent composer members, and 6 represent author members; that each director is elected to serve for a period of three years, and is eligible for reelection upon the expiration of his term; that the terms of office of eight members of said board expire each year, and their successors are elected annually by the remaining members of the board; that the directors have exclusive and absolute control of the management and of all activities of the Society and appoint all its committees, officers and em-

ployees; that admission to membership in the Society is by election thereto by the board; that each member upon admission must execute an agreement in the form required by the board of directors, assigning to the Society the exclusive nondramatic public performance for profit rights of all of the members' works for the period of any then existing agreement between the Society and its members; that the agreement between the Society and its members, a copy of which is hereto attached marked Exhibit "A" and expressly made a part hereof, expired December 31, 1940; that the agreements between the Society and its members, existing prior to December 31, 1940, have been renewed for a further ten-year period; that by reason of the vast number of copyrights of compositions controlled by the members of the Soceity, by reason of the great public demand therefor, and by reason of the vesting of the absolute management and control of all activities of the Society in the self-perpetuating board of directors, the twenty-four persons constituting such board have the power to and do fix the price of and control the public performance for profit rights of the greater part of the music demanded by the public of the United States for entertainment purposes.

5. That licenses to perform publicly for profit the musical compositions copyrighted by its members are issued by the Society upon application therefor; that agents of the Society solicit applications for such licenses by threat of prosecution for infringement of the copyright laws of the United States, from all unlicensed persons, firms or corporations in the United States who use music in connection with their business; that defendant Society refuses to grant licenses to perform single musical compositions or

groups of compositions selected by the licensees; that it grants only blanket licenses to perform any and all musical compositions of all its members upon the payment of such royalty as is demanded by the board of directors of the Society; that six forms of licenses have been and are in use, copies of which are hereto attached and marked Exhibits "B", "C", "D", "E", "F", "G", respectively, and are expressly made a part hereof; that Exhibit "B" is the form of license which radio broadcasting stations not owned at least 51 percent by newspapers were required to accept prior to December 31, 1940; that Exhibit "C" is the form of license which radio broadcasting stations owned at least 51 percent by newspapers were offered, accepted by many and outstanding prior to December 31, 1940; that Exhibit "D" is the form of license which theatres are required to accept; that Exhibit "E" is the form of general license which all other users of musical compositions are required to accept; that Exhibit "F" is the only form of license offered radio broadcasting stations not originating programs as part of a chain broadcast, or the simultaneous broadcasting of programs over two or more stations, subsequent to December 31, 1940; that Exhibit "G" is the only form of license offered radio broadcasting stations originating programs as part of a chain broadcast or the simultaneous broadcasting of a program or programs over two or more stations, subsequent to December 31, 1940.

6. That defendant Society maintains agents and representatives throughout the United States, whose duty is to enforce the demands of the Society in the sale of licenses and in collecting royalties therefor.

III

The radio broadcasting industry

7. That the term "radio broadcasting station" is used herein to designate those radio stations operated for the entertainment of the residents of the United States and residents of adjacent and more distant foreign countries; that there are approximately 793 such radio broadcasting stations interspersed throughout the states of the United States and operated under authority of the Federal Communications Commission, pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior Acts of Congress; that each station is required to broadcast a minimum regular operating schedule of two-thirds of the hours it is authorized to broadcast under the license granted it by the Communications Commission; that the continued existence, success and prosperity of a radio broadcasting station depends entirely upon the entertainment offered by it to the radio listening public within the range of the station's power; that music is the principal form of entertainment demanded by the radio listening public and must be offered by a station in order to retain the continuing interest and patronage of the listening public; that approximately 50 percent of the time devoted to the transmission of energy, ideas and entertainment across state or national boundaries by radio broadcasting stations in the United States is devoted to the radio broadcasting of music in varying forms, and such music must represent the rendition of compositions most desired by the listening public; that the only income available to a station is derived from the sale of its facilities to persons desiring to communicate energy, ideas and entertainment to the public within listening

range of the station's transmission power; that such sale of facilities consists primarily of sales to business concerns for the purpose of advertising the products of the particular concern and of creating good will on the part of the public for the services or products of the advertiser; that the desirability of a particular station for advertising purposes is directly dependent upon the number of persons listening to the programs broadcast by that station, and such persons can only be induced to listen to the station's broadcasts by furnishing the musical entertainment demanded by the radio audience; that a substantial portion of the entertainment furnished by the station must be furnished at the expense of the station, for which is receives no compensation or income.

8. That during all the time herein mentioned it has been and is essential to the continued operation of each of the stations in the United States broadcasting radio entertainment, in order to avoid liability for infringement of copyright, to obtain the permission or license of the owners of the copyrighted musical compositions the public performance of which is demanded by the radio audience.

IV

The interstate commerce involved

A. In radio broadcasting

9. That radio broadcasting stations in the United States are engaged in interstate or foreign commerce; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to the radio listening population of the United States or foreign countries; that approximately 40 percent of the time devoted to the transmission of energy, ideas

and entertainment across state or national boundaries by radio broadcasting stations in the United States has been devoted to the radio broadcasting of copyrighted musical compositions owned or controlled by the Society and its members; that as each radio station under the copyright laws must obtain permission from the copyright owners of musical compositions before such compositions can be broadcast in interstate commerce, any interference with or restraint upon the obtaining of such permission from the copyright owners upon a competitive basis restrains the interstate and foreign transmission of energy, ideas and entertainment by radio broadcasting stations.

10. That there has developed in the radio industry a practice which is commonly called "chain" or "network" broadcasting; that by this method of operation several radio broadcasting stations are connected in a chain or network by means of leased telephone lines for the purpose of broadcasting simultaneously raido programs originating at one of the stations in the network; that this method is generally inaugurated and controlled by what is known as a network company; that the principal network companies presently existing in this country are the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System; that approximately 350 radio stations located in the United States are affiliated with and engaged in such "network" broadcasting; that only those network stations which originate network programs have control over the selection of the content of the programs which are broadcast simultaneously by all of the stations in the network; that approximately 45 percent of the total time devoted to network broadcast-

ing in this country is devoted to the broadcasting of musical compositions; that a substantial number of the copyrighted musical compositions performed over radio networks during the period covered by this Information were owned or controlled by the Society and its members; that the network stations other than those originating network broadcasting, have no control whatsoever over the selection of the musical compositions which are performed by the several stations comprising the network.

B. In sheet music

11. That each defendant who is a publisher member of defendant Society prints, or causes to be printed, the music and lyrics, and special arrangements thereof, of musical compositions; that such printed sheets of music are sold by such deefndants to customers located in all states of the United States and are transported across state boundaries in interstate commerce; that the greater part of the musical compositions broadcast by radio stations is performed by entertainers located in the studio of particular broadcasting stations, or in close proximity thereto, from musical scores transported across state boundaries.

12. That the essential element in effecting the sale and distribution of sheet music throughout the United States is the transmitting of musical compositions to the ear of the public, in order to create a desire on the part of individual members of the public to purchase the printed score representing particular compositions; that radio broadcasting is the principal medium through which individual musical compositions are transmitted to the ear of the purchasing public and a demand for the printed score created; that by means of the combination and conspiracy

hereinafter described, defendant Society through the issurance of only blanket licenses authorizing the performance of the Society's entire repertoire of music at a price which requires the payment of a percentage of the revenue derived from all radio programs regardless of whether Society owned or controlled music is performed, has destroyed the economic incentive on the part of radio stations, having the Society's license, to perform the musical compositions of authors, composers and publishers not members of Society, thereby depriving those owners of copyrighted musical compositions who are not members of defendant Society of the opportunity of transmitting their musical compositions to the ear of the purchasing public, with the result that the sale of scores written by nonmembers to purchasers in states of the United States other than the state where such scores were manufactured, and the transportation thereof across state and national boundaries, is and has been restrained.

C. Motion picture films

13. That motion picture films are produced primarily in the States of New York and California, and shipped to motion picture exhibitors located in every state in the United States; that these motion picture films are produced and shipped in interstate commerce for the sole and exclusive purpose of exhibition or public performance by motion picture exhibitors; that without the right to exhibit or perform, the motion picture films are rendered valueless and restricted from a free flow in interstate commerce; that a substantial portion of the motion picture films are synchronized with music to the extent that the films cannot be exhibited without per-

forming the music synchronized therewith; that a great majority of the music synchronized with the films is copyrighted music, the public performance for profit rights of which are controlled by the Society; that the Society, therefore, has the power to fix the price of, control or otherwise unreasonably restrain the usage of a substantial portion of the motion picture films passing in interstate commerce.

D. Electrical transcriptions

14. That electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations; that more than 50 percent of the electrical transcriptions produced in the United States are produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States; that upon practically all of these electrical transcriptions are recorded musical compositions; that a substantial portion of the music so recorded is copyrighted music owned or controlled by the Society and its members.

V

The combination and conspiracy

15. That for many years preceding as well as during the period of three years next preceding the filing of this Information, and continuing to the date of the filing thereof, defendants, and others to the United States Attorney unknown, well knowing the foregoing facts, have been engaged in the United States, and particularly in the Eastern District of Wisconsin, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate and foreign trade and commerce in radio broad-

casting, sheet music, motion picture films, and electrical transcriptions in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act, and have conspired to do all acts and things and to use all means necessary and appropriate to make said restraints effective, including the means, acts and things hereinafter more particularly alleged and other means, acts and things which at the time of filing this Information are unknown to the United States Attorney; that as part of said conspiracy the defendants have arranged and agreed among themselves to do the following things:

A. To create, maintain and utilize defendant Society as an instrumentality for promoting and maintaining the illegal combination and conspiracy herein described; to create defendant Society as such instrumentality with a self-perpetuating board of directors and to vest in the twenty-four persons constituting such board the exclusive power to control the activities of defendant Society; to restrict membership in defendant Society to such composers and authors who have written or composed and had regularly published not less than five copyrighted musical compositions, and to such publishers as may be approved by the board of directors; to have transferred to and to pool in defendant Society the sole and exclusive right to perform publicly for profit all musical compositions of which all the members of Society are the copyright proprietors, or which any member, either alone or jointly or in collaboration with others, wrote, composed, published,

acquired or owned, or in which any member has any right, title, interest, or control whatsoever, in whole or in part, or which any member during the term of the agreement may write, compose, acquire, own, publish or copyright, either alone, jointly, or in collaboration with others, or in which any member may at any time, during the term of the agreement, have any right, title, interest or control, either in whole or in part; to have all members of defendant Society vest in defendant Society absolutely until and including December 31, 1940, the sole and exclusive right to license others to perform publicly for profit all their musical compositions; to renew and extend the agreements between Society and its members which expired December 31, 1940, for a further ten-year period.

B. To vest in defendant Society a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members, aggregating an unknown number of musical compositions; to refuse to furnish to its licensees complete lists of the musical compositions in the Society's repertoire of music; to eliminate competition among members of defendant Society in the sale of rights to perform publicly their respective musical compositions, which, but for the illegal combination and conspiracy herein described, would have existed; to refuse radio broadcasting stations, advertisers (desiring to utilize the service of such stations to promote the sale of their merchandise), orchestras, theatres, and others desiring the right to perform publicly the copyrighted musical compositions of members of defendant Society, the right to acquire from the individual members of the Society the public performance for profit rights of their

respective copyrighted musical compositions; to require commercial users desiring only certain musical compositions in the Society's repertoire to accept a blanket license from defendant Society for all of its copyrighted musical compositions, upon terms and conditions arbitrarily fixed by it.

C. To agree to establish and maintain, and pursuant to such agreement, to establish and maintain, by means of the pooling of their individual copyright monopolies, enhanced and non-competitive prices or royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by individual defendants; to eliminate all competition among members of defendant Society in the sale of licenses to perform publicly their individual musical compositions and to exercise the power obtained by dedendants through the unlawful pooling of their individual copyright monopolies by concertedly refusing to license the public performance by radio broadcasting stations and all other persons engaged in the public performance for profit of copyrighted music of any copyrighted musical composition owned and controlled by a member of defendant Society, except on the basis of a general license covering any and all musical compositions of all members and except upon the basis of an arbitrary royalty for such general license, fixed and determined by the aforesaid self-perpetuating board of directors of defendant Society; to require compliance with the terms fixed by the defendants by radio broadcasting stations affiliated with radio "networks," prior to December 31, 1940, by issuing licenses to network affiliated radio stations only on the basis that the license issued to each station was not to be construed

as authorizing the license to grant others any right to perform publicly for profit by any means, method or process whatsoever. The radio stations affiliated with a radio "network," other than the station originating the radio program, have had no control over the copyrighted musical compositions performed by the network affiliated stations simultaneously. Broadcasting stations affiliated with radio "networks" have had to accept a license from defendant Society upon any terms and conditions imposed by defendant Society, or subject themselves to numerous infringement suits in which they would be compelled to pay not less than $250 for each copyright infringement, as provided in the copyright laws of the United States.

D. Concertedly to demand and receive from radio broadcasting stations increased amounts as royalties for licenses to perform publicly copyrighted musical compositions owned and controlled by members of defendant Society; to notify on or about April 1, 1932, all radio broadcasting stations throughout the United States that, on and after June 1, 1932, defendant Society would issue to broadcasting stations only a general license covering all musical compositions of all members of defendant Society, which license would require the payment annually as royalty of a sum approximately equal to the annual royalty theretofore paid by them, and in addition thereto, 5 percent of the gross income of the broadcasting station from whatever source derived. This fee represented an increase of approximately 400 percent in so-called "royalty" payments over the aggregate royalty demanded for the previous year. Protests were made by the broadcasting stations to defendant Society and the then existing licenses were tem-

porarily extended to September 1932. Thereupon efforts were made by the broadcasting stations, acting through a committee appointed for the purpose, to obtain licenses providing for royalty payments by each station based on the number of performances by such station of copyrighted musical compositions owned and controlled by Society or its members. The defendants refused to agree to royalty payments based on actual use made of their musical compositions. Other proposals submitted by the broadcasting stations were also rejected by defendants. Each broadcasting station, in order to use the copyrighted musical compositions controlled by defendant Society and to avoid a multiplicity of infringement suits, acceded to the demands of defendant Society and accepted from defendant Society a three-year blanket license agreement, commencing on or about September, 1932, covering all musical compositions of all members of defendant Society, upon the basis of a royalty payment approximately equal to the fixed annual royalty paid for the preceding year, plus three percent of the station's net receipts during the first year of the agreement, four percent of such receipts during the second year, and five percent of such receipts during the third year. "Net receipts" as defined in said agreement, constituted the full amount paid to the station for the use of its broadcasting facilities, after deducting commissions not exceeding fifteeen percent, if any, paid to an independent advertising agent or agency.

E. To refuse to alter or change the terms of the contracts executed by and between the Society and radio broadcasting stations in 1932, which expired December 31, 1935; and to issue an ultimatum on or about January 10,

1936, in writing, to the various radio broadcasting stations to the effect that the performance of copyrighted musical compositions in the Society's repertoire of music would constitute a copyright infringement unless the existing contracts were renewed by January 15, 1936. The radio broadcasters located throughout the United States had no alternative but to accept the terms dictated by the Society, since they could not operate without being subjected to the $250 minimum damage provision for each copyright infringement of the copyright laws by performing music owned and controlled by the Society and its members. Within the specified time they accepted renewals of the contracts executed in 1932. These contracts executed in 1932, expired on December 31, 1940.

F. To refuse to renew the licenses to radio broadcasters which expired December 31, 1940, under threat of withdrawing from the interstate commerce of radio broadcasting and public enjoyment the vast pool of copyrighted music acquired by the Society, by means of the illegal conspiracy alleged herein and under the further threat of inflicting the $250 minimum damage provision of the copyright laws, unless the radio broadcasters accepted the licenses attached hereto and marked Exhibits "F" and "G." The percentage of income demanded by members of defendant Society from radio broadcasting stations since 1932, represents a percentage of the entire income received by such broadcasting stations for the sale to advertisers of their operating time on the air. Such demand for the payment of these percentages constitutes a charge upon income received by radio broadcasting stations for their time devoted to the broadcasting of

lectures, dramatizations, sporting events, and other programs, which employ none of the copyrighted musical compositions of the members of defendant Society.

G. To withdraw on January 1, 1941, from approximately 568 radio broadcasting stations interspersed throughout the United States, including the three national network systems, National Broadcasting Company, Columbia Broadcasting System and Mutual Broadcasting System, who had not accepted a license at the price and terms fixed by the defendants, the right to broadcast in interstate commerce and to deprive the radio listening pubilc of the privilege of hearing and enjoying all the copyrighted music of all the respective members of the Society.

H. To create and maintain, prior to December 31, 1940, a distinction and discrimination between the license agreements exacted of radio broadcasting stations owned at least 51 percent by newspapers and license agreements exacted from radio broadcasting stations not so owned. The license agreement offered by defendant Society to broadcasting stations owned 51 percent by newspapers, and accepted by many, did not require payment to defendant Society of a percentage of the station's income derived from all advertisers, but only required the payment of 3 percent of the income of the station received from advertisers whose programs included musical compositions owned or controlled by members of defendant Society. This 3 percent was payable until the total amount paid by the station equalled an amount agreed upon between the station and defendant Society. Thereafter, the station was required to pay 5 percent of all additional

income received by it from programs in which musical compositions owned or controlled by members of defendant Society were used.

I. To insert provisions or terms in all the license agreements to users of music which permit the copyright owner, through defendant Society, to withdraw at will from the operation of the license any musical compositions owned or controlled by such copyright owner and thereby prevent its broadcast by the broadcasting station, thereby enabling members of defendant Society to withdraw musical compositions in the Society's repertoire in great demand by the general public, for the purpose of collecting additional compensation for the right to perform publicly for profit and for the further purpose of collecting enhanced and non-competitive fees for the right to record and reproduce mechanically copyrighted musical compositions reproduced for public performance for profit; and to force radio broadcasting stations to accept all terms and conditions imposed by members of defendant Society for the right to broadcast popular musical compositions which have been withdrawn from the Society's general licenses.

J. To require radio broadcasting stations to accept a blanket license as heretofore stated upon terms and conditions imposed by defendant Society, thereby securing for members of the Society the exclusive use of radio broadcasting as a means of conveying musical compositions to the ear of the public-at-large, destroying the economic incentive of broadcasting stations to use the musical compositions of composers, authors and publishers who are not members of defendant Society and thereby preventing non-

members of defendant Society from receiving the compensation for the rights of public performance of their musical compositions, which they would otherwise receive, and limiting and restricting the popular demand of the listening public to musical compositions controlled by defendant Society.

K. To require acceptance of their arbitrary and non-competitive demands for royalties by all classes of music users, as a condition precedent to the acquisition by such music users of the right to perform any copyrighted musical compositions of any members of the Society publicly for profit. The motion picture exhibitors interspersed throughout the United States must perform those musical compositions synchronized with the motion picture films in order to exhibit the motion picture films. Without the right to exhibit and perform the musical compositions synchronized therewith, the motion picture films received in interstate commerce are valueless. All users of music must perform those musical compositions demanded by their audiences. The limitation and restriction of popular demand to the musical compositions controlled by defendant Society has forced such users of music to obtain from defendant Society a license to perform music controlled by defendant Society so demanded by the public. The members of defendant Society, through defendant Society have concertedly refused to grant such users permission to perform individual musical composition selected by the users, but have insisted and still insist that general licenses be accepted which cover all the musical compositions of all the members of defendant Society, upon payment of a fixed amount therefor, irrespective of whether

one or more of such musical compositions are actually performed. By this method of licensing the members of defendant Society have further restricted the popular demand to those musical compositions owned or controlled by the members of defendant Society, and, have prevented the use of musical compositions owned by non-members of defendant Society.

L. To prevent the sale and transportation in interstate commerce of musical scores owned by composers authors and publishers who are not members of defendant Society, by refusing to issue licenses for the public performance of musical compositions owned or controlled by them, except upon the terms and conditions above set forth.

M. To adopt and maintain a comprehensive system for the acquiring of detailed and complete information relative to the musical compositions used by broadcasting stations, by means of which information the members of defendant Society have been and are enabled to conduct their operations through defendant Society so as to prevent the development of competition between members of defendant Society and owners of copyrighted musical compositions who are not members of defendant Society, and to maintain and enforce all provisions of the licenses between Society and radio broadcasting stations.

VI

Purpose and effect of the conspiracy

16. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose and effect unreasonably and unlawfully maintaining

enhanced and uniform prices in the interstate commerce in copyrighted musical compositions controlled by Society, and have otherwise restrained unreasonably the interstate commerce of radio broadcasting, sheet music, motion picture films, and electrical transcriptions; that all members of defendant Society, through the mutual and identical agreements hereinbefore described, have actively and effectively restrained their own activities, have eliminated competition among themselves, and have created, maintained and utilized defendant Society as an instrumentality unreasonably to restrain and restrict, directly and indirectly the interstate trade and commerce, as hereinbefore described.

VII

Jurisdiction and venue

17. That the combination and conspiracy herein set forth has operated and has been carried out in part within the Eastern District of Wisconsin, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate trade and commerce in radio broadcasting, sheet music, motion picture films and electrical transcriptions as herein described, is carried on in part within said District; that said defendants have usual places of business in the said District and therein transact business and are within the jurisdiction of the Court.

18. That this Information is filed and the jurisdiction of this Court is invoked against defendants American Society of Composers, Authors and Publishers, its officers and directors, and the members thereof, because of their violations, jointly and severally, as herein alleged,

of Section 1 of the Sherman Act, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

And so, the United States Attorney accuses and says:

That the defendants throughout the period aforesaid, at the places and in the manner and form aforesaid, unlawfully have engaged in a combination and conspiracy in restraint of the aforesaid trade and commerce in radio broadcasting, sheet music, motion picture films, and electrical transcriptions among the several states and with foreign nations; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

B. J. HUSTING,
United States Attorney

THURMAN ARNOLD,
Assistant Attorney General.

VICTOR O. WATERS,
Special Assistant to the Attorney General.

WARREN P. CUNNINGHAM,
Special Attorney.

APPENDIX "B"

In the District Court of the United States for the Southern District of New York

Civil Action No. 13-95

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS; GENE BUCK, PRESIDENT; GEORGE W. MEYER, SECRETARY; AND GUSTAVE SCHIRMER, TREASURER; DEFENDANTS

CIVIL DECREE AND JUDGMENT

This cause came on to be heard on this 3d day of March, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendants being represented by their counsel, and having appeared and filed their answer to the complaint herein.

It appears to the Court that defendants herein have consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendants have violated any law.

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendants and its acceptance by plaintiff it is unnecessary to proceed with the trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

NOW, THEREFORE, Upon motion of plaintiff, and in accordance with said consent, it is hereby

ORDERED, ADJUDGED AND DECREED

I. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the Acts amendatory thereof and supplemental thereto.

II. Defendants, Gene Buck, as President of the American Society of Composers, Authors and Publishers; George W. Meyer, Secretary; Gustave Schirmer, Treasurer; and American Society of Composers, Authors and Publishers, its officers, directors, agents, servants, employees, members, and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the acts or things hereinafter in this paragraph II prohibited.

(1). Defendant, American Society of Composers, Authors and Publishers, shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or otherwise on behalf of any copyright owner, its members, or other owner of the performing right, or pursuant to any understanding or agree-

ment with such owner, or its members, to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendants. Nothing herein contained shall be construed as preventing defendant, American Society of Composers, Authors and Publishers, from regulating the activities of its members in the following respects: (a) By requiring all moneys derived from the issuance of licenses by the respective members of defendant to be paid by the licensee to defendant and distributed in the same manner as other revenues; (b) by requiring of its members that notice be given the defendant of their intent to issue licenses before the issuance of same; (c) by prohibiting the members from issuing exclusive licenses to commercial users of music; (d) by requiring, as a condition precedent to the issuance of a license by an individual member of the Society, the approval and consent, to be obtained by the licensor, of the composer(s), author(s) and publisher subject to such reasonable regulations as may be adopted by the composer(s), author(s), and publisher for that purpose; (e) by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc., the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the defendant Society.

(2) Defendant, American Society of Composers, Authors and Publishers, shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between

licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this sub-paragraph; and provided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(3) Defendant, American Society of Composers, Authors and Publishers, shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions for radio broadcasting, a license fee of which any part shall be (a) in respect of commercial programs, based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) in respect of sustaining programs, an amount which does not vary in proportion either to actual performance, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing bases, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer

a per program basis of compensation on either or both of the following bases which may be specified by the broadcaster:

(1) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;

(2) in respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon either or both of the foregoing per program bases, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the licenses of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this sub-paragraph to afford radio broadcasters alterna-

tive bases of license compensation.

(4) Defendant, American Society of Composers, Authors and Publishers, shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, insofar as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, said defendant shall not refuse to offer to license the public performance for profit by designated radio broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requirng separate licenses for such enumerated stations.

(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license at a price or prices to be fixed by said defendant for the performance of such specific (i. e., per piece) musical compositions, the use of which shall be requested by the prospective licensee.

(7) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by radio broadcasters, refuse to offer a license on a per performance or per program basis as provided for in paragraph II (3) hereof at a price or prices to be fixed by said defendant for the performance of such programs, the use of which shall be requested by the prospective licensee.

(8) Defendant, American Society of Composers, Authors and Publishers, shall not assert or exercise any right or power nor shall any of its members exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein or to

protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

(9) The Society shall not elect the members of the Board of Directors in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors. Upon the expiration of the terms of office of the present directors, the provisions of this section shall apply to the election of their successors. Thereafter, not less than one-twelfth of the total membership of the Board of Directors shall be elected annually.

(10) Defendant, American Society of Composers, Authors and Publishers, shall provide in its by-laws that the Society shall not distribute to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalog of the Society, and popularity and vogue of such works, all to be determined in a fair and non-discriminatory manner.

(11) Defendant, American Society of Composers, Authors and Publishers, shall not require as a condition

precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, American Society of Composers, Authors and Publishers, and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, American Society of Composers, Authors and Publishers, whether by purchase, merger, consolidation, re-organization or otherwise. None of the restraints or requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, American Society of Composers, Authors and Publishers, made to the principal office of said defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating

to any of the matters contained in this decree; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, rgarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. This decree shall become effective ninety (90) days after the entry hereof, except that the provisions of subparagraph (6) of paragraph II shall become effective nine (9) months after the effective date of the other provisions of this decree.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court any time after the effective date hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof upon any ground for the enforcement of compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or denying such applications so made as justice may re-

quire and the right of the defendant to make such application and to obtain such relief is expressly granted.

Approved:

HENRY W. GODDARD,
United States District Judge.

We hereby consent to the entry of the foregoing decree.

For the complainant:

THURMAN ARNOLD,
Assistant Attorney General.

VICTOR O. WATERS,
Special Assistant to the Attorney General.

WARREN CUNNINGHAM, JR.,
Special Attorney.

For the defendants:

CHARLES POLETTI,
MILTON DIAMOND,
SCHWARTZ & FROHLICH,

By HERMAN FINKELSTEIN,
Member of the Firm.

Judgment rendered March 4th, 1941.

GEORGE J. H. FOLLMER,
Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellees.

No. 611

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellants,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.

Appellees.

JOINT MOTION TO SUBSTITUTE SUCCESSOR IN OFFICE.

J. TOM WATSON,
As Attorney General of the State of Florida.
TYRUS A. FORWOOD,
Assistant Attorney General.
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Attorneys for Appellants in Case No. 610, and Appellees in Case No. 611.
THOMAS G. HAIGHT,
FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
MANLEY P. CALDWELL,
Attorneys for Appellees in Case No. 610, and Appellants in Case No. 611.

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SUPREME COURT OF THE UNITED STATES

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Appellants,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.

Appellees.

JOINT MOTION TO SUBSTITUTE SUCCESSOR IN OFFICE.

Come now the parties to the above styled appeals and respectfully move this Court for leave to substitute J. Tom Watson, individually and as Attorney General of the State of Florida, and to continue these appeals in respect to the

said J. Tom Watson in the place and stead of George Couper Gibbs, and show unto the Court as follows:

1. These appeals from portions of the final decree of the United States District Court for the Northern District of Florida, entered on August 5, 1940, were docketed in this Court on December 6, 1940, the appellants in the first of said appeals being the appellees in the second of said appeals, and likewise, the appellees in the first of said appeals being the appellants in the second of said appeals.

2. On December 23, 1940, this Court noted probable jurisdiction in said appeals, and assigned the same for argument.

3. On January 7, 1941, the term of office of said George Couper Gibbs expired, and J. Tom Watson was duly qualified as his successor in office, and is now the duly qualified and acting Attorney General of the State of Florida.

4. Said J. Tom Watson has adopted and continues, and proposes to continue, the same course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals, that was adopted by his predecessor in office, said George Couper Gibbs, in enforcing said State Statutes.

5. There is a substantial need for continuing this suit against said J. Tom Watson, individually and as Attorney General of the State of Florida, as grave and important questions of constitutional law are herein involved.

Wherefore, it is prayed that this Court enter an order herein, pursuant to 28 U. S. C. 780, and Rule 19, Sub-Section 4, of this Court, substituting J. Tom Watson, individually and as Attorney General of the State of Florida, in the place and stead of George Couper Gibbs, and for

such other and further relief as to this Court may seem just and proper.

Dated this 16th day of January, 1941.

J. Tom Watson,
As Attorney General of the State of Florida.
Tyrus A. Forwood,
Assistant Attorney General.
Lucien H. Boggs,
Andrew W. Bennett,
Attorneys for Appellants in Case No. 610,
and Appellees in Case No. 611.
Thomas G. Haight,
Frank J. Wideman,
Louis D. Frohlich,
Herman Finkelstein,
Manley P. Caldwell,
Attorneys for Appellees in Case No. 610,
and Appellants in Case No. 611.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, individually and as Attorney General of the State of Florida, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

No. 611

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

Appellants,

vs.

GEORGE COUPER GIBBS, individually and as Attorney General of the State of Florida, *et al.*,

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

BRIEF OF APPELLEE IN NO. 610, AND APPELLANT IN NO. 611.

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March, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

GEORGE COUPER GIBBS, individually and as Attorney General of the State of Florida, *et al.*, *Appellants*, *vs.* GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,	No. 610
GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, *Appellants*, *vs.* GEORGE COUPER GIBBS, individually and as Attorney General of the State of Florida, *et al.*,	No. 611

BRIEF OF APPELLEE IN NO. 610, AND APPELLANT IN NO. 611.*

Opinions Below.

The opinion of the District Court for the Northern District of Florida (R. II, 1092-1104) is reported in 34 F. Supp. 510. A prior unreported opinion of that court granting a temporary injunction (R. I, 82-3), was affirmed by this Court in *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

* Italics used in this brief are ours unless otherwise indicated.

Questions Presented.

1. Do certain Florida statutes transgress the Copyright Clause of the Federal Constitution by

(a) requiring owners of copyrighted musical and dramatico-musical works to register their works in Florida after having registered them in Washington, D. C., as required by the Federal Copyright Act;

(b) requiring such copyright owners to license their works and schedule prices in advance on an arbitrary basis prescribed by the statutes;

(c) barring suits for infringement in the federal courts by those copyright owners who fall within the condemnation of the statute, thus, in effect, confiscating the copyright;

(d) barring owners of copyrighted musical compositions from licensing the right of public performance for profit in the only way that has been found to be commercially feasible;

(e) permitting Florida citizens to have free use of such copyrighted works for public performances for profit in certain instances;

(f) preventing such copyright owners from separating the right of publication granted under subdivision (a) of Section 1 of the Copyright Act as well as the right to reproduce mechanically under subdivision (e), from the right of public performance for profit which is granted under subdivision (e) of Section 1;

(g) discriminating against such copyright owners by making the laws applicable to copyright owners, but not to those enjoying protection of their works under the common law of Florida;

(h) imposing such enormous penalties for violating such statutes that owners of copyrighted musical works will

refrain from attempting to assert any rights or attempt to collect license fees for the use of such works in the State of Florida?

2. Do such state statutes impair the obligation of contracts in violation of Article I, Section 10 of the Federal Constitution?

3. Does the 1937 Florida Act violate Article III, Section 2 of the Constitution by making it unlawful to bring suit in the federal courts for certain infringements of copyright?

4. Do such statutes violate the Fourteenth Amendment by depriving plaintiffs of privileges and immunities of citizens of the United States, by denying equal protection of the laws and depriving plaintiffs of their property and liberty of contract without due process of law?

5. Do such statutes violate the "Commerce Clause"?

6. May certain provisions of such statutes be upheld while others are held invalid?

7. May the doctrine of "unclean hands" of the character relied upon by defendants be invoked to deny a litigant the opportunity to resort to the federal courts for protection against the deprivation of his constitutional rights under color of a state statute?

Statutes Involved.

The Statutes of the State of Florida, the validity of which are involved, are the Act of June 9, 1937, Chapter 17807, Florida Laws, 1937 (Vol. I, General Laws of Florida, 1937, pp. 204-214), and the Act of June 12, 1939, Chapter 19653, Florida Laws, 1939 (Vol. I, General Laws of Florida, 1939, pp. 1575-1583). These Statutes will be referred to

respectively as the "1937 Act" and the "1939 Act," and will be referred to collectively as the "State Statutes."

The 1937 Act is printed at pages 91-103 of the Appendix submitted herewith. It is substantially the same as the Nebraska Statute (Ch. 138, Neb. Laws, 1937) involved in the companion case of *Swanson* v. *Buck*, October Term, 1940, No. 312. The 1939 Florida Act is printed at pages 104-114 of the Appendix. The provisions of the State Statutes are summarized at length below (pp. 28-43).

This case also involves the Federal Copyright Act (35 Stat. L. 1075, Tit. 17, U. S. C., as amended) which is printed in Copyright Office Bulletin No. 14. Copies of this Bulletin will be handed to the Court on the argument.

Statement of the Case.

I. Nature of the suit and proceedings below.

This suit was brought on the *joint* behalf of all members of the American Society of Composers, Authors and Publishers (hereinafter referred to as the "Society"), an unincorporated association recognized by the Laws of the State of New York, consisting of approximately 1,425 composers and authors and 131 publishers of music, and *also* on behalf of certain members of the Society in their individual capacities, to enjoin enforcement of the 1937 Act on the ground that it is in conflict with the Federal Constitution and treaties between the United States and foreign countries (Complaint, R. I, 1-35, Findings "2" and "4," R. II, 1083-4).

A temporary injunction restraining the enforcement of the 1937 Act was granted on April 5, 1938 by a statutory District Court consisting of Judge Foster, Circuit Judge, and Judges Long and Strum, District Judges (R. I, 84-93), and was affirmed by this Court in *Gibbs* v. *Buck*, 307 U. S. 66.

Thereafter, the 1939 Act was passed, whereupon plaintiffs filed an amended and supplemental bill praying for

an injunction against enforcement of the 1939 Act on substantially the same grounds that were urged against enforcement of the 1937 Act (R. I, 111-178).

Defendant's answer interposed a defense and counterclaim alleging that the plaintiff Society is a "price-fixing monopoly;" that it did not come into court with clean hands, and that it violated the 1937 Florida Act in suit (R. I, 100-110).

On October 30, 1939, a statutory District Court consisting of Judge HUTCHESON, Circuit Judge, and Judges LONG and STRUM, District Judges, granted a temporary injunction against enforcement of the 1939 Act (R. I, 180-182).

On August 5, 1940, the court below (consisting of Judge HUTCHESON, Circuit Judge, and Judges LONG and BARKER, District Judges), after a trial on the merits, entered a decree granting a permanent injunction restraining enforcement of the entire 1937 Act and of Sections 4-A and 4-C of the 1939 Act; the remaining provisions of the 1939 Act were held valid (R. II, 1104-6). The Findings of Fact and Conclusions of Law are printed at R. II, 1082-91.

The defendants have appealed in Case No. 610 from so much of the decree below as held the 1937 Act and part of the 1939 Act unconstitutional (R. II, 1106-10). Plaintiffs have appealed in Case No. 611 from that part of the decree below which upheld certain sections of the 1939 Act (R. II, 1113-19).

II. Organization of plaintiff Society was necessary to meet the evil of wholesale infringement of copyrighted musical works by unauthorized public performances for profit.

A. THE NATURE OF THE RIGHT OF "PUBLIC PERFORMANCE FOR PROFIT" REQUIRES COLLECTIVE ACTION ON THE PART OF CREATORS AND PUBLISHERS OF COPYRIGHTED MUSICAL WORKS.

Section 1(e) of the Copyright Law of 1909 conferred on all persons who comply with the provisions of that law, "the exclusive right * * * to perform the copyrighted work

publicly for profit if it be a musical composition." This right is often called the "petit droit" or "small right", to distinguish it from the "stage right" or "grand right" which is protected under subdivision (d) of Section 1 of the Copyright Law. The latter section gives owners of copyrighted dramatic works (including dramatico-musical works such as operas, operettas and musical comedies) the exclusive right "to perform or represent the copyrighted work publicly," regardless of whether or not the performance is given for purposes of profit.

Although the stage right had been protected against unauthorized public performances as early as the Copyright Act of 1856 (Act of August 18, 1856, 11 Stat. 138-9), similar protection was denied to composers of *non*-dramatic musical works until enactment of the Musical Copyright Act of 1897 (Act of January 6, 1897, 29 Stat. 481-2, amending R. S. Sec. 4966).

When the law of 1897 was enacted, there were few places where performances of non-dramatic musical compositions were given. The twentieth century, however, brought radical changes in the form of musical entertainment. A very substantial use of copyrighted music in the home on phonograph records developed during the first decade of the century (R. II, 754-6). The second decade witnessed a new form of entertainment *outside* the home in the form of cabarets which mushroomed up throughout the country beginning in 1912 and 1913 (R. II, 756). Patrons were lured into these establishments by featuring the "hit" songs, or leading compositions of current stage shows (R. II, 756-7).

Notwithstanding the statutory grant of small performing rights in 1897 and 1909, none of these establishments had ever obtained a license from the copyright owner, or paid any compensation for such use prior to the organization of the Society in 1914 (R. II, 756-61; R. I, 242-3, 274, 305, 365, 386-7, 441, 594).

Protection of this so-called "small right" at that time was impossible because copyright owners had no feasible means of discovering infringements of this kind (no record

of performances being kept by users, and no means of ascertaining infringements being available to copyright owners without having a person stationed at the premises when the infringement took place) and because users could not afford to negotiate with each of thousands of copyright owners for each separate performance (Finding "7," R. II, 1086).

In 1914, the problem became so acute that some of the foremost composers and authors of America, under the leadership of Victor Herbert, organized plaintiff Society as a cooperative association to combat this evil of widespread unlawful performances of their copyrighted works in a field where the individual creator was completely helpless and had theretofore received no income whatsoever (R. II, 754-9, 771, 799; R. I, 194, 221-4, 242-7, 250, 274, 305, 365, 386-7, 431-2). Authors of most of the other civilized countries of the world had previously formed similar associations to cope with the same problem in their respective countries, France having taken the lead ninety years ago (R. I, 500-1; 594-5; R. II, 768).

The court below summed up the situation then existing as follows (Finding "7," R. II, 1086):

> "7. Prior to the organization of the plaintiff Society, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large amount of money to detect infringement and to enforce their rights by means of litigation. None of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works

required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that the Society was organized."

B. Cooperative Licensing is Necessary Because of Divided and Diverse Ownership of Performing Rights.

Publishers were made members of the Society because as a rule the copyrights are in their names (R. II, 798). Some contracts between the more important writers and their publishers merely give the publisher publication rights (See Tr. Ex. 6, R. II, 926); others add mechanical rights (See Tr. Ex. 7, R. II, 927-31; R. I, 239, 252, 263); some reserve stage rights to the composer, but grant all other performing rights to the publisher (See Tr. Ex. 8, R. II, 931-5). Victor Herbert always reserved all performing and mechanical rights to himself, and retained a reversionary interest as to all rights in the event of the publisher's bankruptcy (Tr. Ex. 13, R. II, 936-42; Tr. Exs. 9-A, 9-B, 9-C, 10, 11 and 12 are similar, R. II, 935-6).

Generally the publisher obtains the right to secure copyright for the original term of copyright (R. I, 213-4, 239, 251, 264, 441). The author may own the copyright as to some of his works, while the publisher owns it as to others (R. I, 229-30). The precise terms of the contract between writer and publisher depend upon the strength and prominence of the writer (R. I, 213). The so-called "small rights," however (*i.e.*, the *non-dramatic* performing rights), are generally owned jointly by the writer and publisher to be administered through the Society (R. I, 251-3, 264-5, 272, 392; Dep. Ex. 7, R. II, 990; Dep. Exs. A and B, R. II, 1072A-1078). The writer does not give his publisher the right to license the small performing rights (R. I, 245, 264, 270). One cannot issue licenses

without the consent of the other (R. I, 502). Each collaborator (*i.e.*, composer and author) likewise shares in this ownership; many of them or their heirs cannot be located years after the work is first copyrighted (R. I, 392-3).

Very often the status of the performing rights is in doubt (R. I, 324, 599-600). The publishers dispute the writers' claim that the latter are co-owners of the small rights, and assert that if the contracts with the Society were destroyed, the publishers would own the small rights although they would then have no practical value (R. I, 299, 370).

So long as these rights are licensed on a cooperative basis with a substantial number of the interested parties in a single organization, there is no need for resolving the troublesome questions of ownership of these rights. The writers and publishers have been spared the need of litigating their respective claims, and above all, users have enjoyed immunity from infringement suits on all compositions in the Society's repertoire (R. I, 499-500).

III. How the Society functions.

The Society is managed by a board of twenty-four directors, twelve of whom are composer-author-members and twelve publisher-members selected as provided in its Articles of Association (R. I, 53-5). Each of these groups is divided into four writers and publishers respectively in the field of popular music, four in the field of standard music and four in the field of production music; the writer-members are further subdivided into two authors and two composers of music in each of these three groups (R. I, 512). Agreements between the Society and users are arrived at in negotiations between the management of the Society and committees representing users, the management of the Society being subject to the jurisdiction of the Board of Directors of the Society (R. I, 513, R. II, 795-6).

Eligibility for membership of a composer in the Society depends upon his having written and regularly published

at least five of his compositions; eligibility of a publisher depends upon his having established a catalogue of music generally used in the type of establishments licensed by the Society (R. I, 516). Thus, any qualified composer, author or publisher may join. The reason the Society does not have more members is because some composers, authors and publishers have established their own organizations to issue licenses on a blanket basis (R. I, 516). Each member of the Society executes an agreement in the form of Exhibit "C" annexed to the complaint; all expired on December 1, 1940 (R. I, 302; Ex. "C," R. I, 42-4). These contracts were recently renewed for a further term of ten years (R. I, 327).

The Society has reciprocal agreements with twenty-one similar societies serving the same function in foreign countries; these societies have 56,000 members, whose works are included in the Society's licenses to American users (R. I, 500-1; the agreement with the British Society is typical. Pl. Ex. "15-M," R. II, 996-1004). The reciprocal payments under these agreements are set forth at R. II, 1071.

Part of the royalties received by the Society from licensees are devoted to giving financial aid to members of the Society, their widows, infant children or indigent parents (Articles of Association, Sec. 7, R. I, 62).

The net license fees remaining after deducting operating costs ranging from seventeen to twenty per cent., are divided into two equal funds which are distributed to members every three months; one such fund is placed at the disposal of the publishers' classification committee, and the other at the disposal of the writers' classification committee; each of these groups classifies its own members on the basis of profits and the popularity of their respective works, the number of performances of which the Society has records, etc. (R. I, 501-2). The publishers are not concerned with the manner in which the writers distribute their royalties; nor do the writers have anything to do with distribution of the publishers' fund (R. II, 794-5).

Payment on the basis of each individual performance is admittedly impossible (R. II, 787).

Obviously the contribution of the several members of the Society varies. The novice with five compositions to his credit can hardly be placed in the same class with the seasoned writer whose works number in the hundreds and who has won public acclaim by the perennial appeal of his works. Writers in the latter class include the late Victor Herbert whose estate is represented in the Society by his daughter (plaintiff Ella Herbert Bartlett) and her brother Clifford Herbert (R. II, 703-29; Tr. Exs. 14, 15, 16, 17A, 17B and 18; R. II, 942-50); plaintiff Deems Taylor (R. I, 220-235; Dep. Ex. 3; R. II, 987); the late Ethelbert Nevin whose estate is represented in the Society by his widow, the plaintiff Anne Paul Nevin (R. II, 819-26; Tr. Ex. 19; R. II, 951); and the witnesses, Irving Caesar (R. I, 192-220; Dep. Ex. 1; R. II, 986); Edgar Leslie (R. I, 235-59; Dep. Ex. 5; R. II, 988); Fred E. Ahlert (R. I, 260-300; Dep. Ex. 6; R. II, 989); Oscar Hammerstein, II (R. I, 332-43; Dep. Ex. 9; R. II, 992); George W. Meyer (R. I, 378-97; Dep. Ex. 10; R. II, 993); Irving Berlin (R. I, 425-42; Dep. Ex. 48; R. II, 1052); Jerome Kern (R. II, 730-43); Sigmund Romberg (R. II, 743-51); Gene Buck (R. 753-809; Tr. Ex. 2; R. II, 919).

IV. The blanket license is the only feasible method of licensing the "small right."

A. It is Impossible to Assign in Advance a Separate Price for Each Performance of Specified Compositions; Nor is it Possible to Bargain Separately for each Use. The Blanket License Overcomes These Obstacles.

There are two possible methods of licensing performing rights; one is on a basis of the separate licensing of each composition for each separate performance; the other is a blanket license which permits the licensee to perform any composition in the licensor's repertoire without designating specific compositions in advance of the performance

or securing separate licenses therefor. The Society's licenses have been issued on a blanket basis because no other feasible and practical method of licensing the small performing rights has ever been devised, although possible alternatives have been vaguely suggested but not described by the broadcasters from time to time (R. I, 497-500).

The Society issues its license to more than 32,500 establishments annually (Dep. Ex. 38, R. II, 1038A). In a single year, there are more than sixty-five million performances of musical compositions in these establishments (R. II, 787). This figure is extremely conservative as applied to radio stations alone without regard to other users. Of the 714 commercial stations of the country (R. II, 1041), 633 stations reported to the Federal Communications Commission that they perform weekly more than 32,700 hours of programs devoted exclusively to music (apart from dramatic, variety, miscellaneous and special programs using music) (Dep. Ex. 50-D, R. II, 1054A). This means a total of more than 1,700,000 hours of radio time devoted exclusively to musical programs by these commercial stations annually. An average full time station plays between 250 and 600 musical compositions daily (R. I, 499-500). Thus, from 65,000,000 to 156,000,000 performances of compositions are given annually by the 714 commercial stations.

The number of performances annually by the 31,800 non-radio licensees may be gauged by the fact that dance halls giving a three-hour program perform 30 compositions in a single evening (R. II, 810). Taking that as an average, almost a million compositions are performed in a single evening by users other than radio. This system eliminates the necessity of the Society's checking on each performance and eliminates the necessity of the licensee's keeping a record of, and reporting to the Society, each separate use (R. I, 497-8, 326). These establishments do not keep a log or record of every separate performance (R. I, 523, 593); nor does the Society check the uses in such establishments except for check-ups on certain network programs. If there were no blanket licenses it would be necessary to check each performance in each establish-

ment. It is impossible to check all uses of copyrighted works unless a person skilled in music is present continuously at all places where music is being performed publicly for profit. This would be very costly if the Society were required to have investigators stationed at each of the 32,500 establishments now having a blanket license. Such economic waste is obviated by the blanket license. It also makes it possible for broadcasters to make last-minute changes in their programs without protracted negotiations for a license (R. I, 502). Dance-hall proprietors who must satisfy their patrons by performing *any* composition that such patron may request (R. II, 810, 812, 818) are likewise enabled to do so at a moment's notice.

The alternative to issuing blanket licenses would be a system of licensing each composition separately for each performance. Such a system is completely unworkable for a user who makes any substantial or extensive use of music, and would result in a destruction of the right of public performance for profit of copyrighted musical compositions. It is impossible to fix a price in advance which would fairly compensate the author or constitute a fair measure of payment to the user because each use differs from every other use and because it is impossible to set up machinery that will enable either the user or the creator to bargain on the basis of each separate use.

Plaintiff Deems Taylor, a composer of symphonic works, operas and musical comedies (R. I, 222-223) testified that, in fixing a price for a performance of one of his symphonic works, it would be necessary to take into consideration the size of the hall and of the potential audience, the elaborateness of the performance, size of the orchestra, quality of the performance, and other factors (R. I, 226). He could not license all performances because performances of serious music by some artists would seriously injure the value of the work (R. I, 226). Any attempt to determine a price (particularly under the prohibition of the 1937 Act against acting in concert with others) would cost more than any possible fee that could be derived from such performance (R. I, 227).

Similar testimony as to the impossibility of fixing a price for performances in advance was given by witnesses Edgar Leslie, the author of many famous popular songs (R. I, 235-7, 245-7); Fred E. Ahlert, a composer of numerous popular songs (R. I, 260-1, 266-7); Will Von Tilzer, a publisher of musical compositions (R. I, 273, 276-8). Walter S. Fischer, President of plaintiff Carl Fischer, Inc., publishers of all kinds of music except popular music (R. I, 301), testified that he has no agent in the State of Florida and sells copies of his compositions to jobbers who in turn sell to music stores in Florida. Some sales are made directly by his company to such music stores (R. I, 310-11). To attempt compliance with this Statute, it would be necessary to print separate compositions for sale and distribution in the State of Florida; moreover it would be impossible for a publisher to sell to jobbers who in turn sell copies of compositions throughout the country. The publisher has no means of compelling the jobbers to affix a price or to collect performance fees (R. I, 285). There is not enough space on a sheet of music to cover all the various possibilities that would enter into fixing a price for the performance (R. I, 311-12). It is impossible as a practical matter, to fix such a price and to check on performances to see that performances were given only from compositions purchased in the State of Florida upon which a price for performances had been paid (R. I, 313-16). (See also, R. I, 371, 384-6, 589-93).

Oscar Hammerstein, who specializes in compositions played in musical shows, testified that he had no control over the places where the shows would be played, and he could not prevent a producer from performing the compositions in Florida (R. I, 341).

Neither composers nor publishers have any control over mechanical records or rolls. They may not affix a price upon them nor may they regulate the manner or place of their sale. Nor could they compel the manufacturers of mechanical records and rolls to pay them any performing fee (R. I, 244-5, 270, 309-10, 347, 367; R. II, 685-6, 717-8, 739, 746).

The value of a song fluctuates from time to time; there is no way of knowing what constitutes a fair price for performances and other uses when a song is first published (R. I, 204-6, 282-3, 311-13). Television is a public performing right which will shortly be on a commercial footing, but it is impossible to determine at this time a price for such right or to affix such a price (R. I, 270, 318).

Through this system of blanket licensing, a feasible method has been adopted under which all users may have ready access to a vast number of copyrighted musical compositions at a minimum of expense, without any interruption to their entertainment, and with little risk of infringing copyrighted works.

The license fees paid are in most cases less than the cost of a bookkeeping system. The additional cost to radio broadcasting stations, if they were to operate on a per piece plan, is apparent when one considers that it would require four additional auditors in each station to keep track of the transcriptions used for a period of slightly more than an hour each day (R. II, 886-7).

Practically all licensing of this kind, whether by the Society or by other organizations, is conducted on a blanket license basis (R. I, 515-6, 563). For example, Broadcast Music, Inc., a recent creature of the broadcasting industry, issues only blanket licenses (R. I, 532, R. II, 920); most of the six or seven thousand licenses secured by the National Broadcasting Company are of that type (R. I, 562-3). SESAC (Society of European Stage Authors and Composers) controlling an extensive catalogue of publishers who are copyright owners, likewise issues blanket licenses (R. I, 564-5); so do Associated Music Publishers, G. Ricordi (a publisher controlling quite a few thousand compositions), Society of Jewish Stage Authors and Composers, A. P. Smith and others (R. I, 564-6).

The transcription services likewise issue blanket licenses. For example, the National Broadcasting Company furnishes its transcription services to radio broadcasting stations at flat fees, regardless of the use made of such transcriptions (R. II, 891-2).

The British Performing Right Society which "controls the performing rights in more than a million musical works," likewise grants to users "general licenses to perform all or any of the works under its control * * * at an inclusive fee." *Performing Right Society* v. *Theatre of Varieties*, [1924] A. C. 1; 93 L. J. (K. B.) 33, 35.

B. The Blanket License Enables the Society to Issue Licenses at a Very Low Cost to the User.

It is not suggested that plaintiffs charge exorbitant fees; indeed the average annual license fee paid to the Society by users of music in Florida for the right to perform publicly for profit the copyrighted compositions of approximately 44,000 composers, demonstrates that the Society is most reasonable in the matter of charges. The schedule of annual license fees is as follows (Finding No. 5; R. II, 1085):

39 restaurants paid fees totalling $3,988.50 such fees ranging from $15 to $300 per year, the majority paying less than $100;

22 dance halls paid fees totalling $2,166,00 such fees ranging from $15 to $180;

69 miscellaneous establishments paid fees totalling $8,671.50 or an average of $125;

80 hotels paid fees totalling $6,580.79 or an average of $82;

188 motion picture theatres paid fees totalling $15,343.71, such fees ranging from $1.91 to $463, many paying less than $25 annually.*

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* The last available business census shows that for the year 1935, the dance halls in Florida had gross annual receipts of $113,000; the hotels had gross annual receipts of $21,000,000 and the theatres had gross annual receipts of $5,791,000 (R. II, 1057). The receipts of these users show the relatively insignificant payments made by them to the Society for the use of music, although music plays an important part in their commercial operations.

It is interesting to compare the provision of the Copyright Law which imposes minimum damages of $250 for the unauthorized performance of a single copyrighted composition (Tit. 17, U. S. C., § 25; *Jewell-LaSalle Realty Co.* v. *Buck,* 283 U. S. 202) with the schedule of license fees in Plaintiffs' Exhibits 20-33 (R. II, 1008-37) showing that in most cases motion picture theatres, dance halls, hotels and similar establishments pay the Society much less than $250 *annually* for the privilege of performing all the copyrighted works in the Society's repertoire.

For the year 1939 the Society's gross receipts from the radio broadcasting industry were $4,142,024.44 (R. II, 1070). This was less than one-half of one per cent. of the total amount spent by the United States public for radio that year, which was $814,000,000 (divided as follows: $170,000,000 for time on the air sold by broadcasters to advertisers; $35,000,000 for talent costs, and $609,000,000 for radio sets, tubes, batteries, replacements, etc.) [R. II, 1050D].

The amount paid to the Society is less than two and one-half per cent. of the amount received by the broadcasting industry from the sale of time on the air alone. Yet more than one-half of all radio programs are devoted to music. A survey of a typical week's programs made by the Federal Communications Commission showed that out of a total of 62,352 program hours weekly, 32,706 were devoted to music (Plaintiffs' Deposition Exhibit 50D, Table III, R. II, 1054A).

Station WOW of Omaha, Nebraska, pays a blanket annual fee of $9,100 to the National Broadcasting Company (known as NBC) for the privilege of using as much or as little of its transcription service as it desires (R. II, 891-2). WOW uses only one hour and five minutes of such transcriptions each day (R. II, 887). WOW also receives from NBC a blanket license to use sustaining programs, in return for which WOW gives NBC sixteen free hours of time on station WOW for each 28-day period (*cf.* Tr. Ex. A-6, R. II, 966). This is equivalent to a payment of $60,000 annually for this service (R. II, 898).

WOW pays its musicians $29,000 per annum for one and one-half hours of music each day that originates in its own studios (R. II, 869-70). WOW's gross business amounts to $470,000 annually (R. II, 884). Of this amount it pays 15% or $70,000 to the advertising agencies who act as intermediaries between the sponsors and the broadcasting station (R. II, 884-5). NBC supplies WOW with commercial programs for twelve out of its nineteen hours of operation (R. H, 899). Four hours of this are devoted exclusively to music (R. II, 888). Two hours and twenty minutes are devoted to musical transcriptions and live performances originating in its own station, thus having six and one-third hours of its nineteen hours of operation devoted to music. The musical programs are much more valuable than non-musical programs. This is illustrated by the fact that a short advertising talk of one hundred words, called a "spot announcement," costs the advertiser $15 when interposed between two *dramatic* programs, but cost $25 when interposed between two *musical* programs (R. II, 901). WOW claims that 85% of certain of its musical programs are devoted to the Society's music (R. II, 867). It cannot tell accurately because it does not keep a record of the compositions performed on its stations (R. II, 867, 871, 874-5, 890, 908).

For the license which the Society gives to WOW it receives annually $22,800 (R. II, 884).

Although the Society's rates have been fair and nondiscriminatory, certain users have for many years refused to pay any license fees to the Society or its members until after investigations were made by the Society, infringements ascertained, and suits brought. The court below found (R. II, 1087):

> "12. The Society's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing.

Certain of such users have for many years consistently refused to pay license fees to the Society or its members, until investigations were made by the Society, infringements ascertained and suits brought."

V. The right to restrict non-dramatic performances of certain compositions must be reserved in order to protect dramatic rights.

Certain compositions which are integral parts of stage plays or motion pictures, are often placed on a restricted list by members of the Society in order to limit the number of performances of such compositions on the radio because repetitious and indiscriminate performances of such compositions destroy the value of the stage play or motion picture of which they are a part and in which very large sums are invested (R. I, 210-11, 428-31, 437-8, 227-8, 230, 248-9, 308, 328-9, 499). Members are required to act in good faith in exercising this right (Ex. "C," annexed to Compl., R. I, 43, 328).

The "small right" or non-dramatic right which these statutes primarily affect, is only one of the many rights granted under the Copyright Act. Each right may be vested in separate owners or groups of owners. The author in all cases, is co-owner of the small rights, but he owes a duty to the owners of other rights not to so use the small rights as to destroy other rights which the author has bargained away. The Court below, in its findings, summarized these considerations as follows (R. II, 1088-9):

> "17. There are a great number of separate performing rights with separate owners of each of such rights. The 1939 Act applies to both dramatico-musical works and musical compositions. A dramatico-musical composition (an opera, operetta or musical comedy) usually includes a great number of separate musical compositions. The entire work is copyrighted as a dramatico-musical composition under Section 5(e) of the Copyright Act and that copy-

right protects each of the separate musical compositions under Section 3 of the Copyright Act. With respect to compositions included in dramatico-musical works, the Society licenses the performance of separate numbers from such composition when such performances are given in non-dramatic form. The dramatic rights are not granted to the Society. Such rights are usually owned by a number of different persons, each of whom has an interest in the rights of the others. The producer of a musical show owns the stage rights for performances in first class theatres where the play is originally presented and "on the road" where performances are given by so-called "road show companies." The place where the performance may be given is solely within the discretion of the producer, but the price to be paid cannot be fixed without the consent of the author. The stock rights are usually owned by an entirely different person who, together with the authors, licenses performances by "stock companies." The amateur dramatic rights are owned by still another person."

"18. The rights granted to the publisher and the rights reserved by the composer and author may not be exercised in such manner as to conflict with the dramatic rights for this reason: it is necessary that the composer, author and publisher from whom the Society derives its so-called "small performing rights" shall reserve the right to restrict the performance of the musical compositions in good faith, such restrictions usually being made for the purpose of protecting the investment of the producer of a stage show or motion picture in which the separate musical compositions restricted are incorporated. The right to restrict numbers is the most valuable right certain composer—and publisher-members of the Society have. All these rights are constantly being licensed in the State of Florida. In many cases, the publisher has an interest in the dramatic rights and will fix a price for dramatic uses in collaboration with the composer."

VI. The Society is the author's sole means of protection against the piracy of his copyrighted works in the field of public performance for profit.

The Society has continuously functioned since 1914, solely for the purpose of doing for its members what they cannot do for themselves individually, namely, licensing the right of public performance for profit upon fair and reasonable license fees, and protecting them against infringement of their copyrights; *at no time has it dealt in any commodity; it has not dealt in sheet music, nor exercised any functions with respect to mechanical rights of reproduction* (R. I, 523).

Anything which destroys cooperative societies of authors will restore the situation existing in 1914 when no author received any royalties from the performances of his musical compositions and when infringement was the rule rather than the exception. Most of the Society's licensees were wilful infringers of all copyrighted works before the Society apprehended them. Few users have ever voluntarily requested the Society's license (R. I, 442). They do not pay any attention to the copyright status of the works they use (R. II, 849-51, 871, 874-5, 890, 908). Yet they have never been sued for infringement by any unorganized composer, author or publisher (R. II, 849). They feel that they will enjoy complete exemption from the operation of the copyright laws if the Society is destroyed (R. II, 848).

It is submitted that the State Statutes were enacted for the purpose of destroying the only effective means of obtaining any remuneration from the licensing of the right of public performance for profit. This right is the only valuable right now left to both author and publisher in view of the diminishing returns from sales of sheet music and phonograph records on which authors and publishers formerly depended for their livelihood. The income from those sources has dropped as much as 90% since 1923 (R. I, 236-41, 261-3, 279-81, 286, 319, 346, 361-3, 379-83, 426-8, 508-10; R. II, 781). Indeed, the main source of

an author's income today is the amount he derives through the Society from the licensing of the right of public performance for profit (R. II, 782, 821-2; R. I, 223, 244, 264, 509). The same applies to publishers (R. I, 319-20, 352, 366, 509).

VII. Organized efforts to destroy plaintiff Society as means of securing free use of right of public performance for profit.

The broadcasters, hotel owners, motion picture theatre operators and other users have always presented a united front in negotiating for music through their respective national organizations (R. I, 494-5, 513, 595-6, R. II, 759, 795, 880-4).

Organized resistance to the Society's activities has always had as its sole object the destruction of the right of public performance for profit, so that users might have the same *free* access to the copyrighted musical compositions of members of the Society that they enjoyed before 1914. Among the schemes for accomplishing this end have been attacks on the Society as an alleged monopoly, interposed as defenses to suits for infringement,[1] bringing a suit against the Society in the New York State Courts, claiming that the Society operated in restraint of trade,[2] filing complaints with the Federal Trade Commission,[3] and introducing numerous bills in Congress seeking to amend the Copyright Act so as to permit the users of music to perform

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[1] See, *e.g.*, *Harms* v. *Cohen*, 279 Fed. 276, 280 (E. D. Pa., 1922); *Buck* v. *Hillsgrove Country Club, Inc.*, 17 F. Supp. 643 (D. C. R. I.).

[2] An application for injunction against the Society brought by the Motion Picture Exhibitors League of America to restrain the Society's activities on the ground that it was an alleged monopoly, was denied in *174th Street & St. Nicholas Ave. Amusement Co.* v. *Maxwell*, 169 N. Y. Supp. 895 (1918).

[3] Charges against the Society before the Federal Trade Commission were dismissed on January 2, 1923 (R. I, 492-4).

publicly for profit the compositions of the Society's members without compensation (R. II, 761-6).[4]

Plaintiffs have been compelled to establish in many litigations that the rights given to copyright proprietors to publicly perform for profit musical compositions, covered various situations in which an attempt was made to publicly perform the musical compositions for profit without paying anything therefor to the copyright proprietors.

In *Herbert* v. *Shanley Co.* (229 Fed. 340), and *John Church Co.* v. *Hilliard Hotel Co.* (221 Fed. 229), the Circuit Court of Appeals for the Second Circuit held that the rendition of a copyrighted musical composition by a hotel orchestra and by professional singers accompanied by an orchestra, respectively, where no separate charge was made for the music, did not constitute a public performance for profit within the meaning of the Act. These decisions, how-

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[4] The following Bills were introduced in Congress, having as their object the amendment of the Copyright Law so as to destroy the right of public performance for profit as applied to copyrighted musical compositions, some of the bills seeking to enact legislation in many respects similar to the state statute:

68th Congress, 1st Session: H. R. 713 (Dec. 5, 1923); H. R. 6250 (Jan. 26, 1924); S. 2600 (Feb. 22, 1924); S. 3078 (April 10, 1924); H. R. 8685 (Apr. 15, 1924); H. R. 8734 (Apr. 17, 1924);

69th Congress, 1st Session: S. 2328 (Jan. 7, 1926); S. 2811 (Jan. 16, 1926); H. R. 11209 (Apr. 12, 1926);

70th Congress, 1st Session: S. 4467 (May 3, 1928);

71st Congress, 1st Session: S. 1386 (June 4, 1929);

71st Congress, 3rd Session: S. 5687 (Jan. 5, 1931);

72nd Congress, 1st Session: H. R. 10364 (Mar. 10, 1032); H. R. 10740 (Mar. 22, 1932); H. R. 10976 (Mar. 30, 1932); H. R. 11948 (May 7, 1932); S. 1035 (Dec. 9, 1931); S. 3985 (Mar. 2, 1932);

73rd Congress, 1st Session: S. 342 (Mar. 13, 1933);

74th Congress, 1st Session: S. 2465 (Mar. 13, 1935); S. 3047 (August 12, 1935);

75th Congress, 1st Session: S. 7 (Jan. 6, 1937); H. R. 2695 (Jan. 12, 1937); S. 2031 (Mar. 29, 1937); H. R. 10633 (May 16, 1938).

ever, were *reversed* by this Court (242 U. S. 591), where it was said (p. 594):

> "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. * * * *It is enough to say that there is no need to construe the statute so narrowly.*"

The effort of moving picture theatre proprietors to escape the charge of infringement when *parts* of copyrighted musical compositions were played by orchestras, organs or other musical instruments during the showing of moving pictures, and where no separate charge was made for the music, was met by several adverse decisions. *Harms* v. *Cohen,* 279 Fed. 276 (E. D. Pa.); *Pastime Amusement Co.* v. *M. Witmark & Sons,* 2 F. (2d) 1020 (C. C. A. 4), aff'g 298 Fed. 470 (1924); *Irving Berlin, Inc.* v. *Daigle,* 31 Fed. (2d) 832 (1929, C. C. A. 5).

In numerous cases against owners of dance-halls, hotels, theatres and other establishments, it was necessary to overcome the defense that the orchestra was an independent contractor, and that the owner of the establishment had no control over the compositions performed. *Waterson, Berlin & Snyder Co.* v. *Tollefson,* 253 Fed. 859 (S. D. Calif.); *Harms* v. *Cohen,* 279 Fed. 276 (E. D. Pa.); *Witmark* v. *Bamberger,* 291 Fed. 776 (D. C. N. J.); *Witmark* v. *Pastime,* 298 Fed. 470, aff'd 2 F. (2d) 1020 (C. C. A. 4); *M. Witmark & Sons* v. *Calloway,* 22 F. (2d) 412 (E. D. Tenn.); *Dreamland Ballroom, Inc.* v. *Shapiro,* 36 F. (2d) 354 (C. C. A. 7); *Berlin* v. *Daigle,* 31 F. (2d) 832 (C. C. A. 5); *Buck* v. *Della Russo,* 25 F. Supp. 317 (D. C. Mass.); *Buck* v. *Dacier,* 26 F. Supp. 37 (D. C. Mass.); *Buck* v. *Crescent Gardens,* 28 F. Supp. 576 (D. C. Mass.). The same defenses have also been unsuccessfully interposed abroad. *Performing Right Society* v. *Mitchell,* 131 L. T. 243 (1924); *Canadian Performing Right Society* v. *Famous Players,* 140 L. T. 657.

In many cases performances by a phonograph record or perforated music roll upon a player piano were held to constitute "public performances for profit". *M. Witmark & Sons* v. *Calloway*, 22 F. (2d) 412 (E. D. Tenn.); *Buck* v. *Lester*, 24 F. (2d) 877 (E. D. S. C.); *Buck* v. *Heretis*, 24 F. (2d) 876 (E. D. S. C.); *Berlin* v. *Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz* v. *Buck*, 40 F. (2d) 501 (C. C. A. 5), cert. den. 282 U. S. 880.

Finally, this Court in *Buck* v. *Jewell-LaSalle Realty Company*, 283 U. S. 191, established that the re-broadcasting by hotels or other public places of musical compositions which had been broadcast by radio, was within the protection of the Copyright Act. It had been previously held in a number of cases that broadcasting by radio of the rendition of a copyrighted musical composition constituted an infringement of the copyright.[5]

All these attempts to deprive plaintiffs and others similarly situated of rights granted to them by Congress having failed, the users conceived the idea of nullifying these rights through state legislation (R. 765-7, 848).[6] A Louisiana statute enacted in 1934 imposed confiscatory taxes upon the Society (Act No. 157 of La., 1934). This was held invalid in *State* v. *Lucas*, 199 So. 126 (Sup. Ct. La., 1940, printed in Appendix herewith submitted). In 1937, statutes substantially along the lines of the 1937 Act were

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[5] *M. Witmark & Sons* v. *Bamberger*, 291 Fed. 776 (D. C. N. J.); *Remick* v. *General Electric Co.*, 4 F. (2d) 160 (D. C. S. D. N. Y.); *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6), reversing the District Court for the Southern District of Ohio; cert. den. 269 U. S. 556; *Remick* v. *General Electric Company*, 16 F. (2d) 829 (D. C. S. D. N. Y.). Cases in other countries are in accord: *Messager* v. *British Broadcasting Company, Ltd.*, [1927] 2 K. B. 543; same case on appeal [1928] 1 K. B. 660 (Court of Appeal), [1929] A. C. 151 (House of Lords); *Performing Right Society* v. *Hammond's Bradford Brewery Co.*, [1934] ch. 121; *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia*, 50 Victorian Law Rep., 350 (1925), (Supreme Court of Victoria).

[6] The bills introduced in 35 state legislatures are enumerated in Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 Georgetown L. J. 407, 416-9 (1941).

passed in Washington, Nebraska and Tennessee. (These statutes are all printed in the Appendix.) A Montana statute enacted in 1937 (see *Carl Fischer, Inc.* v. *Shannon*, 26 F. Supp. 727) was recently repealed (H. B. No. 188, enacted February 26, 1941). A similar bill, passed by the Michigan legislature, was vetoed by Governor (now Mr. Justice) MURPHY on July 27, 1937. Copies of the veto message were handed to this Court on the argument of the appeal from the order granting a temporary injunction in this case (*Gibbs* v. *Buck*, 307 U. S. 66).

The users of music very frankly stated that their purpose in passing these statutes was to avoid the obligation of paying for public performances for profit of copyrighted music (R. II, 848).

VIII. The Society controls only a small part of available music.

The amount of copyrighted music is infinitesimal when compared with the entire amount of music available for which no payment whatsoever need be made to the creators or publishers of the works (R. II, 658-9, R. I, 354, 528, R. II, 802). This is known as the public domain. In many cases new popular arrangements are made of this old public domain music (R. I, 526-7, 529-30).

The Victor Record Company, which is owned by the Radio Corporation of America (the parent of the National Broadcasting Company), has a catalogue of 900,000 compositions in the public domain (R. I, 526). The American Record Company, which is owned by the Columbia Broadcasting System, likewise has a very extensive public domain catalogue (R. I, 527). So extensive is the field of music outside the repertoire of the Society that the Radio Corporation of America for a time operated Station WJZ and other stations without utilizing the works of the Society (R. II, 762).

The broadcasters have recently organized a corporation known as Broadcast Music, Inc. for the purpose of com-

peting with the Society (R. I, 531-2, R. II, 902, 904). The form of license issued by Broadcast Music, Inc. is the same as that issued by the Society (R. I, 532).[7]

Although the record does not disclose the fact, we believe the Court may take judicial notice of the refusal of the radio networks and their affiliated stations to obtain a license from, or to broadcast, any compositions in the repertoire of the Society since January 1, 1941.

In addition to the public domain music and the music of the Broadcast Music, Inc., there are a great many catalogues available to broadcasters, including Langlois & Wentworth (R. I, 527, R. II, 906, 1068A), Schubert Publishing Company, Universal Edition, Associated Music Publishers, G. Ricordi of Milan (R. I, 527-8). The users may obtain available music by reference to the Pacdirek Catalogue, the Library of Congress, the Smithsonian Institute, and other libraries (R. I, 529), the Hoffmeister Catalogue (R. I, 529), the libraries of the National Broadcasting Company, Columbia Broadcasting System and the Radio Foundation (R. I, 530-1).

In addition, there are several other licensing agencies such as the Society of European Stage Authors and Composers, known as SESAC, and Davis & Schwegler (R. I, 531). The National Broadcasting Company has between 6,000 and 7,000 licenses from other copyright owners, excluding the publishing firms and societies mentioned above, as well as the Jewish Society, A. P. Smith, E. P. Sherman and others (R. I, 564-6). There are 1200 music publishers in the United States (R. I, 509; Pl. Tr. Ex. 1, R. II, 918).

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[7] Consent decrees were recently signed by both the Society and Broadcast Music, Inc., in *United States* v. *Broadcast Music, Inc.* (Civil Action No. 459, E. D. Wis., decree entered Feb. 3, 1941); *United States* v. *American Society of Composers, Authors and Publishers* (Civil Action No. 13-95, S. D. N. Y., decree entered March 4, 1941). The latter decree is hereinafter referred to and described (*infra*, p. 75).

IX. The State Statutes.

A. The Purpose of the State Statutes.

The court below held that the 1937 Act was unconstitutional in its entirety because its enactment was not reasonably necessary to meet any alleged evil and because the purpose and effect of the Statute was to deprive plaintiffs of rights granted to them under the Federal Copyright Act. In accomplishing this purpose, the Statute *also* ran afoul of the equal protection clause and the due process clause of the Federal Constitution.

The court below found (R. II, 1089-90):

> "1. The 1937 Statute is not a reasonable exercise of the police power of the State of Florida, and the penalties and confiscatory provisions provided for therein are not reasonably necessary to meet any alleged evil; enactment of the said Statute was not necessary to protect, nor does it serve the public interest of the State of Florida; the object, purpose and effect of said Statute is to take the copyrighted musical compositions of the Complainants, and others similarly situated, for a private purpose, to wit: to benefit the 410 users within the State of Florida; the said Statute discriminates against, and in fact, confiscates the Complainants' copyrighted musical compositions as well as those of others similarly situated; it is contrary to and hinders carrying out the purpose of Article 1, Section 8 of the Constitution of the United States, 'and will deter composers, authors and publishers from securing copyright registration of their works.'"
>
> "2. The 1937 Statute is an invasion of Complainants' constitutional rights in the following respects:
>
> (a) It interferes with and destroys the patterns of the Copyright Law by which Congress has endeavored to carry out the purpose of the Constitution to insure uniformity and certainty in the field of copyright.

(b) It denies to Complainants equal protection of the laws, and by making them presumptively guilty of the criminal provisions therein deny to the Complainants due process of law."

"5. The said Statute constitutes an attempt to restrict and to regulate the right of Complainants to the full enjoyment of the exclusive rights granted them by the laws of the United States, generally known as the Copyright Laws."

The court below held Sections 4-A and 4-C of the 1939 Act invalid but upheld the balance of the Statute, having found (R. II, 1091):

"7. The 1939 Act, based as it is upon the purpose to compel disclosure as to the ownership of copyrighted compositions is, except as to Section 4-a and Section 4-c, which are not germane to the purpose of the act, for the reasons set out in the opinion, a valid exercise of the police power of the state. Sections 4-a and 4-c of that act are, for the reasons set out in the opinion, invalid as an arbitrary interference with liberty of contract and with the rights granted under the copyright laws."

B. The 1937 Act.

The 1937 Act has two unmistakable objects, one, to deprive composers, authors and publishers of copyrighted musical works of the only means of protecting themselves against infringement by public performances for profit, and secondly, to attaint all who endeavor to exercise such rights, however remote their conduct may be from any possible charge of illegality. A brief enumeration of the provisions of the Statute will show the surprising lengths to which it goes in deterring copyright owners from exercising thei rights in the State of Florida.

(1) It is unlawful for composers, authors or publishers or assigns of copyrighted musical compositions to form

any society or other entity or group when the members therein constitute a substantial number of the persons *"within the United States"* owning or controlling *"copyrighted* vocal or instrumental musical compositions", and when one of the objects of such group is the determination and fixation of license fees required for itself or its members for any use or rendition of copyrighted musical compositions for private or public performance for profit. Such a society is called a "combination" and is "declared to be an unlawful monopoly in this State (Florida)"; and such "fixing of prices," and the collection or attempting to collect such license fee is "declared illegal and in restraint of trade", and is "declared to be an *intra*-state transaction within this State and shall be subject to the terms and penalties of this Act" (Sec. 1).

Defendants have threatened to prosecute plaintiff Society under this section if it should bring suit for copyright infringement in the federal courts (R. I, 96-7).

It will be shown that the practical effect of this section of the Statute is to make it impossible for American composers and authors to license the performing rights in their musical works on a cooperative basis under a so-called "blanket license" in a field where destruction of the cooperative enterprise means the surrender of the right of public performance for profit granted to them pursuant to the Federal Copyright Act.

Inasmuch as the Statute does not condemn any combination fixing license fees unless "the members therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions," broadcasters and other users who do not constitute a substantial number of persons who own or control copyrighted compositions, are permitted to form a corporation for the purpose of doing the very things which a cooperative society of copyright owners is barred from doing. The radio broadcasters have organized a corporation known as Broadcast Music, Inc. for that very purpose (R. I, 531).

That corporation issues blanket licenses in the same manner that the Society does (R. I, 532; R. II, 920-24).

(2) Copyright owners (whether members of a combination or not) are prohibited from permitting sheets of music or phonograph records of their works to be sold in the State of Florida unless such sheet of music or such record contains thereon in legible form a price independently determined and arrived at for all uses and purposes. Any purchaser paying the price, is given the full right of public performance for profit by himself or by such others as he may license to perform the same (Sec. 2-A).

Findings "17" and "18" of the court below, which will be discussed in connection with the 1939 Act, amply demonstrate the impediments to compliance with the Statute (R. 1088-1089).

(3) If no price is affixed for the several uses of the copyrighted work, the purchaser is free to use the same for public performances for profit free of all liability for copyright infringement. This prohibition applies whether the copyright owner acts as an individual or in combination with others (Sec. 2-B).

(4) Section 2-C provides: (a) that the purchaser of copies of such compositions may not resell, copy, print, publish or vend the composition, and (b) authors and composers (but not publishers or other copyright owners) acting independently may fix a price for the use or rendition of their works.

This is an empty gesture because authors and composers do not publish their own works and in most cases own the performing rights jointly with their publishers (R. I, 264, 298, 300, 599-600).

(5) All of the Society's *existing* contracts are declared void and non-enforceable (Sec. 3).

(6) Owners of broadcasting stations in Florida are allowed to broadcast copyrighted compositions in the

repertoire of the Society (which is "a combination declared unlawful by Section 1 hereof") without the payment of any license fee (Sec. 4-A).

(7) A similar exemption from any requirements to pay copyright royalties is given to owners of motion picture theatres and other places of public performance within the State for performances of copyrighted works when such performances are given by means of living performers or through such mechanical means as loud speakers, radio broadcasting and electrical transcriptions (Sec. 5-A).

(8) Owners of Florida radio broadcasting stations are permitted to rebroadcast copyrighted musical compositions originating or emanating from an affiliated station without the State. The out-of-State broadcaster is prohibited from charging the Florida broadcaster any license fee for the purpose of paying or repaying the same to the Society (Sec. 4-B).

(9) Persons supplying broadcasts, transcriptions, records, films or artists to owners of theatres in Florida for performances of copyrighted music, are prohibited from collecting any moneys from such Florida theatre owners for the purpose of reimbursing the out-of-State person for license fees paid by him to the Society (Sec. 5-B).

(10) All copyright owners, whether members of a condemned combination or not, are prohibited from suing any Florida broadcaster or theatre owner for infringement where the performance is given by means of broadcasts, records, films, electrical transcriptions or living performers brought into the State from outside the State. The copyright owner in such cases, is allowed to assert his rights only as against the person outside the State who sends the broadcasts, records, films, electrical transcriptions or living performers into the State (Sec. 6).

(11) The Statute creates certain irrebuttable presumptions which bar plaintiffs from establishing facts showing that their conduct is reasonable and lawful or that the State of Florida has no jurisdiction in respect of the acts complained of. The following provisions of the Statute are illustrative:

(a) If a substantial number of composers, authors or publishers of copyrighted works combine for the purpose of jointly licensing their works (the compositions of each being entirely different from the compositions of the other) and determine to grant a single license for their combined copyrighted works at a stipulated fee, they are deemed guilty of combining to restrain trade (Sec. 1).

Plaintiffs are denied all opportunity to show that they do not in fact restrain trade, or that the combination is necessary as the only reasonable means of protecting and licensing the right of public performance for profit of their several copyrighted compositions. In this respect this Statute, which attempts to regulate activities of copyright owners, differs from the general anti-monopoly laws of Florida which permit defendants to show that they do not actually restrain trade or that their combination is reasonable.

(b) All existing contracts between the Society and Florida users are *declared* to have been entered into as *intra*-state transactions and are declared invalid (Sec. 3).

(c) Any person outside the State of Florida who obtains a license to perform plaintiffs' copyrighted works, and who sends performers or the instrumentalities from which performances may be given into Florida, and who attempts to collect license fees from Florida users for the purpose of reimbursing himself for payments made to plaintiffs, is "declared to be an agent and representative" of plaintiffs (Secs. 4-B and 5-B).

(d) The use or performance of copyrighted compositions by Florida broadcasters, theatre owners, etc. by

means of receiving and re-broadcasting or reproducing performances by means of radio broadcasts, sound producing instrumentalities or apparatus, or electrical transcription, or by living performers sent into the State from without the State "shall be considered for the purpose of this Act, as *intra*-state business of this State and subject to the control, regulation and prohibition set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State" (Sec. 6).

The statute then proceeds to regulate business transacted beyond its borders *as if* such business were transacted within the State.

(e) Anyone who acts as a representative of the Society in Florida, no matter how petty his function or how remote his representation is "deemed an official representative and agent of the Society," and the Society "shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative *or the agent of such representative* as herein defined". The legal effect of such service of process is declared to be the same "*as if* served upon a duly elected officer or managing agent or other official representative upon whom service might *otherwise* be made upon such combination within this State" (Sec. 7-A).

(12) In order to discourage plaintiffs from attempting to assert the exclusive rights granted to them under the Copyright Act, violation of the State Statute subjects violators to severe and unusual penalties and forfeitures of constitutional rights as follows:

(a) Violation of the statute carries a penalty of $50 to $5,000 or one to ten years imprisonment or both (Sec. 8).

(b) Collection of copyright royalties is deemed a separate offense from the combination (Sec. 1).

(c) All persons who negotiate, collect or attempt to collect license fees for the Society or who act as its representative or agent are declared to be part of the combination and are made subject to the penalties of the Statute, even though they do not participate in the combination (Sec. 7-B).

(d) If individual users in Florida sue for violation of the Statute they may recover attorneys' fees as well as damages (Sec. 10-A).

(e) If the defendants in any suit or proceeding fail to furnish evidence incriminating themselves they are subject to a fine of $100 for each day that they fail to produce such evidence, notwithstanding that personal service may not have been made upon them (Secs. 11-A and 11-B). It is significant that if the information is provided it may be used for self-incrimination because the Statute does not grant immunity from prosecution based upon information so furnished.

(f) All penalties are made cumulative to all other rights, remedies and provisions under other Florida laws (Sec. 13). The cumulative penalties referred to are those enumerated in the general Florida anti-trust laws (Fla. Comp. Gen. L. 1927, Sec. 7948) which imposes *additional* penalties of not less than $50, nor more than $5,000 or imprisonment of one to ten years or both. Each day during the continuance of the violation is made a separate offense. Plaintiffs are brought within Sec. 7948 of the Compiled Laws by reason of Section 1 of the State Statute under which the Society (because of the nature of its organization) is "declared illegal *and in restraint of trade*". Under the Compiled Laws the penalty for failure to furnish incriminating testimony is likewise cumulative, although, as pointed out above, plaintiffs will not escape punishment based upon such testimony.

(13) Jurisdiction to sue or prosecute under the Statute is vested in the Attorney General of the State and the several State's Attorneys (Sec. 9); if such State officials fail to act upon request, any aggrieved individual may

institute such civil proceedings as the State officials might have brought (Sec. 10-B).

(14) The Statute contains the usual separability clause (Sec. 12).

C. The 1939 Act.

On May 5, 1939, (promptly after this Court had affirmed the decree restraining enforcement of the 1937 Act *pendente lite* [307 U. S. 66]), two Bills were introduced into the Florida Legislature: one, which failed of passage, would have repealed Sections 2-A, 2-B and 6 of the 1937 Act (Pltf. Ex. 5 [R. II, 925]). Failure to enact this Bill left the 1937 law intact. The other Bill was enacted and is the subject of this suit. It expressly provided that the Act did not repeal any Statutes of Florida pertaining to monopoly or restraint of trade, "including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14" of the 1937 Act (Sec. 15). Thus the 1939 Act must be regarded as supplementary to the 1937 Act, particularly to those sections expressly enumerated. As a matter of fact, the true and apparent purposes of both are identical, namely, the taking of plaintiffs' copyrights for the benefit of certain Florida users.

The 1939 Act, as its title indicates, has nothing to do with the regulation of alleged monopolies or restraints of trade. In its title it does not purport to deal with or cure any alleged evil. The 1939 Act is entitled:

> "An Act relating to public performing rights in copyrighted musical compositions and dramatico-musical compositions; defining the same; regulating licensing of same; prescribing filing fees; making provisions for a resident agent in the State; levying a tax on the gross receipts from the licensing of such rights within the State of Florida; providing for the enforcement of this Act; the promulgation of rules and regulations, governing the enforcement of this Act; appro-

PRIATING THE PROCEEDS OF THE TAX AND FEES LEVIED HEREIN AND REPEALING CERTAIN LAWS IN CONFLICT HEREWITH."

SECTION 1 defines "performing rights" as the right of "public performance for profit" which in turn is the precise language used in Section 1(e) of the Copyright Act which gives owners of copyrighted musical compositions the exclusive right to perform the same "publicly for profit"; "blanket license" is defined as including "any device whereby public performance for profit is authorized of the combined copyrights of two or more owners"; "blanket royalty or fee" includes "any device whereby prices for performing rights are not based on the separate performance of individual copyrights".

SECTION 2 makes it unlawful for any person to sell, dispose or license the use of performing rights in any copyrighted musical composition or dramatico-musical composition in Florida or to collect any compensation on account of any such sale, license or disposition, unless such person shall file with the Comptroller:

(a) a list describing each such copyrighted musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in Florida, which description shall include the following:

(1) the name and title of the copyrighted composition;

(2) the date of copyright;

(3) the number given thereto in the United States Copyright Office;

(4) the name of the author;

(5) the name of the publisher;

(6) the name of the present owner of the copyright;

(7) the name of the present owner of the performing rights.

Additional lists may be filed from time to time. A filing fee of two cents a composition must be paid for filing any list.

(b) an affidavit describing the performing rights to be sold, licensed or otherwise disposed of and stating that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which the affidavit relates are true, and that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition. The affidavit must be made by a person having knowledge of the facts, inasmuch as he must swear that the statements "are true", and not merely that he "believes them to be true".

SECTION 3 recites that the purpose of the list is to prevent false claims of ownership and to avoid committing innocent infringements of copyrights. There is no proof that any false claims of ownership ever have been made by users in Florida, or that any such users have innocently infringed copyrights or that any user in Florida was ever mulcted in damage for infringement. The true reason for requiring such lists to be filed is to compel a price "per piece" or "per program" to be assigned in a schedule of prices under Sections 4-A and 4-C, which sections have been held invalid under the decision below.

SECTION 3 requires any person issuing licenses to exhibit a duplicate certified copy of the list filed under Section 2 on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

In other words, a dance hall proprietor paying a thirty dollar license fee for the right to perform any or all of complainants' compositions for a period of one year may demand inspection of a list of dramatico-musical works as well as musical works, and a list of symphonic works, oratorios and other compositions in which such user can have no possible interest.

If more than one person is employed to inspect the establishments in the State of Florida and to attempt to offer licenses to them, each must have a certified duplicate copy of the list which is furnished under Section 6 "at the prices regularly charged by a Clerk of the Circuit Court for such work." The price charged for certification by a Clerk of the Circuit Court is 25 cents for the first 100 words, and 12½ cents for each additional 100 words or fraction thereof (Sec. 4867, Comp. Gen. Laws, Fla.).

SECTION 4-A makes it unlawful for two or more owners of copyrighted musical compositions or dramatico-musical compositions to associate or combine for the purpose of issuing blanket licenses covering more than one composition unless *all* the members of the association agree to make *all their compositions* available *to each user in the State* (at such user's option) at a price established for each separate performance of each such composition.

Before issuing *any* blanket license, the person issuing such license must file a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in the list filed under Section 2, together with an affidavit of the copyright owner of the compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. The schedule may contain "reasonable classifications determined by use and function, or either, of the users of said compositions with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications."

The list filed shall remain in force "until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the Office of the Comptroller. * * * changes in prices to become effective seven days from the date of filing thereof."

SECTION 4-B carries out the purpose of Sections 4-A and 4-C by requiring that copies of all blanket licenses be filed by the person issuing the same, in the Office of the Comptroller, accompanied by the payment of specified fees.

SECTION 4-C prohibits the licensing of performing rights in copyrighted works where the fee is "based in whole or in part on any program not containing [the composition licensed]" and limits enforcement of such license agreement "only to the extent that it is based and computed upon a program in which such composition is rendered." This provision bars copyright owners from issuing licenses based upon a percentage of the gross receipts, or computed on a flat or blanket basis for the privilege of using a given composition at will in *any* program, even though users themselves may prefer that method of licensing.

SECTION 4-D deprives copyright owners of the right to license the performing rights in any composition which has not been listed in accordance with Section 2. It applies whether the licensing be done by an individual or by joint licensing by two or more copyright owners or whether the licensing be done on a blanket basis or on any other basis. In reading this section, it must be remembered that a copyrighted work may be played simultaneously in the 32,000 establishments now licensed by the Society. An author is barred from enforcing his rights in those establishments until he registers his work in Washington *and* files a list in Florida (and in each of the other States because if Florida may do it, all the States may do it). Although the term of copyright is 28 years, a popular song nowadays lives for only 6 to 13 weeks (R. I, 382; R. II, 742). If this law were upheld, the song would be dead before the author could have an opportunity to comply with the State Statutes.

SECTION 5 adds further strings to the list required under Sections 2 and 3. There must be filed simultaneously an authorization empowering the Secretary of State to accept service of process on the owner of the performing rights

in any action or proceeding at law or in equity under the Statute. The authorization must be accompanied by a payment of a $5 filing fee. This section must be read together with Sections 11, 12 and 13 which authorize suits for damages, specific performance and injunction. Such suits may be instituted against non-residents by service upon the Secretary of State in accordance with Section 5.

SECTION 6 bars copyright owners from bringing any suit with respect to the performing rights in *any* court except upon pleading and proving compliance with the provisions of the Statute. Compliance with the provisions of the Act is proven by submitting a certified copy of the lists, license agreements, affidavits and other documents filed with the Comptroller, which he must furnish at the prices regularly charged by a Clerk of the Circuit Court for such work.

SECTION 7 imposes a tax of three percent upon the gross receipts from licensing performing rights. The books of such person may be examined and audited by the Comptroller at Tallahassee, Florida, upon thirty days' notice to the Secretary of State. Failure to submit such books is a misdemeanor. Should the Comptroller determine that the tax return was incorrect and should any delinquency not be cured within thirty days after the Comptroller shall have notified the Secretary of State, the Circuit Judge in Leon County must appoint a receiver to take over and administer all assets of the delinquent taxpayer in the State of Florida. The penalties assessed against the taxpayer are two percent per month.

SECTION 8 makes it unlawful for any person knowingly to participate in the public performance for profit of any composition or any part thereof, without the consent of the owner if the owner has complied with the Statute. This is an empty gesture because compliance with the Statute is impossible. If the legislature had intended in good faith to set up a new and workable licensing system, it would

have required all users to file a schedule of all copyrighted compositions publicly performed for profit by them, and would have imposed an obligation to pay, and a method of compelling payment.

SECTION 9 makes violations of the Act punishable as a misdemeanor which under Section 7104 of the Compiled General Laws of Florida is punishable by fine not exceeding $200 or imprisonment not exceeding 90 days, or both.

SECTION 11 authorizes any person to sue for damages as a result of a violation of the terms of the Statute or "to require specific performance under the provisions of this Act," and directs that the plaintiff recover costs and attorneys' fees. Specific performance undoubtedly means that the court can direct the filing of the lists and schedules required by Sections 2, 3, 4-A and 4-B of the Statute. Such jurisdiction may, of course, be obtained by serving the Secretary of State, under Section 5.

SECTION 12 gives jurisdiction to the Circuit Courts to prevent and restrain violations of the Act vesting enforcement power in the respective State's Attorneys under the direction of the Attorney General. Such proceedings may be civil or criminal, or both.

SECTION 13 permits any aggrieved party to sue upon behalf of himself and others similarly situated if the State's Attorney and Attorney General fail to act.

SECTION 14 provides that any excess funds collected shall go into the General Revenue Fund of the State of Florida.

SECTION 15, in addition to provisions already mentioned, states that "nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or a license which was lawfully entered into prior to the effective date of this Act." The same section re-

affirms the 1937 Law which makes all existing contracts of complainants unlawful. Thus none of these contracts is saved by the provision exempting existing contracts *"lawfully* entered into prior to the effective date of this Act."

SECTION 16 is the usual separability clause.

SECTION 17 provides that the Act shall take effect immediately upon its becoming a law.

Specification of Errors.

The court below erred in refusing to grant a permanent injunction against enforcement of the entire 1939 Act (Assignments 1 [R. II, 1114], 6 [R. II, 1115], and 11 [R. II, 1117]); in finding that the requirements of Section 2 of the 1939 Act are not unreasonable or difficult of compliance (Assignment 3 [R. II, 1114]); in holding that the sections of the 1939 Act other than Sections 4-A and 4-C, have a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and that such sections effected that purpose in a reasonable way (Assignment 4 [R. II, 1115]); in holding that Sections 4-A and 4-C were separable from the balance of the entire 1939 Act (Assignment 5 [R. II, 1115]); in refusing to hold that the sections of the 1939 Act other than Sections 4-A and 4-C, as well as those sections, invaded plaintiffs' constitutional rights in violation of Article 1, Section 8, Clause 8 of the Constitution, denied to plaintiffs equal protection of the laws and deprived them of their property without due process of law, impaired obligations of existing contracts, and deprived plaintiffs of their liberty of contract in the State of Florida (Assignments 7 and 8 [R. II, 1115, 1116], and 9 [R. II, 1116]); in refusing to hold that the entire 1939 Act, as well as each and every section thereof is not a reasonable exercise of the police power of

the State of Florida but rather that the object of the Act and each and every section thereof was to take plaintiffs' copyrighted musical compositions for a private purpose (Assignment 8 [R. II, 1116]); that the 1939 Act and each and every section thereof, discriminates against, and confiscates, plaintiffs' musical compositions and is contrary to, and hinders carrying out the purpose of, Article 1, Section 8 of the Constitution of the United States (Assignment 8 [R. II, 1116]); in refusing to hold that the entire 1939 Act and each and every section thereof, violates Article 1, Sections 8, 9 and 10, Article 3, Section 2, Article 4, Section 2, and Article 6, Section 2, of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, (Assignment 10 [R. II, 1116]); in refusing to hold that the entire 1939 Act, including Sections 4-A and 4-C, constitutes an attempt to restrict and to regulate plaintiffs' rights to the full enjoyment of the exclusive rights granted to them by the Copyright Laws of the United States (Assignment 12 [R. II, 1117]).

Summary of Argument.

For a summary of the argument, we refer the Court to the captions and sub-captions of the points hereinafter advanced. Any other summary within permissible bounds would be inadequate.

ARGUMENT.

I. The State Statutes violate the copyright clause of the Federal Constitution.

The objections to the state statutes under the Copyright Clause are twofold: (1) they invade a field delegated to Congress, nullifying the most vital provisions of the 1909 revision of the copyright laws, and confiscating

plaintiffs' right of public performance for profit by barring them from licensing their copyrighted musical compositions in the only manner that is commercially feasible; (2) they discriminate against owners of copyrighted works.

Before discussing these objections, it will be necessary to examine the practical operation of the statutes rather than the form of descriptive words which they employ (cf. *Nelson* v. *Sears, Roebuck & Co.*, 85 L. Ed. 522, 524 [1941 Adv. Sh.]; *Best & Co. Inc.* v. *Maxwell*, 61 Sup. Ct. 334, 85 L. Ed. 274, 275 [1941 Adv. Sh.]; *Thompson* v. *Consolidated Gas Utilities Corp*, 300 U. S. 55, 79-80 [1937]).

(a) The provisions of both state statutes show clearly that they attempt to nullify or abridge the provisions of the Copyright Law which give to owners of copyrighted musical compositions the exclusive right of *public performance for profit* as interpreted by numerous decisions. *Herbert* v. *Shanley*, 242 U. S. 591; *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191; *Pastime Amusement Co.* v. *M. Witmark & Sons*, 2 F. (2d) 1020 (C. C. A. 4), aff'd 298 Fed. 470; *Berlin* v. *Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Harms* v. *Cohen*, 279 Fed. 276 (E. D. Pa.); *M. Witmark & Sons* v. *Calloway*, 22 F. (2d) 412 (E. D. Tenn.); *Lutz* v. *Buck*, 40 F. (2d) 501 (C. C. A. 5), cert. den. 282 U. S. 880; *Buck* v. *Lester*, 24 F. (2d) 877 (E. D. S. C.); *Buck* v. *Heretis*, 24 F. (2d) 876 (E. D. S. C.); *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411 (C. C. A. 6); *Society of European Stage Authors, Composers and Publishers* v. *New York Statler Hotel*, 19 F. Supp. 1 (S. D. N. Y.); *Messager* v. *British Broadcasting Co.* [1928] 1 K. B. 660, 140 L. T. R. 227; rev'd on other grounds [1929] A. C. 151.

(b) The 1937 Act does not contain any legislative finding as to any existing evil requiring its passage. Nor was any established at the trial. The court below found that the Act was not a reasonable exercise of the police power of the State and that its true purpose was to deprive plain-

tiffs of their copyrighted compositions for the private benefit of 410 commercial users in the State of Florida (R. II, 1089-90).

(c) The Act was not prompted by any *bona fide* desire to protect the State of Florida against combinations monopolizing or restraining trade for the following reasons:

(1) The pre-existing Florida statutes amply regulate and punish all such combinations (Tit. II, Ch. 10, Art. 12, sec. 7944-54, Fla. Comp. Gen. L., Ch. 6933, Acts 1915, §5; Ch. 10283, Acts, 1925, §2).

(2) The 1937 Act condemns plaintiffs by *declaring* their Society to be operating in restraint of trade (Sec. 1). It does not give them an opportunity to show the reasonableness of the combination, whereas other combinations are exempt from the general Florida anti-trust laws if they are found to be reasonable. *Brock* v. *Hardie,* 114 Fla. 670, 154 So. 690, 693, 696 (1934).

(3) It was neither reasonable nor necessary to exempt, by non-inclusion, owners of non-copyrighted works (*i. e.*, unpublished works enjoying common-law protection) and combinations of users, who are permitted to buy outright the copyrights of a substantial number of copyright owners (the copyright owners acting independently of each other, but the users acting collectively).

(4) The penalties and confiscatory provisions of the Act were not reasonably necessary to meet any alleged evil (Secs. 8, 11-A, 11-B, 13; also Secs. 1, 7-B, 10-A; Conclusion of Law "1", R. II, 1089).

(5) It was not reasonable to give the 410 users in the State the right to use plaintiffs' copyrighted works without compensation and to bar plaintiffs from suing for infringement (Secs. 4-A, 4-B, 5-A, 5-B, 6).

(6) It was not reasonable to extend the prohibitions of the Act to composers, authors and publishers of copyrighted works not acting in concert (Secs. 2-A, 2-B and 6).

(7) It was not reasonable to create arbitrary presumptions for the purpose of subjecting plaintiffs to the jurisdiction of the Florida courts although they are all nonresidents of the State (Secs. 4-B, 5-B, 6, 7-A).

The private purpose which motivated this statute is apparent when viewed in the light of the many previous attempts of users to destroy the Society as a means of obtaining *free* use of plaintiffs' copyrighted works (*supra*, pp. 22-26).

(d) The *1939* Act does not purport to regulate or penalize combinations in restraint of trade. The title states its primary purpose as "regulating licensing of" "public performing rights in copyrighted musical compositions and dramatico-musical compositions". The regulation is fourfold:

(1) It requires virtual duplication of all data filed with the Register of Copyrights under the Act of 1909 for the *alleged* purpose of enabling Florida users to avoid innocent infringement;

(2) It bars two or more copyright owners from issuing *any* blanket licenses in Florida unless they give *all* users in the State an option to have a license to perform each separate composition at a price fixed independently in advance by each owner for each user in the State, and stated in a schedule filed at least seven days prior to the issuance of the license if the price charged is to differ from any price previously scheduled. No attempt has been made to show how such a price could be fixed in advance. A list prepared by one of defendants' witnesses in purported compliance with the 1939 Act, significantly fails to list any prices for use of the works (Def. Tr. Ex. A-2, R. II, 955-7). The evidence shows that it is impossible. Moreover, the requirement of filing such schedule and fixing such price

bars the copyright owner from exercising the valuable privilege of restricting the time, manner or nature of the performance of his work;

(3) Whether a blanket license or any other form of license is issued by a single person or by many, the license fee must not be based in whole or in part upon a program not using such composition. In other words, the license fee must be computed solely upon the value of the composition in the particular program even though it may be established that the use of the composition in the particular program enhances the value of the preceding and succeeding programs which do not actually employ the licensed composition;

(4) A tax of three per cent. is imposed on gross license fees collected.

A. The Action of Congress in Fully Covering the Field in the 1909 Revision of the Copyright Act Bars the States from Making Any Regulations in That Field.

The Constitution of the United States completely removed the regulation of copyrights from the sphere of state jurisdiction and vested supreme power in that subject in the Congress of the United States. Article 1, Section 8, Clause 8, gives the Congress the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries;"

Of course, no principle is better settled than that the States may not trespass upon the powers delegated by the Constitution to the Congress when the field has been occupied by the latter. However, two of the cases of this

Court are collected in the footnote.[8] As Mr. Justice FRANKFURTER pointed out in his work, *Mr. Justice Holmes and the Supreme Court,* at page 72 (1938), the purpose of conferring certain powers upon Congress was to overcome the dangerous "Balkanization" of this nation which existed before the Constitution was adopted.

Congress, in 1909, made a sweeping general revision of the copyright laws for the purpose of making simple, certain and uniform the requirements for the protection of literary property throughout the country. The Report by Mr. Currier, from the Committee on Patents of the House of Representatives on February 22, 1909, in submitting the bill which subsequently became the Copyright Act of 1909, stated that the Copyright Act "should be revised so that protection to the honest literary worker, artist, or designer shall be *simple* and *certain.*" (H. R. Report No. 2222—Sixtieth Cong., 2d Sess., 1909, p. 1.)

The fact that there were different federal laws relating to copyright was abhorred by President Roosevelt in his message to Congress in December, 1905, in which he urged a general revision. The President then said (Report No. 2222, pp. 1-2):

> "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; *they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public;* they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to

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[8] *Napier* v. *Atlantic Coastline Ry. Co.,* 272 U. S. 605 (Georgia and Wisconsin statutes requiring certain safety appliance on locomotives, held in conflict with Federal Locomotive Boiler Inspection Act although Interstate Commerce Commission had not exercised its authority in field covered by State legislation; *Jennings* v. *United States Fidelity & Guaranty Co.,* 294 U. S. 216, 226 (Indiana statute held inconsistent with system of equal distribution among creditors of national banks as established by federal law).

the public. Attempts to improve them by amendment have been frequent, no less than 12 acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.

"The inconveniences of the present conditions being so great, an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration."

The Committee further quoted a statement of Thorvald Solberg, Register of Copyrights, to the effect that "the laws as they stand fail to give the protection required, are difficult of interpretation, application and administration, lead to misapprehension and misunderstanding and in some directions are open to abuses" (*Ibid*, p. 2).

The Committee pointed out that such a situation existed when the Constitutional Convention met, and the copyright clause was adopted to remove such burdens upon authors. The Committee's Report states (*Ibid*, p. 2):

"When the convention met and framed the Constitution of the United States copyright laws existed in 12 of the 13 States, but the requirements for the

registration of copyrights differed greatly, making it burdensome to an author seeking to protect his work. *The need of a law which would be effective in all the States was so apparent that a provision was incorporated in the Constitution,* * * *."*

It was felt that *Congress* was creating new property rights and could annex to their enjoyment such conditions as *Congress* deemed expedient (Report No. 2222, p. 9, citing *Wheaton* v. *Peters,* 8 Pet. 591 [1834]).

The 1909 Law fully covered the field of copyright within the grant of constitutional power by stating explicitly the nature of the rights granted, designating the persons who might enjoy them, limiting such rights to a fixed period of time, prescribing the remedies for infringement including the recovery of minimum damages, establishing the means of safeguarding the public against innocent infringement, regulating assignments, and specifying certain conditions for the enjoyment of specific rights granted.

All rights granted under the 1909 Copyright Law were expressly made exclusive (Sec. 1). This Court had many times previously passed upon the exclusive nature of those rights. *Burrows-Giles Lithograph Co.* v. *Sarony,* 111 U. S. 53, 56, 59 (1884); *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 291 (1907); *Caliga* v. *Inter Ocean Newspaper Co.,* 215 U. S. 182, 188 (1909).

Not even the United States may invade the *exclusive* rights of owners of copyrights or patents. *United States* v. *Dubilier Condenser Corp.,* 289 U. S. 178, 186, 189 (1933); *James* v. *Campbell,* 104 U. S. 356, 358 (1881); *United States* v. *Bell Telephone Co.,* 167 U. S. 224, 249-50 (1887). *A fortiori,* the State of Florida may not invade these exclusive rights in the manner attempted by the State Statutes.

It is well settled, that copyright owners cannot be compelled to grant licenses except upon their own terms and at prices fixed by such owners (*F. A. D. Andrea, Inc.* v. *Radio Corp. of America,* 8 F. (2d) 474 (C. C. A. 3), aff'g 14 F. Supp. 226, cert. den. 300 U. S. 681; *Buck* v *Hillsgrove*

Country Club, Inc., 17 F. Supp. 643 [D. C. R. I.]). The several States may not pass laws to the contrary (*Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 917 [S. D. Ohio]).

Congress included among the separate and distinct exclusive rights granted to the owner of a copyright in a musical composition the exclusive right:

> "(a) To print, reprint, publish, copy and vend the copyrighted work * * *.
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and * * * to make * * * any form of record in which the thought of an author may be recorded and from which it may be read or reproduced * * *" (Act of Mar. 4, 1909, 17 U. S. C., § 1).

The exclusive *performing* rights (Sec. 1(e), *supra*) include performances by live musicians in hotels, restaurants and night clubs (*Herbert* v. *Shanley*, 242 U. S. 591 [1917]); performances by means of radio broadcasting or rebroadcasting (*Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191 [1931]); and by means of radio receiving sets in hotel rooms operated from a master-controlled set (*Society of European Stage Authors and Composers, Inc.* v. *New York Statler Hotel, Inc.*, 19 F. Supp. 1 [1937, S. D. N. Y.]).

The only limitation which the Copyright Act places upon the exclusive rights granted by Section 1 is that under certain circumstances a manufacturer of phonograph records may record a copyrighted work without the consent of the author upon paying two cents for each record made; but the payment of this two cent royalty does not give the manufacturer the right of public performance for profit. This provision (Section 1[e]) reads in part as follows:

> "* * * whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents

on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the twentieth of the next succeeding month. *The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit: And provided further,* That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

"In case of the failure, of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this Act, not exceeding three times such amount."

The Copyright Law permits a purchaser of a phonograph record or electrical transcription to perform it privately, but he may not perform it *publicly for profit* without the express consent of the copyright owner. *Irving Berlin, Inc.* v. *Daigle*, 31 F. (2d) 832 (C. C. A. 5); *Lutz* v. *Buck*, 40 F. (2d) 501, cert. den. 282 U. S. 880.

This separation of the *recording* right from the *performing* right carries out the general purpose of the Copyright Act to separate all of the several rights embraced in a copyright from the rights transferred by a sale or other disposition of the material object copyrighted (such as a book, motion picture film, sheet of music, etc.).[9]

The separate rights which a copyright owner obtains, are listed in subdivisions "(a)" to "(e)" of Section 1 of the Copyright Act. Section 3 of the Copyright Act permits a further subdivision of the rights in a copyrighted work by directing "that the copyright * * * shall protect all the copyrightable component *parts* of the work copyrighted."

The rights granted under the Copyright Act are not mere personal rights which the author alone may enjoy. They have all the attributes of property. They may be assigned or bequeathed; and the successors in interest have the same exclusive rights which the author himself enjoyed. Section 8 of the Copyright Act provides "that the author *or proprietor* of any work made the subject of copyright

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[9] Section 41 reads as follows (Copyright Office Bull. No. 14, p. 22):

> "SEC. 41. The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Purchase of the material object (*e. g.* engraved plates, books, sheets of music, etc.) was held not to give any rights in the copyright in *Stephens* v. *Cady*, 14 How. 528 (1852); *Stevens* v. *Gladding*, 17 How. 447 (1854); *Henry Bill Pub. Co.* v. *Smythe*, 27 Fed. 914, 921 (S. D. Ohio); *Harms* v. *Cohen*, 279 Fed. 276, 280 (E. D. Pa.); *National Geographic Soc.* v. *Classified Geographic*, 27 F. Supp. 655, 660 (D. C. Mass.); *Davenport Quigley Expedition* v. *Century Productions*, 18 F. Supp. 974 (1937, S. D. N. Y.); *Chappell* v. *Boosey*, 21 Ch. Div. 232 (1882).

by this Act, or his executors, administrators or *assigns*, shall have the copyright in such work under the conditions and for the terms specified in this Act * * *." The only persons who are not accorded all these rights are certain alien authors or proprietors. All citizens of the United States are entitled to the benefit of all the provisions of the Copyright Act.

B. The State Statutes Confiscate Plaintiffs' Right of Public Performance for Profit.

Defendants have admitted that the 1937 Act deprives plaintiff Society of the right to sue for copyright infringement in the federal courts situated in Florida (Letter of Attorney General Cary D. Landis and Tyrus A. Norwood, R. I, 96-7, admitted, R. I, 108).

It has been shown that both in the United States and elsewhere, it has been impossible to detect infringements of, or to license, the right of public performance for profit except through collective action on the part of composers, authors and publishers. The unorganized composer, author and publisher even now suffer from unlimited piracy of their works. The plaintiff Society alone compels the bulk of the users to respect the Copyright Act. If a composer or author is not a member of the Society, his works are freely infringed. The users pay no attention whatsoever to the copyright status of the works they use; they keep no record of them (R. II, 849, 850-1; R. I, 523); broadcasters make no effort to ascertain the titles or copyright status of compositions transmitted by them (R. II, 871, 874-5, 890, 908); the state statutes under attack do not require the users to keep such a record. So helpless is the individual author that users other than the large radio networks have never been compelled to pay royalties or to defend infringement suits brought by individual composers, authors or publishers (R. I, 500; R. II, 849, 871, 874-5, 890, 908). Station WOW only once paid an author a performance fee—on that occasion the fee was only one dollar (R. II, 909-10).

The *1937* Act bars authors from acting collectively in the only manner available to them; and if they do act collectively, the users are given free use of their works. Thus, by statute, the author is faced with the dilemma of losing his performing rights by failing to employ the only available means to protect them; or he may employ such means, only to have the statute strip him of his rights.

Section 1 of the 1937 Act provides that if composers and authors engage in such cooperative enterprise wherein a single fee is fixed for the right to perform any or all of the compositions embraced in their repertoires, they shall be barred from collecting any license fees from persons who render their copyrighted compositions "privately or publicly" through personal performance or through radio or any instrumentality or sound-producing apparatus and forbids such license fees from being collected "in *any* court *within* the boundaries" of Florida and provides that any such collection or attempted collection "shall be a separate offense hereunder" and is declared "to be an unlawful monopoly in this State" (Sec. 1). All *existing* agreements of such a cooperative group are invalidated and their attempted enforcement is made unlawful (Sec. 3).

Sections 4-A, 4-B, 5-A and 5-B expressly permit all broadcasting stations, theatres, moving picture houses and similar places of entertainment, to perform publicly for profit any and all of the musical compositions copyrighted by members of any society condemned by Section 1 without the payment of any copyright royalties and without any liability for infringement.

In interpreting these sections, the Florida Attorney General in charge of this case stated:

> "• • • If the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Courts for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute it under the pro-

visions of Section 1 of the Act, *regardless of whether the suit was brought in the State or Federal Courts"* (R. I, 96-7).

Section 6 of the 1937 Act grants to Florida users the free use of all copyrighted musical compositions, *whether owned by members of a combination or not,* if the means of reproduction or the talent giving the performances come into the State from outside the State. That is a customary practice.

Thus the 1937 Act completely confiscates plaintiffs' right of public performance for profit.

The *1939* Act accomplishes the same purpose by imposing impossible conditions of duplicating all information filed in the office of the Register of Copyrights; fixing prices by individual action, and without reasonable means of doing so; surrendering the right to restrict a work, and barring the issuing of blanket licenses (the only practical method of licensing the performance of musical compositions) unless the copyright owners surrender the right to restrict or to completely withhold the licensing of their separate works (Secs. 2-6, incl.).

C. The State Statutes Abridge and Regulate Rights Granted to Plaintiffs under the Copyright Act and Bar Them from Separately Licensing the Several Rights Granted to Them by Congress.

(1) Sections 2-A and 2-B of the 1937 Act nullify sections 1(e) and 41 of the Copyright Law (quoted *supra,* pp. 52-3, 54, footnote) by requiring the seller of any copy or record of a copyrighted musical composition to surrender all *performing* rights upon selling copies or records in Florida. This prevents the composer and author from selling publication or recording rights to one person and performing rights to others. The court below found that many thousands of copyrighted compositions owned by plaintiffs have been recorded under the com-

pulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records who pay the copyright owners not more than two cents for each record and such copyright owners have no right to demand any further sums from such manufacturers, and that the plaintiffs and others similarly situated have no control over the sale or disposition of such phonograph records and cannot compel the manufacturer to affix any price upon them, or to collect a price for the public performance for profit, or if collected to remit the sum collected for the public performance for profit (Finding "15", R. II, 1087-8). There are a great number of separate performing rights each of which is licensed to different persons. Each licensee must exercise his right in such a manner as not to conflict with the rights of others (Findings "17" and "18", R. II, 1088-9).

(2) The 1937 Act (Secs. 1, 4-A, 4-B, 5-A, 5-B, 6) deprives copyright owners of the right to license the re-broadcasting of their works as well as the public performance of their works by means of radio receiving sets, thus setting at naught rights granted by the Congress under the Copyright Law.

(3) The 1937 Act deprives copyright owners of the right to license their copyrighted works to licensees in other States, by providing that a license given to users outside the State confers a license upon users in the State of Florida without the separate consent of the copyright owner, and in fact, regardless of his consent (Secs. 4-B, 5-B, 6).

(4) Suits for infringement in the federal courts against Florida users are barred whenever such Florida user imports from without the State, the means for giving such performances (1937 Act, Sec. 6).

(5) The 1939 Act prevents copyright owners from restricting their works and from claiming statutory minimum damages under Section 25 of the Copyright Law by providing that if *any* blanket license is issued (and there is no other feasible method of licensing) *all* Florida users shall have an option to use *any* works of any person on whose behalf such blanket license is granted, at a scheduled price fixed in advance for each performance of each work (the 1939 Act requiring schedules of each work, and prices per performance—Secs. 2, 3, 4-A, 4-B, 4-D).

(6) Enforcement of the Act against non-residents is secured by requiring submission to the jurisdiction of the Florida courts when such lists are filed (Sec. 5).

(7) The copyright owner's right to determine the method of charging for his work is restricted by barring any charge in any manner based on programs not using music (Sec. 4-C).

(8) All actions "in *any* court" on account of the performance of any such work are barred unless the plaintiff pleads and proves compliance with the Act (Sec. 6).

(9) The provisions of the 1939 Act requiring filing of a list purports to be for the purpose of enabling users of music in Florida to avoid innocent infringement. The Copyright Law (Tit. 17, U. S. C.), however, provides all the safeguards against innocent infringement that Congress has deemed necessary or proper. The Copyright Law provides that every copy of the copyrighted work must bear *a notice of copyright;* that *copies must be deposited* in the Office of the Register of Copyrights; that the copyright notice must state the *name of the proprietor* and the *year in which copyright was secured* (17 U. S. C., Secs. 9, 12, 18). *Assignments* of copyrights must be *recorded* with the Register of Copyrights (17 U. S. C., Secs. 42-46). The

Register of Copyrights keeps a full index of all copyright registrations and assignments which is printed at periodic intervals, furnished to all parties desiring them at a nominal price (17 U. S. C., Secs. 56, 57). The *Record books* of the copyright office are *open to public inspection.* The State Statute sets up a new system of registration distinct from and in conflict with that set up by Congress.

This phase of the Copyright Act was recently considered by this Court in *Washingtonian Pub. Co.* v. *Pearson,* 306 U. S. 30 (1939).

The information which the 1939 Act compels copyright owners to file in Florida has no possible relation to any public interest of that State, and its purpose can only be to harass and annoy plaintiffs and to make it so expensive and impossible to comply with the Statute as to cause plaintiffs to abandon any attempt to enforce and protect their copyrights in Florida.

D. The State Statutes Discriminate Against Owners of Copyrighted Works.

Although in certain instances states may make laws which may affect rights derived from the Federal Constitution, such laws must be reasonable and must not discriminate against the exercise of a federal right. *Fox Film Corp.* v. *Doyal,* 286 U. S. 123 (1932); *Best & Co.* v. *Maxwell,* 61 Sup. Ct. 334 (1940); *Walling* v. *Michigan,* 116 U. S. 446, 454 (1886); *Welton* v. *Missouri,* 91 U. S. 275 (1875); *Bethlehem Motors Co.* v. *Flynt,* 256 U. S. 421 (1921); see *Bacardi Corp.* v. *Domenech,* 311 U. S. 150 (1940).

The State Statutes ignore this principle.

(1) The State Statutes discriminate against owners of copyrighted musical works by failing to include, and thereby exempting, owners of musical works protected under the common law.

The State Statutes do not affect *common law* rights in musical compositions; they are in terms limited to "copyrighted" compositions. Those rights are not destroyed

until the work is published, after which time the author must rely solely upon rights granted under the Copyright Law. *Wheaton* v. *Peters,* 8 Pet. 591 (1834).

The public performance of a dramatic or musical composition is not a publication and does not destroy common law rights. *Ferris* v. *Frohman,* 223 U. S. 424, 435 (1912); *Nutt* v. *National Institute, Inc.,* 31 F. (2d) 236, 238 (C. C. A. 2).

This likewise applies to performances by means of radio broadcasting. *Uproar Co.* v. *National Broadcasting Co.,* 8 F. Supp. 358, 362 (D. C. Mass.) mod. 81 F. (2d) 373, cert. den. 298 U. S. 670.

It must be remembered that the State Statutes do not apply to combinations relating to the licensing of publication rights or motion picture rights or any other right under the Copyright Law except *performing* rights. The performing rights, unlike the publication rights, are just as valuable and just as useful whether a work is copyrighted or merely protected by the common law.

The 1937 Act permits all the owners of *non*-copyrighted musical and dramatico-musical works throughout the world, to combine to fix the price at which they would grant licenses for the public performance of their works without being subject to the penalties of the Act. If this Statute were upheld, no one would copyright his work because of a desire to take advantage of this exemption. Thus, those who have already copyrighted their works and have lost their common law rights would be at a distinct disadvantage. This is not a remote possibility. It is precisely what would happen if this law were upheld.

Composers and authors may send their compositions to performers for the limited purpose of performing their works without publishing or copyrighting the works and without losing any common law rights. If this should be done, the entire purpose of Article 1, Section 8, Clause 8, pertaining to copyrights and the Copyright Act passed in pursuance thereof will be completely nullified. Any law relating to copyrights must subserve the purpose of the copyright clause of the Constitution, which was pri-

marily intended to serve the public interest of the nation by enriching the public domain with works upon the expiration of the term of copyright. This can be accomplished only by encouraging authors to copyright their works. The copyright law gives the necessary inducement by conferring upon copyright owners exclusive rights for a limited period. *Grant* v. *Raymond,* 6 Pet. 218, 241-3 (1832); *Fox Film Corp.* v. *Doyal,* 286 U. S. 123, 127-8 (1932); *Kendall* v. *Winsor,* 21 How. 322, 327-8 (1858).

The 1939 Act does not even purport to be based upon any desire to regulate or curb monopolies or combinations in restraint of trade. Without any possible justification it imposes insuperable burdens upon certain copyright owners who endeavor to license the right of public performance for profit.

What incentive remains to copyright a work if the States may pass laws *discriminating* against owners of copyrights as distinguished from rights protected at common law? The evidence in the case at bar shows without contradiction, that with respect to musical compositions, the right of *publication* which was once the most valuable right enjoyed by a copyright owner, has now dwindled almost to the vanishing point (R. I, 195-7, 223, 237-41, 244, 261-4, 264, 279-81, 286, 319, 346, 361-3, 379-83, 426-8, 438-40, 508-10, 509; R. II, 782, 821-2).

In 1909, Congress adopted a new policy of extending copyrights to unpublished works as well as to published musical and dramatico-musical works. The report of the Patents Committee submitting the 1909 Copyright Law to Congress stated, "If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph [Sec. 1(d)] as to amply secure him in these rights" (Rep. No. 2222, H. R. Sixtieth Cong., 2d Sess., 1909, p. 4). At the same time it was made clear in Section 2 of the Copyright

Law that Congress did not intend to invade the field of common law rights as to authors who might choose not to secure copyright.[10] The field of common law rights continued to be, as theretofore, solely within the domain of State legislation.

The number of *unpublished* musical works copyrighted under section 11 of the Copyright Law of 1909 has increased in leaps and bounds. Whereas in the fourteen year period from 1912 through 1925, almost four-fifths of all musical compositions registered for copyright were *published* works (284,296 of such compositions being published, the remaining 76,292 being unpublished); for the succeeding fourteen year period, more than one-half of the musical compositions registered for copyright during the following fourteen year period were *un*published works (there were only 195,359 published musical compositions copyrighted as against 231,512 unpublished), with the present trend showing a ratio of more than two unpublished copyrighted musical compositions for each such published work (Def. Ex. A-5, R. II, 965). There are many advantages to be gained in desisting from copyrighting unpublished works. If a work is copyrighted, its duration is limited to a period of fifty-six years. If it is not copyrighted, the owner, so long as he does not publish his work, is entitled to protection under the laws of the several States, including the State of Florida *perpetually*.

The discrimination by these Statutes against copyrighted works will handicap those who have already copyrighted their works, and will deter others from copyrighting their works in the future.

If the purpose of these Statutes be to curb monopolies and combinations in restraint of trade there is no reason

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[10] Section 2 of the Copyright Act provides:

> "Nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

for exempting non-copyrighted works. The owners of such works are just as capable of monopolizing the field of performing rights as are owners of copyrighted works.

This classification shows on its face that the true purpose of the Statutes is to deprive copyright owners, and especially the members of plaintiff Society, of rights granted to them by the Federal Constitution. Such a Statute cannot be upheld. *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375 (statute aimed at interstate commerce); *Truax* v. *Raich*, 239 U. S. 33 (statute designed to restrict aliens' right to secure employment); *Buchanan* v. *Warley*, 245 U. S. 60 (discrimination against colored race under guise of protecting public against race-riots); *Schneider* v. *State*, 308 U. S. 147; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *DeJonge* v. *Oregon*, 299 U. S. 353; and *Lovell* v. *City of Griffin*, 303 U. S. 444 (statutes limiting right of free speech and free assembly under guise of police power); *State ex rel. Fulton* v. *Ives*, 123 Fla. 401, 167 So. 394 (invasion of barbers' right of contract not justified by public welfare).

In *Schneider* v. *State*, 308 U. S. 147, *supra*, it was said at page 161:

> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

(2) The penalties and forfeitures imposed for violation of the State Statutes are far more severe than those imposed under other Florida laws on combinations actually monopolizing or restraining trade.

The State Statutes form a part of the 5th Division, Title II, Chapter 10, Article 12 of the Florida Compiled General Laws, which condemns "trusts."

The laws of Florida defining and punishing combinations which *actually* monopolize or restrain trade are found in sections 7944 to 7954 of that Article.

Section 7948 of the general anti-trust law imposes a fine of not less than $50 nor more than $5,000 or imprisonment from one to ten years, or both, each day during the continuance of the violation being a separate offense, section 7952 imposes a penalty of $50 for each day during which the violation shall be committed or continued.

The Acts of 1937 and 1939 involved in the cases at bar impose these penalties by reason of the provision making all penalties *cumulative* (Section 13 of the 1937 Act, reaffirmed in Section 15 of the 1939 Act). Section 8 of the 1937 Act imposes *additional* penalties of $50. to $5,000. or imprisonment of one to ten years, or both. *In addition,* the 1937 Act deprives groups affected by it of certain rights and copyrights granted under the Federal Constitution and Statutes; it nullifies all existing contracts, declares them to be entered into as intrastate transactions and in restraint of trade, and makes their attempted enforcement a violation of the Statute (Section 3). The general monopoly law of Florida does not purport to affect existing contracts or to declare their enforcement a violation of the Statute (Comp. Gen. Laws, Sec. 7953).

The 1937 Act penalizes persons affected by it by giving to users in Florida a free license to perform their works if such performances are made by means of picking up broadcasts emanating from outside the State or by means of importing electrical transcriptions, sound projection in-

strumentalities or apparatus, performers, musicians, singers, players, orchestras, bands or other artists or talent (Sections 4-A, 4-B, 5-A, 5-B and 6), and prohibits the persons affected from obtaining redress in the Federal courts for the infringement of their works (Section 6). It subjects them to the jurisdiction of the State of Florida even though in fact, they are not present within the State (Sections 7-A, 9, 10-A and 10-B). It makes all their agents, no matter how innocent, guilty of a violation of the Act and subject to all the penalties under Section 7-B—a provision not to be found in the general laws of Florida relating to monopolies and restraints of trade.

Section 9 permits the dissolution of any condemned combination which includes a combination which may be wholly outside the State of Florida, under Section 1, which extends its scope to the entire United States. The general law empowers the State to dissolve only those corporations over which it *actually* has jurisdiction (Section 7946) and it deprives *foreign* corporations merely of the right to do business in the State (Section 7947). The general law, however, does not resort, as does the 1937 Act, to a fiction by which foreign corporations are *deemed* to be doing business in the State.

Section 11-A compels those subject to the 1937 Act to furnish exact copies of all documentary evidence, records or data which may incriminate, and Section 11-B makes the failure to furnish such documents a contempt of court and carries with it a fine of $100 for each day of failure to furnish such documents. The general law of Florida authorizes the subpoenaing of all persons, but it grants immunity from prosecution to all persons summoned and examined for any violations of such laws (Comp. St. Sec. 7954).

This comparison of the laws defining and punishing *actual* monopolies and restraints of trade with the 1937

Act which creates a presumption of guilt regardless of whether trade is actually monopolized or restrained, is very significant. It shows a deliberate intention to discriminate against the persons subject to the 1937 Act, to deny them the equal protection of the laws, and to deprive them of their property without due process of law.

(3) The State Statutes discriminate against copyright owners by denying them the right to show the reasonableness of their Association and the fact that they do not actually monopolize or restrain trade.

The Florida statutes relating to combinations monopolizing or restraining trade generally as defined in Title II, Chapter 10, Article 12 of the Florida Compiled General Laws, do not condemn them unless they *actually* monopolize or restrain trade (Sec. 7948, *supra*). *Cooperative* associations *such as the Society,* are exempt under the general anti-trust laws of the State if they engage in agricultural or horticultural pursuits (Secs. 7944, 7948).

No combination under the provisions of the general anti-trust statutes other than the Statutes complained of, is condemned if it is a reasonable one. *Brock* v. *Hardie,* 114 Fla. 670, 154 So. 690, 693, 696.

In *Brock* v. *Hardie,* 114 Fla. 670, 154 So. 690, 696, the court recognized the necessity for exempting cooperative marketing associations from the general Florida anti-trust laws. It is also pointed out in that case (p. 697) that combinations which do not deal in any article of merchandise, manufacture, trade or commerce, are not within the condemnation of the Florida anti-trust laws.

In spite of these exemptions relating to combinations in other fields, a cooperative association of composers, authors and publishers of copyrighted works is declared illegal under the 1937 Law and discriminated against under the 1939 Law, even though they do not deal with any article of trade or commerce. No economic reason has

been advanced for discriminating against an association of copyright owners operating in a field where cooperative action alone will protect composers and authors and where they do not deal with any article of trade or commerce.

II. The attempt to destroy plaintiffs' property rights by legislative fiat constitutes a violation of the Fourteenth Amendment, and invalidates the Statutes in their entirety. In effect the Statutes are bills of attainder.

A. THE STATUTES FALL SQUARELY WITHIN THE CONDEMNATION OF *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, BY CREATING ARBITRARY PRESUMPTIONS MAKING PLAINTIFFS PRIMA FACIE GUILTY.

(1) The attempt to destroy the Society by a Statute which declares that it shall be deemed to be in restraint of trade without giving the Society a right to show that it is not in restraint of trade is similar to the attempt of the State of Louisiana in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, to legislate the American Sugar Company out of existence in that state. A statute there declared the business of refining sugar to be impressed with the public interest "by reason of the nature and by reason of the monopolization thereof", and on that footing certain regulations were made. It authorized an inspector to make reasonable regulations affecting any branch of sugar refining in the public interest and to prevent monopoly, and then provided that any person engaged in the business of refining sugar within Louisiana who systematically paid in Louisiana a lower price for sugar than he paid in any other state "shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade." Drastic penalties followed, as in the case of the State Statutes leading ultimately to the appointment of a receiver. Failure to operate a plant for a period of one year or to sell it within six months thereafter also gave

rise to the appointment of a receiver with a power to sell the plant within twelve months after appointment. The statute provided that an injunction could be issued or a receiver appointed after a hearing, subject to an appeal.

In that case the court pointed out that the following allegations of the bill "throw special light upon the case" (p. 82): The plaintiff, American Sugar Company, built a new refinery in Louisiana and closed an old one in the State to save expense; it purchased less than one-half of Louisiana sugar crop, often paying lower prices in Louisiana than it would pay in New York. The answer alleged that plaintiff was a monopoly and combination in restraint of trade completely controlling the sugar trade in Louisiana; that suits had been brought against it by the United States and others under the Sherman Act. Other facts were alleged in the answer attempting to show that the plaintiff was in fact a monopoly. In affirming a decree granting an interlocutory injunction, this Court said at page 85:

> "The answer is signed by the Attorney General of the State; and if he were authorized to interpret the meaning of the other voice of the State heard in Act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff is the only one to whom the act could apply and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity since it made the legislation necessary. If the connection were admitted it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights or prevent it from asserting them in the only practicable and adequate way.

> "The statute bristles with severities that touch the plaintiff alone, and raises many questions that would have to be answered before it could be sustained. We deem it sufficient to refer to those that were mentioned by the District Court; a classification which, if it does not confine itself to the American Sugar Refinery, at least is arbitrary beyond possible justice,—and a creation of presumptions and special powers against it that *can have no foundation except the intent to destroy.*"

In commenting on the presumption making the Sugar Company guilty of being an unlawful monopoly and in holding the *entire* Act invalid, the Court said at page 86:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed,* 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But *it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.* If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. *We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed.*"

Applying that decision to the cases at bar, the Society is made guilty of being a combination in restraint of trade

because its members constitute a substantial number of composers, authors and publishers who have assigned their performing rights to the Society which in turn (in negotiation with users' organizations) fixes the price of a license for the public performance for profit of the copyrighted musical compositions of the members of the Society. That activity is declared to be an unlawful combination in restraint of trade, regardless of whether or not it is in fact and in law such a combination.

(2) In addition to the presumptions of guilt, there are certain conclusive presumptions with respect to doing business in the State, the character of the business, etc., which are not based upon actual facts, and which result in vesting the courts of Florida with jurisdiction to deprive plaintiffs of their property without actually being within the jurisdiction of the State. The presumptions are set forth *supra*, pp. 33-4. These arbitrary presumptions cannot be sustained. The State may not deprive plaintiffs of their property which actually has no *situs* in the State of Florida or subject them to a personal judgment, as these Statutes attempt to do, without actually securing jurisdiction over their persons. These Statutes attempt to vest such jurisdiction in the Florida courts by setting up fictions which would bring them within the State. Such an attempt was condemned in *Bailey* v. *Alabama*, 219 U. S. 219, where it was said at page 244:

> "What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, *it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment.*"

In *Morrison* v. *California*, 291 U. S. 82, it was said at page 90:

> "* * * 'The legislature may go a good way in raising [a presumption] or in changing the burden

> of proof, but there are limits.' *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' ''

One of the extreme extents to which the 1937 statute goes in creating a conclusive presumption opposed to the actual fact is found in the provision of Section 6 that "the use or rendition by radio broadcast, radio re-broadcast" of a copyrighted musical composition "shall be considered for the purpose of this Act, as *intra*state business of this State and subject to the control, regulation and prohibition set forth in this Act, notwithstanding that such copyrighted musical compositions originated or emanated from *without* this State." Of course, radio broadcasts know no state frontiers.[11]

B. Both the 1937 and 1939 Acts Discriminate in Favor of Those Who Have Not Copyrighted Their Compositions Pursuant to the Statute of 1909, But Rely Upon Their Common Law Right, as Against Those Who Have Availed Themselves of the 1909 Act.

The discrimination here referred to has been fully covered under the preceding point (*supra*, pp. 60-68). What is there set forth need not be repeated because the only difference is that there the discrimination is shown to violate

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[11] It is settled that radio broadcasting is interstate commerce (*Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 [1936]; *Federal Radio Communications* v. *Nelson*, 289 U. S. 266 [1933]), and the subject of broadcasting is entirely covered by the Federal Communications Act (48 Stat. 1064, Title 47, U. S. C. 151-609) pursuant to the "Interstate Commerce" clause of the Federal Constitution.

the copyright provision of the Federal Constitution, and here it violates the equal protection feature of the Fourteenth Amendment. Manifestly there can be no reasonable basis for the discrimination, so far as the objects and purposes of the statutes under attack are concerned, between composers and authors who avail themselves of the 1909 Act and those who rely upon their common law right.

C. The 1937 Act Discriminates in Favor of Copyright Owners Residing Outside of the United States, as Against Those who Reside Within the United States.

The 1937 Act applies only to "persons, firms or corporations *within the United States* who own or control vocal or instrumental compositions." Foreigners may buy up a great number of American copyrights and combine for the same purposes as plaintiffs without being subject to this law. Such organizations of foreigners already exist, as heretofore shown (R. I, 564-6). This Statute deliberately exempted them from its operation. No valid reason has been or can be assigned why this discrimination against copyright owners residing in the United States should exist. The American Society represents a great many foreign societies. Under the Statute it would be necessary and proper for these foreign societies to divorce themselves from the American Society and to have a separate licensing agency which could continue to do what the Society now does so long as none of the copyright owners resided in the United States. The Statute is aimed clearly at the American Society of Composers, Authors and Publishers and no other organization.

D. The Statutes Discriminate Between Owners of Copyrighted Musical Compositions and Other Copyright Owners.

The Statute, by failing to include owners dealing in other forms of licensing of copyrighted works, exempts them

from its operation. For example, it is well known that the Associated Press and virtually all the newspaper syndicates, license their services on a blanket basis. The newspaper which subscribes to one of these services must pay, whether it uses the material or not. These associations necessarily deal with a great number of copyrights. A newspaper may subscribe to one or more of the syndicated news services, and may be compelled to pay a stipulated fee for the license accorded, regardless of the actual use of the material supplied by the copyright owner. Each of these syndicates must have a substantial number of copyrighted stories or news items available or they cannot furnish any worthwhile service. Likewise they must fix a blanket fee for the right to use any or all of their respective copyrighted works. Yet they are not subject to the provisions of the Florida Statute and are not "declared illegal and in restraint of trade" because of their operations.

The same applies in the field of licensing motion pictures and many other forms of copyrights and rights thereunder. But all are exempt from the operation of this Statute.

Discriminations made by the State Statutes in condemning solely the creators and owners of property rights in musical compositions who copyright their works are grossly unreasonable. It is as if the Statutes should say in terms to composers and authors, "You may injure the public by monopolizing and restraining trade in the licensing of musical compositions—which privilege is denied to those who copyright their works—provided only you fail to copyright your works," or "You may likewise injure the public if you turn your talents to fields other than musical or dramatico-musical works, whether you copyright them or not, provided, only, you do not compose and copyright dramatico-musical compositions," or "You may injure the public in any manner condemned by the Statutes so long as you assign your copyrights to persons not residing with-

in the United States." Since performing rights may be licensed whether the works are copyrighted or protected under common law principles, or whether they are owned by Americans or foreigners and since rights under copyrights may be licensed in the manner condemned by owners of rights in copyrights other than performing rights, the alleged evils which the Statute is designed to reach may result from the operations of any of the exempted groups.

III. The State Statutes cannot be justified under the police power.

A. The State Statutes Were Not Enacted in the Public Interest.

As will be seen from the quotation of one of the conclusions of law of the court below, it found that the 1909 statute was not a reasonable exercise of the police power of Florida and the statute was not necessary to protect and did not serve the public interests of that State. On the contrary, "the object, purpose and effect" of the statute was to take the copyrighted musical compositions of the plaintiffs "for private purpose, to wit, to benefit the 410 users within the state of Florida" (R. II, 1089-90). This conclusion was abundantly justified by the evidence in the case and no attempt was made in the court below to demonstrate that any of the public other than the 410 users would be benefited by the act. They, in turn, would be benefited by escaping the necessity of paying royalties for the use of music duly copyrighted under the laws of the United States. The statute itself cannot be justified as being in the public interest, if it was passed for the benefit of that particular class. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton* v. *Steele*, 152 U. S. 133, 137.

B. The Statutes are Designed to Prohibit a Lawful Enterprise.

In the case at bar, the plaintiffs are engaged in occupations not only harmless in themselves but which bring to countless thousands that pleasure and entertainment which only music affords, and which have been carried on without detriment to the public interest, but to its benefit. They are now, as a practical matter, prohibited by the Florida Statutes. Such interference with the conduct of their private business is arbitrary and unnecessary. *Lawton* v. *Steele, supra.*

The activities of the Society were held to be entirely lawful in New York in *174 St. & St. Nicholas Ave., Amusement Co.* v. *Maxwell,* 169 N. Y. Supp. 895, and in *State of Washington* v. *American Society of Composers, Authors and Publishers* (Super. Ct. Washington, Thurston County, June 10, 1936 [printed in the Appendix]). The Federal Trade Commission came to a similar conclusion (R. I, 493-4). The legality of the foreign affiliated societies, and the necessity for their organization have likewise been upheld. *Performing Right Society, Ltd.* v. *Magistrates of Edinburgh,* 1922, Sess. Cas. 165; *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.* [1924] A. C. 1; *Performing Rights Society, Ltd.* v. *Thompson,* 34 T. L. R. 351 (K. B., 1918.)[12]

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[12] As previously stated (*supra,* p. 27, footnote) a consent decree was entered in the Southern District of New York on March 4, 1941, in a suit instituted by the United States against the Society. For the convenience of the Court, if this decree is deemed relevant to these suits, a copy will be handed up at the time of the argument. It will be noticed that it makes no adjudication of illegality, but enjoins the Society from refusing to license broadcasters on their request on a per program basis and from refusing to license other users on the basis of individual compositions, when requested. As a part of the settlement of the controversy between the Government and the Society, the latter pleaded *nolo contendere* to a criminal information filed against the Society, its officers and directors, and certain publish-

National and state anti-trust laws are designed to regulate marketing, and may not be used as a screen to destroy it. Such laws are necessarily based upon the assumption that there is a right way and a wrong way of marketing property. There is only one way by which the owners of copyrighted musical compositions may obtain revenue for the public performance for profit of such compositions, and that way is by collective action. The evidence is conclusive that without such collective action the exclusive right of public performance for profit, vested in the copyright owner, becomes an unenforceable and valueless right, existing in theory only, and robbed of all commercial value. The individual copyright owner standing alone is helpless and hopeless. Necessity compels copyright owners to act collectively in order to exercise the exclusive right of public performance for profit. A statute which prevents them from acting collectively confiscates this right. Instead of promoting the licensing of this right the Statutes destroy it.

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ing firms, in the Eastern District of Wisconsin. There has never been an adjudication based upon a full exposition of the facts and law that the Society is an unlawful combination under the Sherman Act. There was a decision by a statutory court in the State of Washington (whose previous decision that it was without jurisdiction to entertain the suit brought by the Society to enjoin the enforcement of the Washington statute similar to those *sub judice* was reversed by this Court in *Buck* v. *Gallagher*, 307 U. S. 95) that the Society had violated the Sherman Act and, consequently, was not entitled to relief (*Buck* v. *Gallagher* [as yet unreported] W. D. Wash., Dec. 23, 1940). The point on which the decision was based was not raised by any of the defendants in that case. It was advanced by an intervenor (who had not raised the point in his pleadings) after plaintiffs and defendants had submitted the case on testimony previously taken before a special master. It is plaintiffs' expectation to appeal this case to this Court if a petition for rehearing which is now pending is denied.

C. Defendants' Authorities Distinguished.

Defendants attempted in the court below and in this Court, when the case was here on appeal from the preliminary injunction, to justify the State Statutes as a reasonable regulation affecting commercial dealings in copyrights, under *Allen* v. *Riley,* 203 U. S. 347; *Patterson* v. *Kentucky,* 97 U. S. 501; *John Woods & Sons* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251; *Carbice Corporation* v. *American Patents Corp.,* 283 U. S. 27, 33; *Fox Film Corp.* v. *Doyal,* 286 U. S. 123; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436.

We have already seen that the State Statutes were not enacted in the true public interest of the citizens of the State of Florida. The provisions of the Statutes destroying the rights of copyright owners operating *individually* were certainly not necessary to accomplish the purpose of destroying any alleged *monopoly.* The provisions making the Society an unlawful combination in restraint of trade were not necessary if the Society really is a combination in restraint of trade, because earlier Florida Statutes which continue in effect, and the penalties of which are made cumulative, amply provide for the regulation and punishment of combinations in restraint of trade.

The regulations which were held reasonable in the cases relied on by defendants are of an entirely different scope.

In *Allen* v. *Riley, supra,* a Kansas Statute made it unlawful for any person to sell or barter any patented right without first filing in the particular county a copy of the letters patent, stating under oath that they were genuine and that they had not been revoked or annulled, and that such person had full authority to sell or barter the same. It further required that any note taken in consideration of a patent right must recite "Given for a patent right." These statutes were passed to meet a well-known evil. The

Court pointed out that small expense was involved in complying with the statute, and that the statute was a reasonable means of meeting the evil of fraudulent sales of nonexistent patents. In upholding the statute, the Court warned against such statutes as the one at bar, saying at page 355:

> "To uphold this kind of a statute *is by no means to authorize any State to impose terms which, possibly,* in the language of Mr. Justice DAVIS, *in Ex parte Robinson,* 2 Biss. 309, '*would result in a prohibition of the sale of this species of property within its borders,* and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred upon Congress by the Constitution.' *Such a statute would not be a reasonable exercise of the powers of the State.*"

Woods v. *Carl, supra,* and *Ozan Lumber* v. *Union County, supra,* followed *Allen* v. *Riley, supra,* in interpreting a similar Arkansas Statute.

Patterson v. *Kentucky, supra,* involved a Kentucky statute which required the inspection of oils and other inflammable fluids used for illuminating purposes, and prohibited the sale for such purposes of any substances which could ignite at a certain temperature. The defendant, who was convicted of selling oil in violation of the statute, defended on the ground that his process was protected by letters patent. The statute was upheld as a reasonably necessary means of protecting the lives and health of the citizens of Kentucky. As the Court pointed out, this was a mere police regulation "strictly and legitimately for police purposes," which said at page 506 that "police regulations which were enacted in *good faith,* and had appropriate and direct connection with that protection to life, health and property, which each State owes to her citizens" must be upheld.

The State Statutes here were not enacted in good faith and have no appropriate or direct connection with the protection of the citizens of Florida, except to the extent that they immunize 410 citizens of that State against enforcement of the Federal Copyright Act.

Defendants urged below that the purpose of the Florida legislature in passing these Statutes cannot be considered, citing *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126. In that case the court refused to "speculate as to the motives of the State" where there was nothing on the face of the statute or by its necessary operation to justify an assumption that the State had not acted in good faith.

In the cases at bar, the purpose of the legislators appears both on the face of the Statutes and in their practical operation. The State Statutes make it impossible for any owner of a copyrighted musical composition to enforce the payment of royalties by Florida users who profit from the public performance of such copyrighted works whether the copyright owners act as individuals or whether they act collectively. If the copyright owners act as *individuals*, they are barred from collecting license fees for the public performance for profit apart from the amount charged for the sale of sheet music, and they cannot collect royalties from Florida users who import their music from other States by contract with third parties who give such performances by means of records or other articles or devices serving to reproduce the copyrighted work mechanically. Nor can they license performance rights under the 1939 Act unless they comply with impossible conditions relating to methods of licensing and the filing of schedules of prices which cannot reasonably be determined in advance. If the copyright owners act *collectively* and attempt to issue blanket licenses (as permitted by the consent decree in *United States* v. *American Society*, *supra*), they necessarily run afoul of the Statutes and are subject to their drastic penalties. If the purpose of these Statutes were to regulate monopolies or combinations in

restraint of trade, there would be no reason for limiting the rights of copyright owners who act as individuals. Those sections which curtail the rights of individual copyright owners, and which defendants would have this Court ignore, show clearly that the Statutes were not passed in the *bona fide* public interest of the State of Florida.

Since the Statutes *on their face* show an absence of good faith, it is entirely proper to examine the circumstances surrounding their passage; and since the Statutes were obviously passed for the benefit of a few users of music in the State of Florida, who secured passage of such Statutes, that fact is relevant in passing upon the question of whether the Statutes were enacted in the public interest.

Carbice Corporation v. *American Patents Development Corp., supra,*[13] merely cites the above cases in a footnote at page 33 for the proposition that the grant of a United States patent does not exempt the patented product from limitations imposed by said police power. This, of course, does not give the States the right to enact unconstitutional statutes under the guise of protecting the public interest. In that footnote, Mr. Justice BRANDEIS also refers to the case of *Webber* v. *Virginia,* 103 U. S. 344, where it is said at page 347:

> "It is only the right to the invention or discovery —the incorporeal right—which the State cannot interfere with."

The statute in *Webber* v. *Virginia* was held to discriminate against non-resident owners of patents and was invalidated on that ground. Referring to those subjects which come under the powers reserved to Congress, the Court there said at page 351:

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[13] The proposition, broadly stated, decided in the *Carbice* case was that one could not, through the doctrine of contributory infringement, use a patent to procure a monopoly over an unpatented article.

> "Here there can, of necessity, be only one system or plan of regulations, and that Congress alone can prescribe."

As previously pointed out, if each State were free to make its own regulations on the subject of copyrights, some States might enact statutes like that of the State of Washington considered in *Buck* v. *Gallagher,* 307 U. S. 95, some might enact statutes like the State Statutes, and others might conceive some other form of regulating copyrights. In such event, the constitutional provision reserving to Congress the power to secure to authors and inventors the exclusive rights in their respective writings and discoveries for limited periods of time would be completely nullified.

The State Statutes not only discriminate against copyrights, but make the enjoyment of performance rights therein impossible. Those rights are actually confiscated. Thus the copyright owners affected by the Statute, are deprived of the very rights without which, under present day conditions, a copyright in a musical or dramatico-musical work is virtually worthless.

The *Ethyl Gasoline* case, *supra,* involved an *actual* restraint of trade in fixing the prices of non-patented articles moving in commerce.

The Society is not concerned with sheet music or any article of trade. It promotes licensing of copyrights by creating a practical method of licensing in a field where there was no licensing and *no means of licensing* before its organization. If it affects trade or commerce, it promotes rather than restrains it.

IV. The State Statutes impair obligations under existing contracts.

Section 3 of the 1937 Act provides that "All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforcible in any Court within this State." The collection or attempted collection of moneys thereunder is made illegal and subjects the combination, its agents, members or representatives seeking to enforce the same to the penalties of the Statute.

Thus the 1937 Act destroys all of the 410 contracts now existing between the plaintiff Society (representing all its composer, author and publisher members jointly) and users located in the State of Florida.

The Constitution of the United States provides (Art. I, §10):

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

The contracts between the Society and users in Florida and between the Society and its members were valid when made. We need not consider whether these contracts are within the category of those which may be *ex post facto* invalidated in the public interest because, as we have endeavored above to show, the purpose of the law in destroying these contracts was solely to benefit the other parties to them at the plaintiffs' expense. It would seem to admit of no argument that that is beyond the power of the State.

In *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 62 (1935), the court invalidated an Arkansas statute which impaired the security of bondholders under the guise of the "public interest," pointing out that the underlying reality rather than the form or label controlled its judgment.

V. The State Statutes violate the Fourteenth Amendment by interfering with plaintiffs' right to do business outside the State and interfere with interstate commerce by requiring prices to be fixed on sheets of music and phonograph records coming from outside the State and prescribing the uses that can be made of such compositions and records, as well as by the provisions respecting broadcasting.

The Statutes are so framed that in their practical operation the plaintiffs will be penalized, regardless of whether they do anything within the State of Florida.

For example, under Sections 2-A and 2-B of the 1937 Act, unless the physical copy of the copyrighted composition or a manufactured record or other instrument from which the copyrighted composition may be reproduced, bears a notation as to the selling price for all uses and purposes, including private rendition and public rendition for profit, the purchaser of such copy or manufactured article is given the right to use or render or cause or permit others to use or render the copyrighted work in the State of Florida for any purpose whatsoever without further compensation, even though the Copyright Law gives the copyright owner distinct rights of publication and performance which he may separately license or sell.

In other words, when the plaintiffs grant the right of publication to publishers located in New York, or are compelled to grant an involuntary license under Section 1 (e) of the Copyright Law to manufacturers of records located in any part of the United States, unless they see to it that the publisher or the manufacturer affixes to the record or article a price for all uses of the work in the State of Florida, the plaintiffs are compelled to forfeit all rights under their copyrights so far as that State is concerned.

The evidence is uncontradicted that the plaintiffs have no control over manufacturers of phonograph records or piano rolls, and cannot compel the latter to affix a price

(R. I, 205-6, 225, 239-40, 244-5, 270), and that authors have no control over their publishers, and can not compel them to affix a price on the sheet music (R. I, 201, 208-9, 211-12, 230, 244-5, 251-3, 257-8). Professional copies are furnished gratis to artists as a necessary part of exploitation (R. I, 211-12).

This penalty is imposed, even though plaintiffs do no business in Florida, have no agent within the State, and do not come within the State themselves.

Failure to cause such a price to be affixed results in plaintiffs being deprived of even the right to resort to the Federal Court to redress infringements of their copyrighted works.

All these penalties follow upon acts done or omitted *outside* the State.

If the plaintiff publishers sell sheets of music in New York to purchasers who take them to Florida, and if those sheets of music do not have a price affixed thereon, the penalties of the Statute follow just as much as if plaintiffs themselves sold the copies within the State.

The penalties in the form of deprivation of rights under their copyrights, are inflicted not upon the sellers of the sheets of music in Florida, but *upon the owners of the copyrights who have done nothing in that State.*

Section 4-A of the 1937 Act gives radio stations the right to broadcast and rebroadcast plaintiffs' copyrighted compositions, free of charge as long as plaintiffs remain members of the Society.

Plaintiffs are prohibited from issuing licenses to, and collecting from radio broadcasting stations located *without* the State, for the privilege of broadcasting or rebroadcasting within the State, because Section 4-B makes it unlawful for any such broadcasting station to pass on the charge to any user located in Florida.

Here, again, the Statute penalizes the plaintiffs for acts done without the State.

Sections 5-A and 5-B of the Statute contain similar provisions in favor of motion picture theatres and other places

of public amusement and entertainment, and prevent persons furnishing such entertainment from outside the State from collecting any license fees from users located within the State.

Section 6 shows that the whole object of the Statute is to exempt users of copyrighted music in the State from any payment whatsoever, because it is there provided that if the means of performing the music is sent to Florida from any other State, *regardless of whether the owner of the copyright is a member of any combination condemned by the Statute,* the sole responsibility rests upon the person located outside the State and not upon the user located within Florida, and the copyright owner is prohibited from bringing any suit for infringement in the Federal Courts for such infringing performance within the State.

Section 7-A shows an intent to deprive plaintiffs of their rights notwithstanding the fact that they are not within the State, by providing that if any person acts as a representative in Florida for a combination made unlawful by Section 1, he shall be deemed an *official* representative and agent of the combination, and the combination shall be deemed to be doing business in the State and service of process may be made upon such representative *or upon any agent of such representative,* with the same effect as if served on an officer or a managing agent or official representative upon whom service upon the combination might be made in the absence of this Statute.

Section 7-B bars the Society from assigning any claim that it has against users in Florida for license fees, by providing that any person who attempts to collect license fees, *or* who acts as representative or agent for any combination, is considered a part of the unlawful combination and subject to the penalties of the Statute.

If the Society should withdraw from the State, it would not be able to collect moneys due for license fees under existing contracts.

Any lawyer who attempts to bring suit to collect any such license fees would be guilty of violating this Statute. If he brought such a suit he would be deemed a representative of the Society and the Society would be deemed to be doing business and service upon him would subject the Society to the jurisdiction of the Florida courts and the penalties of the Statute under Section 7-A.

Upon securing such jurisdiction, the State Court is authorized to decree the dissolution of the Society and to enjoin its operations (Sec. 9).

If plaintiffs wish to protect themselves against infringements of their works in Florida, they must refrain from licensing all persons located outside the State who have any affiliation with users in Florida; they must refrain from entering into publication contracts outside the State, unless the publisher agrees to affix a price for all uses of the work in Florida, and they must at their peril locate all manufacturers of records and other articles from which the copyrighted work may be produced, in the hope of inducing such manufacturers to affix a price for all uses of the copyrighted work.

Complications that would result from any such endeavor, are so numerous and so obvious, that it would serve no purpose to lengthen this brief by enumerating them.

This Statute is clearly an attempt by the State of Florida to project its legislation into other States and to regulate the business of plaintiffs outside the State.

In *Provident Savings Ass'n* v. *Kentucky*, 239 U. S. 103, a Kentucky statute imposed a tax of 2% on the collections of insurance premiums within the State and provided that any insurance company which had theretofore been authorized to transact business in the State, must report its business to the State so long as it continued to collect premiums from insurance theretofore written. Failure to make the report resulted in a fine of $500.00.

The Provident Company withdrew from the State and continued to receive premiums by mail in New York City.

The State brought suit to recover the tax on premiums for five years after the company withdrew.

This statute was held to violate the Fourteenth Amendment on the ground that the statute was an attempt by the State to penalize the company for acts not done within the State and that it therefore violated the Fourteenth Amendment. This Court said at page 112:

> "• • • *Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment* (*Louisville & Jefferson Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R.* v. *Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax *for the privilege of doing acts which lie beyond the sphere of local control.* It follows that the quality of the acts with respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked."

In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, a Connecticut surety company doing business in Mississippi, made a contract in Tennessee, under which it agreed to indemnify the plaintiff company, a Mississippi corporation. The loss occurred in Mississippi and the suit was brought there. A Mississippi statute declared that all contracts insuring any interest in the State "shall be deemed made therein." The State court held that the contract in question was a Mississippi contract, although made elsewhere, and that consequently the provision for a one-year limitation period was void under the Mississippi law although in conformity with Tennessee law. This Court held that law invalid.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the defendants took out an insurance policy with a New York company on their cotton which was shipped from Louisiana.

A Louisiana Statute which provided that any person doing any act within the State to effect insurance on property in that State, and not complying with the State Insurance Law, was subject to a fine of $1,000 for each offense, was held violative of a citizen's liberty to contract. The Court said at page 589:

> "The liberty mentioned in that amendment means not only the rights of the citizen to be free from the mere physical restraint of his person, as by incarceration but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will;* to earn his livelihood by any lawful calling; *to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.*"

It was held in *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346, that the imposition of a 5% tax on premiums paid by residents to outside insurers under facts similar to those of the *Allgeyer* case, was an unconstitutional attempt to regulate extra-territorial activities. This Court there said at page 348:

> "In Louisiana the detriment was $1,000. Here it is five percent upon the premiums—which is three percent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of Allgeyer in that here no act was done within the State whereas there a letter constituting a step in the contract was posted within the jurisdiction. *It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside.*"

The Florida Statutes would set up just as effective an economic barrier between States as that condemned in *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511.

VI. The Society is not an unlawful combination in restraint of trade; but even if it were, the State of Florida may not deprive the members of the rights secured to them by their copyrights, and a court of equity may not deny them the means of protecting those rights.

Defendants urge that plaintiffs should be denied any relief because they allegedly come into Equity with unclean hands in that the Society is "a price-fixing combination operating in restraint of trade."

This defense of unclean hands was raised *in limine* upon motion to dismiss (R. I, 78, 80). That motion was heard together with a motion for temporary injunction restraining enforcement of the 1937 Act. The order of the court granting temporary injunction also denied defendants' motion to dismiss (R. I, 84, 85). That order was affirmed by this Court in *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

We have shown above the purpose for which the Society was formed. It was not to restrain trade in any sense of the word both because the rights of the Society are only to grant licenses for public performances and because the licenses are given equally to all persons applying for them upon reasonable terms.[14]

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[14] Defendants contend that the Society discriminates between newspaper-owned broadcasting stations and others, comparing the contract under which a station owned by a newspaper guarantees a minimum payment of $2,000 with the payment of 3% of the gross amount received from the sale of broadcasting facilities in which music copyrighted or composed by members of the Society is rendered until the receipts reach a total of $25,000 and 5% thereafter (R. II, 1006 A-C)—with the contract by stations which are not newspaper-owned and which guarantee a minimum payment of only

A copyright gives to the proprietor thereof an exclusive right. All that the members of the Society have done is to vest in representatives of their choosing, the right to grant collective licenses under all of the copyrights of all of the members of the Society. The record is void of any suggestion of oppression or illegal use in combination of what the individual members of the Society could have done separately. The purpose of the Society is to protect the copyrights and at the same time make it possible for those who wish to use copyrighted music in public performance for profit to do so by getting a blanket license on reasonable terms. No other feasible method of licensing has ever been devised.

This Court had such a situation in mind in *Standard Oil Company* v. *United States*, 283 U. S. 163, 171, when it said (p. 171):

> "An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. *If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition.*"

The Society makes it possible to license the public performance for profit of copyrighted musical compositions in a situation where such licensing would be otherwise impossible.

$1,000 with percentage payments on receipts from the sale of all broadcasting facilities ranging from 3% to 5% of such receipts and permitting the broadcasting station to make a 15% reduction for advertising agency commissions (R. I, 70-73). These two types of contracts are the standard forms of contracts. They are entirely different. The "newspaper contract" was approved by the entire radio industry through the National Association of Broadcasters (R. I, 595-6). It is fully explained in the record (R. I, 598-9). It cannot be said that either one discriminates against the other.

It has been held by many of the lower courts that the fact that the owner of a patent, trademark or copyright is a member of a combination prohibited by the Federal Anti-Trust Acts, does not deprive such owner of the privilege of protecting the rights given to him by the patent, trademark or copyright, as the case may be, in a *court of equity* or allow another to steal or pirate his property.[15]

By a parity of reasoning, the owner of a copyright should not be denied the right to protect the copyright in a court of equity against invasion by a State Statute, especially when no other adequate remedy is available (R. II, 1090). Indeed there is no adequate way in which plaintiffs can test the constitutionality of the State Statutes short of risking the enormous penalties and forfeitures provided thereby for violations thereof, except by a suit in equity for an injunction. *Ex parte Young*, 209 U. S. 123, 147.

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[15] *Cimiotti Unhairing Co.* v. *American Fur Co.*, 120 Fed. 672 (N.J.; reversed on other grounds, 123 Fed. 869, 198 U. S. 399); *Independent Baking Powder Co.* v. *Boorman*, 130 Fed. 726 (N. J.); *Motion Picture Patents Co.* v. *Eclair Film Co.*, 208 Fed. 416 (N. J.); *Harms* v. *Cohen*, 279 Fed. 276, 280 (E. D. Penna.); *Witmark* v. *Pastime Co.*, 298 Fed. 470, 480 (S. C.; aff'd on opinion of D. C., 2 F. (2d) 1020); *Western Electric Co.* v. *Wallerstein*, 48 F. (2d) 268 (W. D. N. Y.); *Trico Products Co.* v. *E. A. Laboratories, Inc.*, 49 F. (2d) 404 (E. D. N. Y.); *Radio Corporation* v. *Majestic Distributors*, 53 F. (2d) 641 (D. C. Conn.); *Western Electric Co.* v. *Pacent Corporation*, 53 F. (2d) 639 (S. D. N. Y.); *National Electric Co.* v. *Circle Flexible Co.*, 57 F. (2d) 219 (E. D. N. Y.); *Radio Corporation* v. *Duovac Radio Tube Corp.*, 6 Fed. Supp. 275 (E. D. N. Y.); *General Electric Co.* v. *Wise*, 119 Fed. 922; *General Electric Co.* v. *Minneapolis Electric Lamp Co.*, 10 F. (2d) 851; *Van Kannel Revolving Door Co.* v. *General Bronze Corp.*, 6 F. Supp. 518; *cf. contra*: *Buck* v. *Gallagher* (D. C. W. D. Wash., 1940, unreported).

VII. The Statutes must fall as a whole, and their various sections cannot be separated.

The scheme of the State Statutes is to destroy the right of public performance for profit in the State of Florida, whether the right is licensed individually by the separate owners of the copyright or whether it is licensed collectively through the Society. Defendants seek to divorce the two groups of provisions on the theory that they will not enforce the Statutes against individuals who sue in the Federal Courts for copyright infringement, but will enforce it if the Society should sue or attempt to sue in the Federal Courts or elsewhere. (See letter of Tyrus A. Norwood, Assistant Attorney General [R. I, 96-7]).

The right of public performance for profit of all members of the Society has been transferred to the Society for a period expiring December 31, 1940.[16] Under the circumstances, the sections barring the licensing of performing rights separate and apart from the sale of sheet music are presently applicable. Sales of sheet music are controlled by the members of the Society acting individually. The Society has nothing to do with such sales, nor has it anything to do with the manufacture or sale of records; but the Society owns the right of *public performance for profit*, and it is only that right which is affected by *all* the sections of the Statutes. Consequently, the validity of every section of the Statutes is before this Court.

Where it is probable that certain provisions of the Statutes would not have been enacted but for other provisions which are held bad, all the provisions of the Statutes must fall together. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 316; *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 243.

To sustain some of these provisions while invalidating others would be to rewrite the Statutes and give it an effect

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[16] These agreements have been renewed for an additional ten-year period (R. I, 327).

altogether different from that sought by the Statutes when viewed as a whole. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362.

As this Court said in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 87: "the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

CONCLUSION.

The decree appealed from should be modified by restraining enforcement of the 1939 Act, in its entirety, as prayed for in the appeal in case No. 611. In all other respects the judgment appealed from should be affirmed.

Respectfully submitted,

THOMAS G. HAIGHT,
FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
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Counsel for Plaintiffs.

March, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, individually and as Attorney General of the State of Florida, *et al.*,

Appellants,

vs.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

---

No. 611

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

Appellants,

vs.

GEORGE COUPER GIBBS, individually and as Attorney General of the State of Florida, *et al.*,

---

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

APPENDIX

TO BRIEF OF APPELLEES IN NO. 610, AND APPELLANTS IN NO. 611.

THOMAS G. HAIGHT,
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36 F. Supp. 405

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Opinion in

Buck v. Gallagher, 307 U. S. 95 (1939).

(Washington Statute printed at p. 76, *infra*.)

Appeal from a decree of the District Court of three judges which dismissed, for want of jurisdiction, a bill to enjoin the enforcement of a statute of the State of Washington affecting the right of the owners of copyrights to combine in licensing performances of their musical compositions.

Mr. Thomas G. Haight, with whom Messrs. Louis D. Frohlich and Herman Finkelstein were on the brief, for appellants.

Mr. Alfred J. Schweppe, with whom Messrs. G. W. Hamilton, Attorney General of Washington, John E. Belcher, Assistant Attorney General, Edwin C. Ewing, Ralph E. Foley, and Sam M. Driver were on the brief, for appellees.

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal, under §266 of the Judicial Code, from a decree dismissing appellants' bill to enjoin the enforcement by the appellees of a statute of the State of Washington.[1] The purpose of the statute is to render illegal certain activities carried on by pools of copyright owners in authorizing by blanket licenses the performance of their musical compositions.

The statute declares it unlawful for two or more persons holding separate copyrighted works to pool their interests in order to fix prices for their use, to collect fees or to issue blanket licenses for their commercial production. Joint undertakings for this purpose are permitted if the licenses are issued at rates assessed on a per piece system of usage.

[1] Buck v. Case, 24 F. Supp. 541. Washington Laws 1937, c. 218, p. 1070.

All combinations of owners of separate copyrighted musical works are required to file a complete list of these works once each year with the secretary of state of the State of Washington, together with detailed information as to prices and ownership. There are numerous other provisions unnecessary to detail.

The appellants are the American Society of Composers, Authors and Publishers; Gene Buck, suing in his own name and as the president of the Society; and a number of other members, corporate publishers and authors, composers or their next of kin. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest. The bill alleges the organization of the Society as a voluntary, unincorporated, non-profit association under the laws of New York, and sets out that its purpose is to protect the owners of copyrighted musical works against piracies, to grant licenses and to collect royalties for the public performance for profit of the compositions of its members. These are composers, authors and publishers of musical compositions or their successors. The royalties and license fees collected by the Society are distributed from time to time, as ordered by the Board of Directors, among the members of the Society, after the payment of expenses of operation and sums due to foreign affiliated societies and after the deduction of a limited reserve fund.

In addition to the general allegation that the value of the matter in dispute is in excess of $3,000, the bill alleges that the value of each publisher's copyrights exceeds $1,000,000. The bill further shows that each individual complainant has rights to royalties and renewals worth in

excess of $100,000. It is shown by the bill that in the State of Washington there were five hundred twenty-eight contracts outstanding in 1936, all entered into in the name of the Society, from which it received more than $60,000 and that similar sums annually will be collected. Other allegations are discussed later.

On the filing of the bill, a motion was made for an interlocutory injunction and affidavits were filed in support of the request. At the time the motion for a temporary injunction came on for hearing, the defendant state officers and certain intervenors filed motions to dismiss which challenged the bill on various grounds. The district court considered only one ground: whether the value of the subject matter in dispute is more than $3,000, exclusive of interest and costs. Upon the hearing, the district court found that neither the bill nor the record shows the necessary jurisdictional value and dismissed the bill. The basis for this ruling is treated here.

Although this statute of Washington, as that of Florida,[2] is aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit, the differences between the enactments and the procedural situations require additional consideration. The Florida statute does not permit any combination of copyright owners for the purpose of licensing the use of their compositions. The prohibition is complete. In the Washington statute, on the other hand, such a combination, federation or pool is not prohibited if it issues licenses "on rates assessed on a per piece system of usage." Even upon these permitted transactions there are limitations of

[2] Considered in Gibbs v. Buck, 307 U. S. 66.

price and use, unnecessary to consider here.[3] The statute is directed particularly at the practice of issuing blanket licenses which authorize the performance of all copyrighted material belonging to the licensor. Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under section 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.[4] Where the statute is regulatory the value of the right to carry on the business, as was said in *McNutt v. General Motors Acceptance Corporation*, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. The difficulties of determining the value of rights by calculating past profits as compared

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[3] Washington Laws, 1937, sec. 3, c. 218, p. 1071, reads as follows: "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage; *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

[4] Prohibitory statutes—Gibbs v. Buck, *supra*; regulatory statutes—McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 181; Kroger Grocery Co. v. Lutz, 299 U. S. 300, 301.

with possible future profits, influenced by the single factor of statutory regulation, are obvious. This difference is not the only test of the value of the right in question. The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation. This factor was not offered in evidence in the *McNutt* case.

In *Packard* v. *Banton*[5] the existence of the jurisdictional amount was partly determined by consideration of the cost of providing liability insurance required by a regulatory statute. Where a state railroad commission required the construction and service of an industrial spur which did not increase earning capacity, the cost was held to measure the jurisdictional amount.[6] The expense of producing the information required by a challenged order in a utility investigation was considered sufficient to establish the value of the matter in controversy.[7] The cost of complying with the challenged statute as a test of the value of the amount in controversy has been applied in effect in suits to enjoin the collection of taxes as unconstitutional interferences with the right to do business. In such cases "the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount."[8]

By section four of the Washington statute every combination of two or more copyright owners must file, once a year, with the secretary of state, a complete list of their

[5] 264 U. S. 140.

[6] Western & A. R. R. v. Comm'n, 261 U. S. 264, 267.

[7] Petroleum Exploration, Inc. v. Pub. S. Comm'n, 304 U. S. 209, 215.

[8] Healy v. Ratta, 292 U. S. 263, 271, and cases there cited; Grosjean v. Am. Press Co., 297 U. S. 233, 241; Henneford v. No. Pacific Ry., 303 U. S. 17, 19.

copyrighted works, under oath.[9] By section three, individuals are forbidden from joining together "for the purpose of collecting fees in this state" unless their licenses are on a per piece system of rates. In addition to the general allegation that the value of the matter in controversy exceeds $3,000, the bill alleges that the cost of compliance by the Society, the combination of members, with section four would exceed $300,000.[10] For the individual members who now have the benefits of the services performed by the Society, additional allegations set out the cost imposed upon them by the statutory regulation as being "in excess of $10,000" to each for carrying on for themselves the functions now performed for them by the Society. The motions to dismiss deny the general allegation of value, deny that there would be any cost to the Society by compliance with section four as the required list is already compiled and the expense, since the Society is non-profit, would be borne by members, and deny that the individual complainants would be put to a cost of $10,000 each. There was no allegation of the loss or cost to the Society or members occasioned by the requirement that the licenses from pooled copyrights should be issued at per piece rates.

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[9] The list must state that it "is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work."

[10] Specifically the allegation is that "The cost to the Society of attempting to compile the lists and information required to be furnished under the State Statute would be far in excess of $300,000., which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers' fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute."

On submission of the motion to dismiss for want of the jurisdictional value, the burden of proof was upon complainants.[11] Although the trial court called specific attention to the jurisdictional matters three months before it filed its opinion denying jurisdiction, by request for additional briefs, no evidence was offered. After the filing of the opinion and before the entry of the decree, on complainants' motion an order was entered to show cause why witnesses should not be heard on the value of the matter in controversy. The complainants furnished an uncontroverted affidavit stating that their failure to offer evidence was due to the fact that there was no denial of the facts pleaded. The offer of proof showed that it was desired "to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute." The court did not reject the evidence as a matter of discretion because tardily presented. On the hearing on the rule the court made it quite clear that the proffered evidence was deemed immaterial because it showed only cost of compliance, not the value of the right to do business free of the compulsion of the statute.[12] The application to take further testimony was denied and the motion to dismiss granted "in that this cause is not within the jurisdiction of this court as a federal court." We conclude that the refusal to permit additional evidence in these circumstances was error.

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[11] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[12] E. g., this statement was made by the court: "Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy."

The complainants in this case are the same as those in *Gibbs* v. *Buck, supra.* In the *Gibbs* case we pointed out that the members share directly in the earnings of the Society and have a common and undivided interest in the right to license in association through the Society free of the provisions of the state statute. The allegations as to relationship between the Society and its members show the same status in this case. The fact that "neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown,"[13] does not affect the rights members have in the apportionment of the royalties from license fees. These rights are granted by the articles of association which are a part of the bill. *KVOS, Inc.* v. *Associated Press,*[14] relied upon below, is distinguished in the *Gibbs* case.

The cause will be remanded to the District Court with directions to permit the introduction of evidence and for further proceedings not inconsistent herewith.

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

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[13] Buck v. Case, 24 F. Supp. 541, 549.

[14] 299 U. S. 269.

Opinion in
Gibbs v. Buck, 307 U. S. 66 (1939).

(Florida 1937 Statute printed at p. 91, *infra*.)

APPEAL from an order of the District Court, of three judges, overruling a motion to dismiss the bill and granting an interlocutory injunction, in a suit to restrain enforcement of a Florida statute forbidding combinations of owners of copyrighted musical compositions.

Messrs. Tyrus A. Norwood, Assistant Attorney General of Florida, and Lucien H. Boggs, with whom Messrs. George Couper Gibbs, Attorney General, and Andrew W. Bennett were on the brief, for appellants.

Mr. Thomas G. Haight, with whom Messrs. Frank J. Wideman, Louis D. Frohlich, Herman Finkelstein, and Manley P. Caldwell were on the brief, for appellees.

Mr. Justice REED delivered the opinion of the Court.

This is an appeal from the order of a three-judge court refusing to dismiss a bill of complaint on motion for failure to set out facts sufficient to show Federal or equity jurisdiction, or to constitute a cause of action, and granting an interlocutory injunction against the enforcement of a Florida statute aimed at combinations fixing the price for the privilege of rendering privately or publicly for profit copyrighted musical compositions. Sec. 266, Jud. Code.

The appellant, the state Attorney General and various State Attorneys, are officers of the State of Florida charged with the enforcement of the act. The appellees, complainants below, are the American Society of Composers, Authors and Publishers, an unincorporated association organized under the laws of the State of New York; Gene Buck as president of the Society; various corporations publishing musical compositions; a number of authors and composers of copyrighted music; and several next of kin

of deceased composers and authors. This suit was brought by complainants on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest.[1]

One of the rights given by the Copyright Act is the exclusive right to perform copyrighted musical compositions in public for profit.[2] The bill of complaint alleges that users of musical compositions had refused to recognize this statutory right and to pay royalties for public performances for profit, and that authors, composers and publishers were unable, individually, to enforce their exclusive right because of the expense of detecting and suing for infringement throughout the United States. The Society was founded in 1914 to license performance of copyrighted music for profit and otherwise protect the copyrights. The state statute was directed at organizations like the Society and became effective on June 9, 1937.[3] So far as is important here, the statute makes it unlawful for owners of copyrighted musical compositions to combine into any corporation, association or other entity to fix license fees "for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit," when the members of the combination constitute "a substantial number of the persons, firms or corporations within the United States" owning musical copyrights. It declares the combination an unlawful monopoly, the price-fixing in restraint of trade, and the collection of license fees and all contracts by the combination illegal.

The bill attacked the statute as contrary to the Constitution and laws of the United States and the constitution

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[1] Equity Rule 38.

[2] Act of March 4, 1909, Sec. 1(e), c. 320, 35 Stat. 1075, 17 U. S. C. Sec. 1(e).

[3] Fla. Gen. Laws 1937, Vol. I, c. 17807.

of Florida. More specifically, it urged that the law impinged upon rights given by the Copyright Act of 1909, deprived complainants of rights without due process of law and without the equal protection of the laws, impaired the obligation of contracts already executed, and operated as an ex post facto law.

There was a formal allegation that the matter in controversy exceeded $3,000, exclusive of interest and costs. In addition, the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights worth in excess of $100,000; that it would cost each individual more than $10,000 to create an agency in Florida to protect himself against infringement by unauthorized public performances for profit, to issue licenses and to check on the accuracy of uses reported; that fees collected in 1936 in Florida amounted to $59,306.81 and that similar sums were expected in the future; and that in 1936 each of the three publishers received more than $50,000 from the Society and each individual more than $5,000.

A motion for a temporary injunction was made on February 7, 1938, the same day the bill was filed. Voluminous affidavits were presented in support of the motion. They tend to substantiate the allegations of the complaint on the value of the copyrights and the income from the Society. Each publisher deposed that it had received more than $50,000 from the Society in 1936, that its contract with the Society had a value in excess of $200,000, and that to fix prices on each composition for each use in Florida would require an expenditure of more than $25,000. The affidavits of the individuals showed annual incomes to them from the Society of from $3,000 to $9,000; contracts with the Society which the affiants valued in the thousands of dollars and an expense, in one instance, as high as $5,000 to comply with the requirements of the Florida statute.

On March 3, 1938, the appellants moved to dismiss on several grounds: (1) absence of jurisdictional amount; (2) failure to state a cause of action; (3) want of equity and other objections not strongly pressed at this time.

The district court granted an interlocutory injunction and denied the motion to dismiss the bill. It thought that great damage would result unless the injunction issued and that there was grave doubt of the constitutionality of the act. Its findings of fact and conclusions of law were filed about a month and a half after the per curiam decision. It found that "the matter in controversy exceeds $3,000 exclusive of interest and costs."

Federal Jurisdiction.—The issue was raised in the lower court by a motion to dismiss on the ground that it affirmatively appears "from the allegations of the bill . . . that the jurisdictional amount of $3,000.00 . . . is not involved . . . in that it appears that the suit is brought for the benefit of the members of the American Society of Composers, Authors and Publishers . . . and it does not affirmatively appear that the loss of any member of said society due to the enforcement of [the challenged act] would amount to the . . . necessary jurisdictional amount." Other jurisdictional averments of the motion state that the Society cannot suffer any loss from the legislation because it affirmatively appears that the Society divides all its proceeds from licensing between its members and affiliates and "therefore, the loss, if any, sustained due to the enforcement of said Florida laws would fall on the members of the Society, and not on the Society itself." Finally the motion sets out the lack of jurisdiction because it affirmatively appears from the allegations of the bill that the jurisdictional amount is not involved "because the plaintiffs have not shown the extent of loss or damage they would suffer by reason of the enforcement of said State law, as compared with the amount of profit they would

make by the non-enforcement of said law." As the form of the motion on the jurisdiction admitted the bill's statements, it was submitted on the allegations without the production of any evidence.

This method of testing the jurisdiction properly raises the question. No issue is made as to the standing of the Society or its members to sue. The basis of the attack is that there is a lack of the essential allegations as to the value of the matter in controversy. As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.[4] Both complainants and defendants were content to rest upon the bill and motion.

The bill alleges that the value of the matter in dispute exceeds the jurisdictional amount. Such a general allegation when not traversed is sufficient, unless it is qualified by others which so detract from it that the court must dismiss *sua sponte* or on defendants' motion.[5] In this instance, the allegation is, in effect, traversed by the language of the motion which asserts that no plaintiff has shown loss from enforcement equal to the jurisdictional amount. No other allegations are denied. By this method of attack the facts set out in the bill are left unchallenged for the court to accept as true without further proof. The burden of showing by the admitted facts that the federal court has jurisdiction rests upon the complainants. If there were any doubt of the good faith of the allegations, the court might have called for their justification by evidence.[6] In view of the unchallenged facts, federal jurisdiction will be adequately established, if it appears that for

[4] Wetmore v. Rymer, 169 U. S. 115, 120, 121; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 184; KVOS, Inc. v. Associated Press, 299 U. S. 269, 278.

[5] KVOS, Inc. v. Associated Press, 299 U. S. 269, 277; McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

[6] McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 189.

any member, who is a party, the matter in controversy is of the value of the jurisdictional amount,[7] or, if to the aggregate of all the members in this representative suit, the matter in controversy is of that value.

This Society, an unincorporated association with a membership of more than a thousand of the leading authors, composers and publishers of music, has received by assignment and possesses, for a five-year period which covers the time here involved, the "exclusive right to publicly perform for profit" musical compositions owned by its members. Licenses are issued by the Society to users in Florida "for the public performance for profit" of these compositions. After payment of expenses and royalties for similar rights to foreign associates, and retention of certain reserves, the receipts from licenses are divided among the members in amounts and by classifications fixed by the articles of association and the Board of Directors. The Society undertakes to protect itself and its members from piracies of the rights assigned to it. The Society has, in the absence of the challenged legislation and without now giving consideration to other objections as to the legality of its organization, a right to license which may be injuriously affected by the Florida statute. Whether this right to license flows from its limited ownership of the copyrights or by authority of its members is immaterial here. We find it unnecessary to decide whether this unincorporated association has standing to sue and confine our decision to the amount in controversy between the members of the Society and the defendants. Members, both corporate copyright owners and individual composers of music and lyrics, are plaintiffs. They represent all other members. As the members own the copyrights, less the limited assignment to the Society of the right of public performance for profit, and share in the earnings through

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[7] Grosjean v. American Press Co., 297 U. S. 233, 241-242. Clark v. Paul Gray, Inc., 306 U. S. 583.

mandatory distribution under the articles of association and not by way of dividends, they are proper parties to the action.[8] These members are real parties in interest. Because of the interposition of the statute they cannot in combination license production and collect fees in Florida. Unless the relief sought, the invalidation of the statute, is obtained, the members cannot conduct their business through the medium of the Society. They have a common and undivided interest in the matter in controversy in this class suit.[9]

The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is interdicted by the Florida statute. It is not a question of taxation or regulation but prohibition. Under such circumstances, the issue on jurisdiction is the value of this right to conduct the business free of the prohibition of the statute.[10] To determine the value of this right the District Court had the admitted facts that more than three hundred contracts expiring in 1940 were in existence be-

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[8] Article XV, section 1, of the articles of association, reads as follows: "Apportionment of Royalties—

"Section 1. All royalties and license fees collected by the Society shall be from time to time as ordered by the Board of Directors distributed among its members, provided, however:

"(a) That all expenses of operation of the Society and sums payable to foreign affiliated Societies shall be deducted therefrom and duly paid; and

"(b) That the Board of Directors, by two-thirds vote of those present at any regular meeting may add to the Reserve Fund any portion not exceeding 10% of the total amount available for distribution; and

"(c) That the net amount remaining after such deduction for distribution shall be apportioned as follows: one-half (½) thereof to be distributed among the 'Music Publisher' members, and one-half (½) among the 'Composer and Author' members respectively."

[9] Cf. Troy Bank v. Whitehead & Co., 222 U. S. 39; Shields v. Thomas, 17 How. 3.

[10] Scott v. Donald, 165 U. S. 107, 114; cf. Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 334; McNeil v. So. Ry. Co., 202 U. S. 543; Bitterman v. Louisville & N. R. R., 207 U. S. 205; Packard v. Banton, 264 U. S. 140.

tween the Society and the Florida users; that in 1936 alone almost sixty thousand dollars was collected from the users, and that similar sums were expected for the remainder of the term. While the net profits of the business in Florida is not shown, the business of the Society, as a whole, is profitable. The three publisher parties receive more than $150,000 yearly and individuals more than $5,000 per year each. The cost of compliance with its requirements is evidence also of the value of the right of freedom from the act.[11] The complainants, other than the Society, allege without traverse that the cost to each one of providing individually in Florida the services now provided by the Society for each member would exceed $10,000. Whether this is annually, for the length of the agreement or for some other term is not shown. From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate rights of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported.

McNutt v. *General Motors Acceptance Corporation*[12] differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press*,[13] relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was "the right to conduct those enterprises free of" interference. On the issue of the value of this right, it was deposed

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[11] Packard v. Banton, 264 U. S. 140; Petroleum Exploration, Inc. v. Comm'n, 304 U. S. 209, 215; Healy v. Ratta, 292 U. S. 263; Buck v. Gallagher, 307 U. S. 95.

[12] 298 U. S. 178.

[13] 299 U. S. 269.

only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a non-profit corporation, operated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments.

Failure to State a Cause of Action.—The motion to dismiss also presents generally the issue whether the bill states facts sufficient to constitute a cause of action. By the submission of the motion this issue was left to the Court on the facts alleged in the bill. The elaboration of these facts, contained in the affidavits supporting and objecting to the motion for temporary injunction, is not available for consideration, as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction.[14] Whether to grant or refuse a motion to dismiss before answer, is largely a matter of discretion for the court below.[15] Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise "grave doubts of the constitutionality of the Act" in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied. This bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute; that existing contracts are impaired; property taken without compensation; recovery on extra state contracts denied and the equal pro-

[14] Polk Company v. Glover, 305 U. S. 5, 9.

[15] O'Keefe v. New Orleans, 273 F. 570; Wright v. Barnard, 233 F. 329; Doherty v. McDowell, 276 F. 728; Ralston Steel Car Co. v. National Dump Car Co., 222 F. 590, 592. Compare Kansas v. Colorado, 185 U. S. 125, 144-145; Wisconsin v. Illinois, 270 U. S. 634. Wilshire Oil Co. v. United States, 295 U. S. 100, 102-103.

tection and due process clauses of the 14th Amendment violated in manners specifically pleaded. Drastic penalties for violation of the act are provided.[16] The manner in and extent to which the challenged statute offends or complies with the applicable provisions of the Constitution will be clearer after final hearing and findings.[17] The findings here were on the motion for interlocutory injunction and on the issue of jurisdiction.

Other Assignments.—The other material assignments of error to the interlocutory order specified on the appeal are addressed (1) to the lack of equity in the bill, (2) to the exercise of discretion in ordering a temporary injunction, (3) to the lack of findings before the order of temporary injunction and (4) to the failure to strike from the bill allegations as to certain sections which deal with contract relations between the Society and users of the musical compositions because these sections are not enforced by the state officers. We treat of them briefly: (1) It is clear that there is equitable jurisdiction to prevent irreparable injury, if the sections of the state statute outlawing the Society raise issues of constitutionality. The heavy penalties for violation and the prohibition of the issue of licenses or collection of fees show the need to protect complainants.[18] (2) Upon the conclusion that the motion to dismiss should be overruled, there was no abuse of discretion in granting an interlocutory injunction.[19] The damage before final judgment from the enforcement of the act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer

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[16] Fine $50 to $5,000 and imprisonment one to ten years or either. Section 8, Fla. Gen. Laws, 1937, c. 17807.

[17] Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 211-213. Polk Co. v. Glover, 305 U. S. 5.

[18] Ex parte Young, 209 U. S. 123, 165; Terrace v. Thompson, 263 U. S. 197, 215.

[19] Alabama v. United States, 279 U. S. 229, 231; Ohio Oil Co. v. Conway, 279 U. S. 813.

charged with supervision of enforcement,[20] of readiness and willingness "to prosecute any violations of said act," sufficiently establish the immediate danger from enforcement.[21] No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court. Ordinarily it would be expected that where a temporary injunction is considered necessary to protect the rights of complainants against the allegedly unconstitutional action of state officers, under a statute, a final order would follow with all convenient speed. (3) The order of the trial court was entered April 5, 1938. The findings of fact and conclusions of law were not filed until May 17, 1938, after the first assignment of errors had pointed out the omission and after the appeal was allowed. The original assignment of error, which had relied upon the failure to comply with Equity Rule 70½, was amended to show subsequent compliance but no assignment of error was made on account of the fact that the findings were out of time. The objection was taken in the statement of points to be relied upon on the appeal and in appellants' brief in the specification of errors to be urged. Better practice dictates the filing of the finding of facts and conclusions of law before or contemporaneously with the order or decree. It would be useless, however, to reverse the order granting the temporary injunction and remand the cause. The temporary injunction would now be in order. (4) In answer to the fourth objection it may be said that the issue like that of constitutionality can be more satisfactorily disposed of upon final hearing.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

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[20] Sec. 10, Fla. Gen. Laws, 1937, c. 17807.

[21] Terrace v. Thompson, 263 U. S. 197, 214-16; Cline v. Frink Dairy Co., 274 U. S. 445, 451-52.

Mr. Justice BLACK, Dissenting.

I believe the decree enjoining and suspending Florida's law prohibiting monopolistic price fixing should be reversed because

(1) No showing has been made that casts any doubt upon a State's power to prohibit monopolistic price fixing,

(2) Complainants (appellees here) failed to sustain their burden of showing $3,000.00 in controversy, as required by statute.

(3) The court below failed to require a bond or other conditions adequate to protect the people in Florida who might be injured by the injunction.

First. Do general allegations of unconstitutionality,[1] similarly general affidavits and general findings by the trial court show that the Florida statute against monopolistic price fixing is "novel, if not unique"[2] State legislation, and raise such "grave constitutional questions" that a Federal court should suspend the statute to permit complainants to continue exacting monopoly tribute from the public until the court hears evidence?

The enjoined Attorney General and prosecuting attorneys of Florida do not have, and expressly disclaim any duty to enforce the statute against appellees unless they combine to fix monopolistic prices. Therefore, this injunction cannot rest upon the alleged unconstitutionality of any provisions of the statute other than those prohibiting monopolistic price fixing. And allegations of the bill attacking other provisions of the statute raise only moot questions. If this record can be said to raise any "grave",

[1] Cf. Borden's Co. v. Baldwin, 293 U. S. 194, 203; Aetna Ins. Co. v. Hyde, 275 U. S. 440, 447; Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130, 136, 137.

[2] Borden's Co. v. Baldwin, *supra*, 203.

"novel", or "unique" question at all, that question is whether a State has power to prohibit price fixing by monopolies in restraint of trade.

If the issue is not narrowed to this single point, approval is given to the enjoining of State officials from action which they have no duty to perform and have solemnly disclaimed both here and in the District Court.[3] In the absence of an interpretation by the Florida Supreme Court, to what more authoritative source or evidence may a Federal court turn for the meaning of the statute, than to the decision of the highest State official charged with its enforcement? He has determined that, so far as he and the prosecutng attorneys under him are concerned, appellees may license their compositions as they please, may combine to detect and punish infringers and may operate in Florida at will, provided only that they abandon monopolistic price fixing. Even as to the statutory prohibition against price fixing, all that is before us, a practice more desirable and more in keeping with our dual form of government, previous decisions,[4] and the trend of Congressional legislation,[5] would be to refrain from Federal judicial interference until the State courts are presented with an opportunity to define the statutory duties of appellants. "And . . . the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."[6] Judicially restraining these Florida officials from action which they declare they cannot and will not take, denies to Florida

[3] Cf., Carroll v. Greenwich Insurance Co., 199 U. S. 401, 412.

[4] Gilchrist v. Interborough Co., 279 U. S. 159, 207; Fenner v. Boykin, 271 U. S. 240, 243-4; cf., Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43; and see Clark, Brandeis, JJ., dissenting, Cincinnati v. Cincinnati and H. Traction Co., 245 U. S. 446, 461.

[5] 28 U. S. C. 41; c. 726, 50 Stat. 738, 48 Stat. 775, 47 Stat. 70, 43 Stat. 938, 36 Stat. 1162, amended 37 Stat. 1013.

[6] Defiance Water Co. v. Defiance, 191 U. S. 184, 194.

the traditional respect that has been accorded State officials by this Court.[7]

Even according to the comparatively new judicial formula here applied, the only issue is whether "novel . . . unique" or "grave constitutional questions" are raised by the charge that these state officials will perform their sole duty under the Florida statute of prosecuting appellees for violations of the prohibitions against monopolistic price fixing. Paraphrasing this formula, the question here actually becomes: When complainants charge in a Federal Court of Equity that a State has passed, and its officers are about to enforce, a law against monopolistic price fixing, is there so much doubt about the power of the State to prohibit monopolistic price fixing that operation of the law must be enjoined and effect denied to it until evidence is heard by the Court?

Here, both the very bill upon which the injunction now approved was granted and affidavits of record establish beyond dispute appellees' flagrant violation of the Florida law by combining to fix prices. This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single compositions, and can, and does require purchasers to take, at a monopolistically

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[7] See Spielman Motor Co. v. Dodge, 295 U. S. 89, 96; Cincinnati v. Cincinnati and H. Traction Co., *supra*, 454, 455; Virginia v. West Virginia, 231 U. S. 89, 91; cf. Des Moines v. City Ry. Co., 214 U. S. 179, 184. This injunction makes strikingly pertinent the question of Justice Harlan, dissenting, in Ex parte Young, 209 U. S. 123, 179 (1908): "If the Federal court could thus prohibit the law officer of the State from representing it in a suit brought in the state court, why might not the bill in the Federal court be so amended that that court could reach all the district attorneys in Minnesota and forbid them from bringing to the attention of grand juries and the state courts violations of the state act . . . ?" His apprehensive prophecy has more than come true in the present case.

fixed annual fee, the entire repertory of all numbers controlled by the combination. And these fees are not the same for like purchasers even in the same locality. Evidence shows that competing radio stations in the same city, operating on the same power and serving the same audience, are charged widely variant fees for identical performance rights, not because of competition, but by the exercise of monopoly power. Since it appears that music is an essential part of public entertainment for profit, radio stations or other businesses arbitrarily compelled to pay discriminatory fees are faced with price fixing practices that could destroy them, because the Society has a monopoly of practically all—if not completely all—available music. When consideration is also given to the fact that an arbitrarily fixed lower rate is granted to a favored station itself controlled by another instrument of public communication—a newspaper—the ultimate possibilities for control of the channels of public communication and information are apparent.

We have here a price fixing combination that actually wields the power of life and death over every business in Florida, and elsewhere, dependent upon copyrighted musical compositions for existence. Such a monopolistic combination's power to fix prices is the power to destroy. Should a court of equity grant this combination the privilege of violating a State anti-monopoly law?[8] Does a State law prohibiting such a combination present "grave constitutional questions"?

It is my position that a State law prohibiting monopolistic price fixing in restraint of trade is not "novel" and "unique" and raises no "grave constitutional questions." The constitutional right of the States to pass laws against

[8] Cf., Cont'l Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 262, affirming 148 Fed. 939; Gibbs v. Baltimore Gas Co., 130 U. S. 396, 412. McConnell v. Camors-M'Connell Co., 152 Fed. 321; Pacific Postal Telegraph Cable Co. v. Western Union Tel. Co., 50 Fed. 493; American Biscuit & Mfg. Co. v. Klotz, 44 Fed. 721; 1 Pom. Equity Juris. (3rd Ed.) § 402.

monopolies should now be beyond possibility of controversy. "That state legislatures have the right . . . to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question",[9] and few have challenged the power of State legislatures to ordain that "competition not combination, should be the law of trade."[10] Surely, there is presently no basis to doubt this power and to assert that its exercise raises "grave constitutional questions." As recently as 1937, this Court held that Porto Rico, with legislative powers not equal to, but "nearly as extensive as those exercised by any state legislature," could prohibit monopolistic price fixing as one of the "rightful subjects of legislation" upon which legislatures act.[11]

If the States have somehow lost their historic power to prohibit monopolistic price fixing combinations before presentation of evidence to a Federal court, at what point in our history and in what manner did they lose it? The people have not exercised their exclusive authority, by Constitutional amendment, to strip the States of their power over price fixing combinations and thus raise monopoly above the traditional power of legislative bodies.

It was expressly conceded at the bar that Florida had the Constitutional power to prohibit price fixing combinations unless the copyright laws limited this power. And, since argument of the present case, a decision rendered by us February 13, this year, made clear the principle that

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[9] Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86, 107. "There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing [statutes which secure competition and preclude combinations which tend to defeat it] . . . To so decide would be stepping backwards." International Harvester Co. v. Missouri, 234 U. S. 199, 209. See, Atl. & Pac. Tea Co. v. Grosjean, 301 U. S. 412, 425-6; Nebbia v. New York, 291 U. S. 502, 529; Rast v. Van Deman & Lewis, 240 U. S. 342, 366-7.

[10] National Cotton Oil Co. v. Texas, 197 U. S. 115, 129; Carroll v. Greenwich Ins. Co., *supra*, 411

[11] Puerto Rico v. Shell Co., 302 U. S. 253, 260, 261.

the copyright laws grant no immunity to copyright owners from statutes prohibiting monopolistic practices and agreements. We there declared that "An agreement illegal [by statute] because it suppresses competition is not any less so because the competitive article is copyrighted."[12]

"Due process" has been judicially endowed with great elasticity in relation to property rights, but it is inconceivable that it would afford refuge for monopolies deemed undesirable by the people's representatives. When a legislature as a matter of public policy determines to prohibit monopolistic combinations, we cannot, under any doctrine of "due process", rightfully "review their economics or their facts."[13] And, although "due process" is invoked, can evidence either add to or take from the legislative power to permit, regulate or prohibit monopolies in the public interest?

Several of the general allegations in the bill are relied upon to justify suspension of the Florida statute until evidence is heard by a court. It is said the court should hear evidence because the "bill sets out that the exercise of rights granted by the Federal Copyright Act to control the performance of compositions for profit is prohibited by the statute . . ." But what evidence can the court hear that will assist it in comparing the statute with the copyright laws? The Florida statute does not even purport to prohibit the "performance of compositions for profit," and the enjoined officials have neither threatened, nor do they intend, to prohibit such performance. It is said the bill alleges "that existing contracts are impaired" by the statute. But no contracts can be affected unless involving prohibited monopolistic price fixing. That the Florida law prohibits the continuation and execution of monopoly practices in pursuance of price fixing

[12] Interstate Circuit, Inc. v. United States, 306 U. S. 208, 230.

[13] Central Lumber Co. v. South Dakota, 226 U. S. 157, 161.

agreements made before the law was passed, can be no basis for constitutional objection.[14]

It is said the bill alleges "property taken without compensation." If the statute, of itself, takes property, (and no charge of unconstitutional application of the statute is made) is evidence required to show the manner of the taking? It is said the bill alleges that the statute violates "equal protection." But the sole thing threatened is prosecution of an admitted price fixing combination—comprised of practically all the musical copyright owners and publishers in the nation. " . . . if an evil [of monopoly] is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."[15] It is said a drastic penalty is provided for practicing price fixing. What evidence will serve to enlighten the Court on the statutory penalty? That penalty is set out clearly in the statute. If it invalidates the statute, that determination should be made now.

The present case illustrates how the recently fashioned judicial formula under which state laws must be enjoined if "grave constitutional questions" are presented in a complaint, actually results in an automatic judicial suspension of state statutes upon any general complaint to a federal court. The apparently inevitable operation of this formula runs counter to the Tenth Amendment intended to preserve the control of the States over their own local legislation, and opens the door to further evasions of the Eleventh Amendment protecting the States

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[14] Waters-Pierce Oil Co. v. Texas (No. 1), *supra*, 108.

[15] Carroll v. Greenwich Ins. Co., *supra*, 411; Central Lumber Co. v. South Dakota, *supra*, 160. "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." United States v. Carolene Products Co., 304 U. S. 144, 151.

from suits in federal courts.[16] A lower federal court's refusal in its "discretion" to suspend a State statute was recently reversed because "grave constitutional questions"—requiring evidence—were deemed raised by charges that the statute by requiring citrus fruit cans to be truthfully labeled violated the Constitution.[17] And here, where the District Court enjoined a State law in its "discretion", the injunction is sustained by a holding that evidence should be heard because "grave constitutional questions" are involved. However the lower court's "discretion" may be exercised, the formula apparently achieves but one result—state statutes are suspended.

Careful scrutiny of appellees' bill for injunction reveals no allegations indicating that Florida's power to prohibit monopolistic price fixing would, even under the formula applied, be altered by proof of any "particular economic facts . . . which are . . . properly the subject of evidence and of findings."[18] True, the bill alleges that the statute of Florida and similar legislation enacted by other States were "sponsored by an organized group . . . for their own selfish aggrandizement . . . without an adequate hearing being afforded to complainants and others similarly situated," and that "in truth and in fact, [the statute] was enacted not in the public interest . . . ." Appellees also allege that "unless the enforsement of this State statute is restrained . . . other States, in addition to Florida, Montana, Washington, Nebraska and Tennessee, may enact similar statutes . . . all of which would work undue hardship on complainants and would violate the spirit of the Constitution . . . ." These are some of the strongest—if not the strongest—of the

[16] Cf. Ex parte Young, 209 U. S. 123; Harlan, J., dissenting, 168-204; and see Fitts v. McGhee, 172 U. S. 516, 528, 530; In re Ayers, 123 U. S. 443, 496, 497, 505.

[17] Polk Co. v. Glover, 305 U. S. 5.

[18] Borden's Co. v. Baldwin, *supra*, at 210.

bill's allegations deemed to raise "grave constitutional questions." Is the temporary injunction approved so that the Federal court in Florida may hear evidence on what constitutes the public interest of Florida? Shall the court hear evidence to determine whether or not "unless the enforcement of this statute is restrained" other States, "in addition to Florida", may similarly prohibit appellees' monopoly?

It is difficult to perceive how in the future—under this formula—any state law, directly or indirectly affecting ings have dragged their weary way through federal property, can become effective until injunction proceedings have dragged their weary way through Federal courts. All state statutes might hereafter well substitute for the expression "to take effect within" a certain period of time, the words "to take effect after the Federal courts have heard evidence to determine" their reasonableness (wisdom). And the formula likewise fits Congressional enactments. Had the pronouncement of this formula not been the culmination of gradual judicial advances, it would have been everywhere recognized as a revolutionary departure from our constitutional form of government, under which the wisdom of legislation, within the field of legislative action, was left to the judgment of elected representatives of the people.

Florida can find little comfort in the admonition that "Ordinarily it would be expected that where a temporary injunction is considered necessary . . . a final order would follow with all convenient speed." This law has now already been suspended for a year, and experience demonstrates that injunctive suspension of state laws and state action can hang in the courts for many years before receiving final disposition.[19]

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[19] See dissent, McCart v. Indianapolis Water Co., 302 U. S. 419, 435, and note.

Second. Jurisdictional Amount.

These eleven appellees alleged in their bill for injunction that they sued on behalf of themselves and the more than 1,000 other (American) members of the Society. No determination is made here "that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount"—$3,000. However, while appellees are not aided in establishing the jurisdictional amount by the "allegation that [they] . . . sued on behalf of others similarly situated,"[20] the Court nevertheless holds that the jurisdictional amount is in controversy in "the value of the aggregate rights of all members" (including the more than 1,000 who have not appeared in person) to combine and fix prices in Florida.

"Assuming that such a case as this will be called a class action, and . . . could be maintained as such . . . yet that it may be properly a class action does not affect the rule against aggregation [of claims for making up the jurisdictional amount], because [such aggregation] . . . is necessarily only applicable to those class actions in which several claimants to a fund are joined as plaintiffs asserting common and undivided rights therein."[21] Appellees assert no common and undivided rights in any fund[22] or property;[23] "the amount payable to each [by the Society] depends upon his contract alone."[24] Neither does appellees' bill seek, as would the traditional class or representative bill in equity, to protect group rights all claimed under and traceable to a single decree,[25] or rights "which . . . [no one plaintiff] can enforce in the absence

[20] Lion Bonding Co. v. Karatz, 262 U. S. 77, 86.

[21] Eberhard v. Northwestern Mut. Life Ins. Co., 241 Fed. 353, 356, referred to with apparent approval in Lion Bonding Co. v. Karatz, *supra*.

[22] Smith v. Swormstedt, 16 How. 288.

[23] Beatty v. Kurtz, 2 Pet. 566.

[24] Eberhard case, *supra*, 356.

[25] Shield v. Thomas, 17 How. 3, but see Chapman v. Handley, 151 U. S. 443.

of the" others because derived from a single security instrument.[26] In this proceeding, all that members of the Society have in common is their alleged right to violate with impunity the Florida statute against price fixing. Unless opposition to and violation of the statute can be their bond of unity, appellees have "separate and distinct demands . . . [united] for convenience and economy in a single suit, [and] it is essential that the demand of each be of the requisite jurisdictional amount."[27]

Permissible joinder of many plaintiffs as a matter of convenience and economy is not a means of enlarging the jurisdiction of the District Court. Rule 38, under which this class or representative suit was brought, did not, in fact could not, extend that jurisdiction which depends solely upon Acts of Congress.[28]

A common desire to disregard a state law cannot serve as a common and undivided interest for purposes of federal jurisdiction;[29] otherwise, all who oppose such a law can aggregate the values of their alleged individual rights so to disregard the law, in order that they may escape the courts of a State and bring its law before a Federal court. And the fact that a State law inflicts pecuniary loss upon members of a non-profit association because of their membership does not permit aggregation of the members' pecuniary interests as a basis for attack upon the law in a federal court by some members "on behalf and with the authority of all."[30] Here, the individual members

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[26] Troy Bank v. Whitehead & Co., 222 U. S. 39, 41.

[27] *Id.* 40.

[28] Alaska Packers v. Pillsbury, 301 U. S. 174, 177; Christopher et al. v. Brusselback, 302 U. S. 500, 505; see, KVOS, Inc. v. Associated Press, 299 U. S. 269, 279.

[29] Pope v. Blanton, 10 F. Supp. 15, 18, dismissed per curiam for lack of requisite jurisdictional amount in controversy, 299 U. S. 521; Gavica v. Donaugh, 93 Fed. (2d) 173.

[30] Rogers v. Hennepin County, 239 U. S. 621. The complaint appears in the original records of this Court, No. 411, Oct. Term 1915. Cf. Robbins v. Western Auto Ins. Co., 4 Fed. (2d) 249, cert. den., 268 U. S. 698; Woods v. Thompson, 14 Fed. (2d) 951, and Illinois Bankers' Life Ass'n v. Farris, 21 Fed. (2d) 1014, cert. den., 276 U. S. 621.

have made no showing of what they as individuals have at stake—or of what all the members as a class stand to lose by virtue of the Florida law.

The enjoined state officials have only the duty to prosecute appellees if they continue to fix prices (i. e., to issue licenses) through monopolistic combinations, and these officials have expressly disavowed any intention to do more.[31] Appellees are left free to form such combinations as they please in Florida for the purpose of protecting against copyright infringements. They are here deprived by the Florida statute only of the right to combine to fix prices, and the value of that right must determine the amount in controversy.[32] That right was the object which appellees' bill for injunction sought to protect from allegedly unconstitutional interference.[33] Yet, there is no evidence at all in the record from which even an inference can be drawn as to the amount, if any, individual appellees or other members might lose in Florida by selling or licensing their copyrighted articles individually (which the law permits) instead of fixing prices by monopolistic combination (which the law prohibits). No showing was made that appellees ever have made or ever will make any profit from the operations of the Society in Florida. As stated by the majority opinion, the record discloses that the business of the Society in the entire United States and sixteen foreign countries is a profitable one. But we cannot assume from this that its Florida operations are as a unit profitable. In fact, the record shows only that the entire Society had sixty thousand dollars worth of contracts in Florida in 1936. We are not told what ratable share of this sixty thousand dollars would come to any individual in the division of the entire amount among the

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[31] Cf., Carroll v. Greenwich Ins. Co., *supra*, 412.

[32] Scott v. Donald, 165 U. S. 107, 114, 115.

[33] Cf., Glenwood Lt. Co. v. Mutual Lt. Co., 239 U. S. 121, 125, 126; KVOS, Inc. v. Associated Press, 299 U. S. 269, 277.

forty-five thousand odd members affiliated with the Society (in America and abroad). Each individual member's gross income from Florida might be less than $1.50 per year.

The loss of a right to an annual gross income of $1.50 cannot amount to the loss of a right valued at ten thousand dollars—as appellees allege—on the theory that it would cost ten thousand dollars to collect the $1.50 income individually. And it is, of course, possible that if the Society in fact has no net income from Florida but operates there at a loss, each member's ratable share of income from the Society will actually be increased when the unprofitable Florida operations cease because of the statute. Measuring the amount in controversy on the above theory, jurisdiction might be obtained by a Federal court to enforce rights of a value far less than the jurisdictional $3,000 required by Congress. For illustration, a statute might prohibit parking of automobiles on certain city streets; an automobile owner assailing the law might be admitted to the jurisdiction of the Federal court by alleging that it would cost him more than three thousand dollars to purchase a parking lot in which to park off the streets of the prohibited area. He would thus "comply" with the statute and abandon the streets in obedience to it.[34] I do not believe that jurisdiction of a Federal court can be rested on measurements of the imagined cost of what a complainant conceivably could, but certainly would never do as an alternative to action forbidden by statute.

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[34] "Cost of compliance" with an assailed legislative act may be considered the measure of the amount in controversy when a right of complainant is regulated, or where he is required to take affirmative action. Cf., Kroger Gro. Co. v. Lutz, 299 U. S. 300, 301; McNutt v. Gen. Motors Etc. Corp., 298 U. S. 178, 181. But appellees have not been required to take any affirmative steps, nor are they permitted to fix prices on condition that they "comply" with regulations. The fixing of prices through combinations has been prohibited. Obviously, appellees cannot be prohibited from doing that which they may also do by "complying" with the statute.

The statutory monetary standard is precise and the amount in controversy therefore cannot be conjectural. "It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.

"Accordingly this Court has uniformly been strict to adhere to and enforce it."[35]

Without proof of the amount each appellee or member has in issue, how can the "aggregate amount" be fixed at any figure?

Rigid enforcement of the jurisdictional requirement will limit the interference of Federal courts in State legislation and will accord with the policy of Congress in narrowing the jurisdiction of Federal courts by successive increases in the jurisdictional amount.[36] "The policy of the statute calls for its strict construction."[37] Since no individual complainant has established that he has the statutory jurisdictional amount in controversy, to rest jurisdiction of a Federal court on no more than the unified desire of many complainants to violate a State statute prohibiting monopolistic price fixing, does constitute a "novel, if not unique," and "grave" judicial departure from the jurisdictional requirement fixed by Congress.

Third. The otherwise complete suspension of Florida's law was limited only by the condition that appellees make bond of five thousand dollars payable to the Attorney General of Florida and the District Attorneys of the State. Manifestly, these officials have no individual interest in the monopoly prohibited by the Florida law. The major injuries accruing from the suspension of the law will not be inflicted upon them, but upon the People of Florida who are required to pay monopoly prices while the law remains

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[35] Elgin v. Marshall, 106 U. S. 578, 581.

[36] See Healy v. Ratta, 292 U. S. 263, 270.

[37] *Id.*

enjoined. Thus, while the law is suspended, these nonresident appellees can carry on a monopolistic business in Florida contrary to its prohibitions, and the people of Florida who must pay monopoly prices are granted no protection. We have recently declared the governing principal that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interest the injunction may affect.[38] The injunction here was not granted upon conditions that would protect the interests of all who might be affected by it. It neither ordered the monopoly tribute exacted by appellees to be paid into court during suspension of the Florida statute, nor required a bond for the benefit of, and adequate to indemnify those who must pay this tribute until the court permits the statute to go into effect.

Nevertheless, this Court now refuses to correct the grossly unjust failure to protect those who may suffer irreparable injury from the suspension of the Florida law on the ground that "No objection appears as to the adequacy of the bond or the other terms of the injunction. These remain under the control of the lower court." However, the lower court has already exercised its control resulting in manifestly injurious error apparent on the record.[39] And as "upon this appeal in equity the whole case is before us, we can render such decree as under all the circumstances may be proper."[40] Litigation is not a game in which justice can be awarded only to the alert

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[38] Inland Steel Co. v. United States, 306 U. S. 153, 157.

[39] See, Lamb v. Cramer, 285 U. S. 217, 222; United States v. Tennessee & Coosa R'd, 176 U. S. 242, 256; Revised Rules of the Supreme Court of the United States, 27, paragraph 6; cf., Mahler v. Eby, 264 U. S. 32, 45.

[40] United States v. Rio Grande Irrigation Co., 184 U. S. 416, 423; Cincinnati v. Cincinnati & H. Trac. Co., *supra*, 454; Ridings v. Johnson, 128 U. S. 212, 218; cf., Patterson v. Alabama, 294 U. S. 600, 607.

and fastidious objector, particularly when—as here—a court suspends statutory rights of members of the public who, not being in court, have no opportunity to object. The injustice to the public apparent on this record violates the rudimentary principles of equity and fair play. We should neither condone nor permit it.

They who attack the constitutionality of a law, obtain its judicial suspension, and then continue to violate its terms, should not benefit by the suspension, in the event the law is later held constitutional. Otherwise, a judicially granted period of immunity will reward litigants who unsuccessfully assail the constitutionality of legislation. Seemingly, the time has arrived when despite our constitutional system of government no State law can become effective until a federal court hears evidence on its constitutionality. The courts—responsible for this fundamental change—should at least protect citizens of an enacting State from disobedience to a state law permitted by an erroneous or improvident interlocutory injunction.

The interlocutory injunction should be vacated.

Opinion in

Buck v. Gibbs, 34 F. Supp. 510 (N. D. Fla. 1940).

(Florida 1937 Statute printed at p. 91, *infra*.)
(Florida 1939 Statute printed at p. 104, *infra*.)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others against George Couper Gibbs, individually and as Attorney General of the State of Florida, and others to enjoin enforcement of Florida statutes relating to copyrighted musical compositions.

Injunction granted against enforcement of one statute and certain sections of another statute and denied as to remainder of the latter statute.

Frank J. Wideman, of Washington, D. C., and Manley P. Caldwell, of West Palm Beach, Fla. (Louis D. Frohlich and Herman Finkelstein, both of New York City, of counsel), for plaintiffs.

George Couper Gibbs, Atty. Gen., of Florida (Thomas J. Ellis, Asst. Atty. Gen., Lucien H. Boggs, Sp. Asst. Atty. Gen., and Andrew W. Bennett, of Washington, D. C., of counsel), for defendants.

Before HUTCHESON, Circuit Judge, and LONG and BARKER, District Judges.

HUTCHESON, Circuit Judge.

Plaintiffs are owners of musical copyrights or rights of renewal therein, which have been pooled with the American Society of Composers, Authors and Publishers, hereafter called ASCAP. Defendants are the state officers charged with enforcement of the two statutes the suit brings in question. As originally brought, the suit was to enjoin

the enforcement of Chap. 17807, Laws of Florida, 1937.[1] There was a temporary injunction, an appeal and an affirmance.[2] After the enactment of Chapter 19653, Florida Laws, 1939,[3] it was extended by a supplemental bill to include that chapter in its scope and to obtain injunctive relief, temporary and permanent as to it.

The claim of the original and the supplemental bills in general was: that the statutes were confessedly aimed at ASCAP and its constituent members and were class legislation of the most indefensible kind and that in

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[1] 1937 Act, Chapter 17807.

Section 1. Prohibits combinations of authors, composers, publishers, owners of copyrighted vocal or instrumental musical compositions from forming any society, association, partnership, corporation or other group or entity, when the members therein constitute a substantial number of those owning or controlling copyrighted vocal or instrumental musical compositions and when one of the objects of such combination is the determination and fixation of license fees, required by such combination for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit, declares the association so formed unlawful, prohibits the collection of license fees so fixed and makes persons collecting or attempting to collect them subject to the penalties of the Act.

Section 2-A. Requires selling prices to be stated on sheet music or records and gives purchaser general public performance rights to use for all purposes on paying such price.

Section 2-B. Provides if selling price not so fixed, purchaser of the composition may use the composition privately or publicly without further license fee and exempts such purchaser from accountability to the copyright owner.

Section 2-C. Declares against purpose to give a purchaser general right to resell or distribute; or to prevent copyright holders from determining prices not in combinations forbidden in Section 1.

Section 3. Declares void existing contracts contrary to the Act and makes their attempted enforcement illegal.

Section 4-A. Relieves Florida broadcasting stations from payment of license fee for re-broadcast of copyrighted music controlled by a combination prohibited by Section 1.

Section 4-B. Similarly forbids collection by outside station of license fees to unlawful combination.

Sections 5-A and 5-B. Counterparts of Section 4-A and 4-B, except relating to theatres, etc.

Section 6. Concerning music broadcast or emanating from without the state, makes outside source of emanation solely liable for compensation to copyright owner and deprives owner of right to collect from Florida user.

Section 7-A. Provides for service of process on agent of outside combination.

Section 7-B. Declares such an agent a part of the combination for which he acts and as such, subject to all the penalties of the Act.

addition to violating the equal protection, liberty of contract and due process clauses of the Fourteenth Amendment, they violated various other constitutional provisions, Federal[4] and State.[5]

In particular the claim as to ASCAP was that it had been organized not to increase, or obtain unfair, prices for the performing rights of copyrighted musical compositions, but to protect authors, owners and publishers from the systematic piracy of their performing rights which, acting alone, they were powerless to prevent. And there was the further claim as to it that by fair and reasonable contracts and arrangements, it had at the same time afforded full public use of and access to copyrighted musical compositions at fair and reasonable prices, and secured to copyright owners, the benefits of the copyright law. While the claim as to the statutes in question was that they

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Section 8. Penalty clause for violation of Act.

Section 9. Confers jurisdiction on circuit courts and designates state attorneys under Attorney General to enforce public rights and penal provisions, particularly to dissolve unlawful combinations and otherwise enforce Section 1.

Sections 10-A and 10-B. Confers jurisdiction on circuit courts in private suits under the Act.

Sections 11-A and 11-B. Provides for discovery of documentary evidence and penalty for failure to produce same.

Section 12. Severability clause.

Section 13. Makes act and rights thereunder cumulative to rights and remedies under existing law.

Section 14. Effective date. (Approved and effective June 9, 1937.)

[2] Gibbs v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111.

[3] 1939 Act, Chapter 19653.

Section 1. Definitions. Defines blanket license as including any device whereby public performance for profit is authorized of the combined copyright of two or more owners. The term blanket royalty or fee includes any device whereby prices for performing rights are not based on the public performance of individual copyrights.

Section 2. (Disclosure section.) Requires seller of public performance rights in copyrighted music to file with Comptroller a list showing name and title of composition, date and number of copyright, names of author, publisher and present owner and owner of performance rights, with provision for filing additional lists and filing fee of two cents per composition; also for filing affidavit describing rights intended to be sold and verifying the statements in the listing or registration, with name, agent, occupation, residence and authority of affiant.

had been enacted, not in response to a public need, to make effective the general will of the people of Florida, but at the instigation of an organized group or band of radio broadcasters and other users of music in order that, the association stricken down and outlawed in Florida, they might with complete impunity again pirate the performing rights to copyrighted musical compositions without making payment to the owners therefor. As to the 1937 statute, the claim in general was that, though put forward as an anti-monopoly statute, it was really a statute designed and enacted, in the interest and at the behest of this anti-copyright group, to deprive the members of the society of the protection, in Florida, of the copyright laws. In particular it was that, by at once outlawing ASCAP and providing for the performance, without compensation to them, of the copyrighted vocal or instrumental

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Section 3. Makes such lists available for public inspection and taking copies "in order that any user . . . may be fully advised concerning the performing rights . . . and avoid being overreached . . . and avoid committing innocent infringement." Comptroller may publish lists and must give certified copies and anyone selling, licensing or otherwise disposing of performing rights, must exhibit them.

Section 4-A. Makes it unlawful "for two or more owners" of musical or dramatics musical copyrights to associate or combine together for purposes of issuing blanket public performance licenses upon a blanket royalty or fee unless each owner or such combination shall make available to each user of such composition within the state the right to perform each at a price established for each separate performance by filing with the Comptroller either as part of the list under Section 2 or separately a schedule or prices for the performing rights to each separate performance with affidavit that such price was fixed by the copyright owner alone and not in combination with other owners—with provision for reasonable classification by uses if without unreasonable discrimination; and for filing new schedules at any time effective seven days from filing, and for public inspection of publication of schedules.

Section 4-B. Provides any person issuing a blanket license shall file verified copies of blanket performance license with Comptroller within thirty days after issuance and fixes filing fee.

Section 4-C. Prohibits the sale or license of performing rights to any musical composition for a compensation based "in whole or in part on any program not containing any such composition," and makes illegal and invalid any charge for compensation so based.

Section 4-D. Makes sale of public performance rights or collection of compensation unlawful if composition not listed as provided in Section 2.

Section 5. Performing rights owner must authorize Secretary of State to accept service of process and copy shall be mailed him by Secretary.

musical compositions of its members, the statute undertook in effect to nullify the copyright laws and to take plaintiffs' properties in their copyrighted compositions without compensation and without due process.

As to the 1939 statute, the claim was that its rigorous provisions for registration, its prohibitions against and restriction on blanket licensing, its prohibitions against collection of compensation when based in whole or in part on any program not containing such composition and its general provisions for filing fees, taxes, etc., are so in derogation of the rights of owners under the copyright

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Section 6. No action to be brought without prior compliance with Act. Comptroller to furnish copies of any papers at same fees as clerk of circuit court.

Section 7. Imposes three per cent tax on gross receipts, provides for annual tax return, inspection and audit of books by Comptroller and provides for means of collection.

Section 8. Makes unlawful public performance of compositions without authority of owner if he has complied with the statute.

Section 9. Makes violations misdemeanors under general law.

Section 10. Makes agents of owners subject to the statute.

Section 11. Confers on circuit courts jurisdiction of private suits.

Section 12. Confers on circuit courts jurisdiction of enforcement of public rights by state attorneys under Attorney General upon complaint of a person aggrieved.

Section 13. If prosecuting officers fail to act, aggrieved party may bring such civil action as state officers might have brought.

Section 14. Appropriates taxes above expenses to general revenue fund.

Section 15. Supersedes inconsistent laws with express saving clause as to prior lawful contracts and "any of the statutes of the State of Florida pertaining to monopoly or restraint of trade" including but not limiting the generalities of the foregoing sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14, Chap. 17807, Laws of Florida, 1937. Provides for filing copies of existing contracts within thirty days and for compliance otherwise with Act within thirty days.

Section 16. Severability clause.

Section 17. Effective date. (Filed and effective June 12, 1939.)

[4] The Copyright Clause (Art. 1, Sec. 8, Cl. 8) and the Federal Laws enacted pursuant thereto; the Impairment of Contract Clause (Art. 1, Sec. 10); the Privileges and Immunities Clause (Art. 4, Sec. 2); the Interstate Commerce Clause (Art. 1, Sec. 8, Cl. 3).

[5] The privilege against self-incrimination (Sec. 12, Declaration of Rights); the prohibition of cruel and unusual punishment (Sec. 8, Declaration of Rights); the Equal Protection and Liberty of Contract Clauses (Sec. 1, Declaration of Rights).

law, and so onerous, that they amount to an illegal taking for private use, that is, for the benefit of broadcasters and other users, of plaintiffs' rights in and under their copyrights.

The defense in general was: a denial that the legislation was oppressively or partisanly conceived and that it operated in violation of any constitutional protection, and an assertion that it aimed at and constitutionally reached, the evils of a combination, to fix prices and in restraint of trade. A combination, organized and operating to fix the prices to be paid for, and to restrain freedom of trade in, the public performance of individual copyrighted musical compositions at a fair price per use, by blanketing them together under general licenses covering many compositions of many owners, authors and composers, and refusing to license or permit the licensing individually and per use of particular compositions. In particular the defense as to the 1937 Act was: that it was an anti-monopoly Act and that taken as such it was valid; that sections 2-A and 2-B and 6, which purport to authorize the performance within the state of copyrighted musical compositions without payment by the users therefor, have been repealed by the 1939 Act; and that the remaining sections are valid and the Act as to them must stand as an anti-monopoly Act condemning and making illegal, combinations like those of ASCAP and the other plaintiffs.

As to the 1939 Act, the defense was: that it is in general an Act for disclosure, and as such is valid under Allen v. Riley, 203 U.S. 347, 27 S.Ct. 95, 51 L.Ed. 216, 8 Ann.Cas. 137; and that its other provisions requiring blanket licenses by two or more persons and prohibiting sales or licenses at a price, based other than on a use in a program of the particular music sold or licensed, are mere regulatory measures to reach and do away with the evils of blanket licensing in all its forms.

With their contentions thus put forward, plaintiffs and defendants ring the changes on their respective arguments. Plaintiffs urge upon us that ASCAP is a beneficial, defendants that it is an evil institution; plaintiffs that the copyright laws protect them from the legislation; defendants that copyright owners may not, any more than others, form combinations to monopolize or restrain trade. If the case were as simple in its issues as each contender thinks it is, if it turned, on the one hand, simply on whether plaintiffs had rights and, on the other, as simply on whether these rights were subject to regulation, we could and would end it quite simply by saying to defendants, "The plaintiffs certainly do have rights in their copyrighted musical compositions", and to plaintiffs, "These rights are certainly not beyond reasonable state regulation."

But the answer to the questions the suit raises is not so simply found. For conceding both plaintiffs' rights and the State's power to subject them to reasonable regulation, the difficulty remains of determining whether the statutes in question are unreasonable prohibitions masking under the guise of regulation, or if regulations, whether, unduly and beyond the legitimate purpose to be served, they hamper and restrict plaintiffs' undoubted rights. In short, the question for decision comes down at last to, and is to be decided by, not a general statement of principles, for as to them there is no real dispute,[6] but a construction

[6] They are sufficiently stated for our purpose in Buck v. Swanson, D. C., 33 F. Supp. 377, dealing with a Nebraska statute of the same purport as the Fla. 1937 Act, and we need not restate them here. Other authorities not cited in Buck's case, which may be consulted are: For the plaintiffs: Lawton v. Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. Ed. 385; Hale v. Bimco Trading, 306 U. S. 375, 59 S. Ct. 526, 83 L. Ed. 771; State ex rel. Fulton v. Ives, 123 Fla. 401, 167 So. 394; People's Petroleum Producers v. Sterling, D. C., 60 F. 2d 1041, at page 1047; McLeaish & Co. v. Binford, D. C., 52 F. 2d 151; Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, at page 539, 43 S. Ct. 630, 67 L. Ed. 1103, 27 A. L. R. 1280; Smith v. St. Louis & S. W. R. Co., 181 U. S. at page 255, 21 S. Ct. 603, 45 L. Ed. 847; McFarland

and interpretation of the statutes under attack, as to what they purport to do and whether they may constitutionally do that.

Both plaintiffs and defendants see plainly enough that this is so and by an analysis both of the statutes as a whole and of each section thereof, plaintiffs undertake to show their invalidity, defendants their validity. Plaintiffs pointing to the confiscatory provisions of Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6, by which the 1937 Act undertakes to permit performance, in Florida, of copyrig' 'ed music without compensation, urge upon us that not only these sections but the statute as a whole is invalid because, not a reasonable regulation of, but a repressive prohibition of, dealings in copyrighted music, it breathes and attempts to make effective throughout the unconstitutional spirit of repression and reprisal. Outlawing ASCAP and those in association with it, and expropriating their property for the use, without compensation, of radio broadcasters and others, it, they say in violation of every constitutional principle, operates as a kind of Bill of Attainder.

Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to

v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899; Herbert v. Shanley Co., 242 U. S. 591, 37 S. Ct. 232, 61 L. Ed. 511; Buck v. Jewell-La Salle Realty Co., 283 U. S. 191, 51 S. Ct. 410, 75 L. Ed. 971; Remick & Co. v. American Automobile Accessories Co., 6 Cir., 5 F. 2d 411, 40 A. L. R. 1511.

For the defendants: Allen v. Riley, 203 U. S. 347, 27 S. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137; Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010; Carbice Corp. v. Amer. Patents Corp., 283 U. S. 27, 51 S. Ct. 334, 75 L. Ed. 819; Straus v. American Publishers Ass'n, 231 U. S. 222, 34 S. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; Interstate Circuit v. United States, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610; Strassheim v. Daily, 221 U. S. 280, 31 S. Ct. 558, 55 L. Ed. 735; Ford v. United States, 273 U. S. 593, 47 S. Ct. 531, 71 L. Ed. 793; Stephenson v. Binford, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, 87 A. L. R. 721; Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 60 S. Ct. 618-625, 84 L. Ed. —; Tigner v. State of Texas, 60 S. Ct. 879, 84 L. Ed. —; United States v. Socony-Vacuum Oil Co., 60 S. Ct. 811, 84 L. Ed. —.

For both: Standard Oil Co. v. United States, 283 U. S. 163, 51 S. Ct. 421, 75 L. Ed. 926.

them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute.

[1] We do not think so. In complete agreement with what was said in Buck's case as to the invalidity of Sections 2-A and 2-B of the Nebraska law, we find invalid the similar sections of the Florida 1937 Law. For the same reasons, that they unreasonably interfere with and in effect deprive the owners of their copyright protection, by imposing unlawful conditions, in effect a servitude, in favor of those desiring to use them, upon the performing rights in their copyrighted musical compositions, and even under named conditions completely take the copyright, by permitting use without compensation, we find Sections 3, 4-A, 4-B, 5-A, 5-B and 6, also invalid.

There remain: Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally; and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it.

[2-6] It is, of course, the duty of a Court, if reasonably possible, consistent with the protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality, sustaining it, if it can be

done as a whole, or if that cannot be done, as to the part of it that is constitutional. But legislation, even though containing a separability clause, is not the enactment of isolated sections, but of a law as a whole. And the function of the Court, if there are invalid sections in a statute, is to search out, not isolated valid ones, but the valid law as a whole. To do this, a Court may, especially where the Act contains a separability clause, cut and pare and trim away its diseased parts, if, when this has been done, the live spirit of the law as enacted still remains, the living tree still stands. But, law making at last, is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not, by lopping and paring away, create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. Williams v. Standard Oil Co., 278 U.S. 235, 241, 49 S.Ct. 115, 73 L.Ed. 287, 60 A.L.R. 596; Sage v. Baldwin, D.C., 55 F.2d 968, and cited cases. Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind, we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the "without pay" sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect

the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in Buck v. Swanson, supra, that the whole Act is invalid and must fall. We are the more inclined to this view because of the inconsistent provisions in the 1939 Act, and because, while specifically providing that nothing in it shall be construed to repeal any of the statutes of the state of Florida, pertaining to monopoly or restraint of trade "including . . . Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937", that Act by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole, they must stand or fall together. In this view it is not necessary for us to determine whether as plaintiffs claim, Section 1 is invalid, for indefiniteness and uncertainty in its provision that it shall apply to combinations only where "a substantial number" of owners are concerned. Nor is it necessary to determine whether defendants are right in their counter to this claim of plaintiffs, that if the statute might be regarded as indefinite in its application as to some, it is certainly not so in its application to plaintiffs, for they admit that they own or control substantially all of the playable copyrighted musical compositions and they may complain of the statute, not as it applies to others but only as it applies to themselves.

[7] When it comes, however, to the 1939 Act we think the matter stands differently, for, having a valid purpose to compel disclosure to protect music users against imposition in the matter of copyrighted music and, except as to Sections 4-A and 4-C, which are not germane to that

purpose, having gone about effecting that purpose in a reasonable way, the Act as a whole is valid and may stand with those sections stricken from it. These sections constitute clear invasions of plaintiffs' rights under federal laws for which no warrant or justification can be found in the exercise of the state's police power. They may not stand.

[8, 9] As to 4-A, it seriously invades the rights of copyright owners to sell or license or refuse to sell or license as they please and by its compulsion, opens to the public the unlimited right to use copyrighted material upon terms the owner must fix generally in advance, and under conditions which are not only unreasonable in fact but are in their nature beyond the power of the state to impose. A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state.

The defendants seem to recognize that this would be so if the condemned provision were not coupled in the statute with a provision permitting dealing in copyrighted music under blanket licenses. They seem to think that the permission of the statute for two or more owners to combine in a blanket license authorizes the state to impose unreasonable restrictions upon that joining.

[10, 11] This will not at all do. It is not unlawful for one or more copyright owners merely to pool their com-

positions for one royalty for them as pooled. Standard Oil Co. v. United States, 283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926. Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the Act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license. There is no conceivable public policy against such action by two or more owners and therefore no valid exercise of police power involved in a statute putting limitations on such trading. So long as persons do not unlawfully combine to fix prices, and the section in question does not deal with such unlawful combinations, there is no offense in mere pooling. And the mere fact that the statute permits to be done what without the statute it was already lawful to do, does not authorize it to impose unconstitutional restrictions upon that doing. "But a state may not impose any condition which requires the relinquishment of a right guaranteed by the National Constitution". Sage v. Baldwin, D.C., 55 F.2d 968, at page 969. The copyright laws guarantee to owners of musical compositions, protection against the use thereof without their consent. The state of Florida may not, therefore, as a condition to their being allowed to sell in Florida, a right they already have under the Federal constitution and laws, compel them to throw open to general public use the performing rights to their compositions at a price fixed in advance.

[12-15] Section 4-C is for the same reason invalid. It undertakes to impose unreasonable restrictions on copyright owners, restrictions having no reasonable relation to the public policy the Act is designed to further, that of disclosure for the protection of the public against fraud and imposition. In attempting to prevent individuals from contracting for the use of their copyrighted music upon any

price bases they and their customers may select, the Act goes clearly beyond and is wholly outside the reasonable exercise of the police power. People's Petroleum Producers v. Sterling, note 6, supra. The prohibition of the section, against basing the price upon programs in which a particular piece of music is not performed, is a completely arbitrary one and as such, it could not stand if the subject of the prohibition were uses unprotected by copyright. For, the end and aim of the prohibition is to limit the right to sell or license copyrighted musical compositions to contracts based solely upon performances per piece of each particular piece of music and to prohibit contracts arrived at on any other basis, however reasonable and well adapted to the needs of, and acceptable in, the business generally, of selling and licensing performing rights in copyrighted musical compositions. If the statute dealt with contracts for the hiring of the work and labor or the personal services, of animals or things and by its prohibition prevented, wages and salaries from being fixed except on the basis of piece work, the hire of horse, car or boat from being fixed, except upon the basis of each particular use, or journey, we think it would be admitted that such a statute would be invalid as an invasion of the right and liberty of contract, and not at all a reasonable exercise of the police power of the state. Certainly the state is in no better, the owner of a copyright in no worse position as to rights protected by copyright, "While the Copyright Act [17 U.S.C.A. § 1 et seq.] may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., supra (215 U.S. 182, 30 S.Ct. [38], 39, 54 L.Ed. 150), 'The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period.'

"The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property, may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co., D.C.Mass., 27 F.2d 556; American Tobacco Co. v. Werckmeister, supra [207 U.S. 284, 28 S.Ct. 72, 52 L.Ed. 208, 12 Ann.Cas. 595]"; Buck v. Swanson, note 6, supra [33 F. Supp. 387].

For the reasons herein stated, the injunction prayed for will be granted against the enforcement of the 1937 Act and as to Sections 4-A and 4-C in the 1939 Act; as to the remainder of the 1939 Act, it will be denied.

Opinion in

Buck v. Swanson, 33 F. Supp. 377 (D. C. Neb. 1939).

(Nebraska Statute printed at p. 115, *infra*.)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers against Harry R. Swanson, as Secretary of the State of Nebraska, and others to enjoin the enforcement of a Nebraska statute relating to monopolies in the field of musical compositions.

Judgment for plaintiff.

Louis D. Frohlich and Herman Finkelstein, both of New York City, and L. J. TePoel, of Omaha, Neb., for plaintiffs.

William J. Hotz, Sp. Asst. to the Atty. Gen., of Nebraska, John Riddell, Asst. to the Atty. Gen. of Nebraska, Gordon Diesing, of Omaha, Neb., and Andrew Bennett, of Washington, D. C., for defendants.

Before GARDNER, Circuit Judge and MUNGER and DONOHUE, District Judge.

GARDNER, Circuit Judge.

This is a suit in equity in which plaintiffs seek to enjoin the enforcement of Legislative Bill 478 of the State of Nebraska, Laws, 1937, c. 138, and which by its terms became effective May 17, 1937.

The American Society of Composers, Authors and Publishers, a voluntary unincorporated association under the General Associations Law of New York, consisting of a large number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers, through Gene Buck its president, and certain individuals and corporations interested in copyrighted musical compositions are the plaintiffs. The secretary of state, the state treas-

urer, the auditor of public accounts, and the attorney general, all of the State of Nebraska, as well as the county attorneys of various counties of Nebraska, are the Defendants.

The statute, the enforcement of which is sought to be enjoined, is too voluminous to be set out herein *in haec verba*, but it will be found in the subjoined note. [The Statute is printed at p. 91, *infra*.]

There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, in the United States, and 123 publisher-members who constitute the principal publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between the Society and its members expiring December 31, 1940. The Society has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing such licenses.

In Nebraska there are some 350 dance pavilions and ballrooms of a class that are independent of taverns where dancing is carried on incidentally. There are ten radio stations operating within the state, of which one is affiliated with the Columbia Broadcasting Network and one with the National Broadcasting Network. The other stations initiate their own vocal and instrumental musical programs. A

large number of theatres are users of music. There are 284,000 radio receiving sets in private homes, and about one-third of the population of the state at some time during the year attend dances and balls where music is played. In 1938 approximately $12,000.00 was collected by ASCAP from the theatres in the state. The largest radio station in Nebraska pays about $26,000.00 to the Society annually. Another group of stations paid the Society about $27,000.00 in 1938. There were 391 signed contracts with users of music in Nebraska introduced in evidence upon which an aggregate of approximately $20,000.00 was paid ASCAP during 1938. The Society is given, by its members, the exclusive right to make collections, fix prices, and otherwise carry on the public performance of all the musical compositions it controls. Some $6,000,000.00 was taken in for public performance rights by the Society in the United States during 1938. Fifty per cent of its net commissions was divided among the composer members and the other fifty per cent was divided among the publisher members. These groups are classified, but the classification does not seem to have any material bearing upon the issues presented. Of the popular music necessary for the successful operation of radio stations, dance-halls, hotels and theatres, the Society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the Society. The users of music in Nebraska cannot successfully carry on their business except they deal with the plaintiff Society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the Society.

All the contentions of plaintiffs, as well as those of the Defendants, go to the constitutional validity of the statute involved. Whether or not, under the common law of Nebraska the contracts between ASCAP and its members, and between it and the users of music in Nebraska, are valid or not, we need not consider. That issue is not before us, but the single question is the constitutional validity of the challenged statute.

It appears from the evidence that prior to the organization of the Plaintiff Society, an author or composer who had obtained a copyright for his production had no practical means of enforcing the exclusive right given him by the Copyright Act. He was not so equipped nor organized to discover violations of his rights, and it would require much time and a large amount of money to enforce his rights by means of litigation. Users of music, on the other hand, who wished to buy the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit that the Society was organized.

[1-3] The control or prohibition of combinations in restraint of trade and the prohibition of monopolistic practices is recognized as a proper exercise of the police power of the state. Nebbia v. New York 291 U. S. 502, 54 S. Ct. 505; Waters-Pierce Oil Co. v. Texas 112 U. S. 115, 29 S. Ct. 227; Bayside Fish Flour Co. v. Gentry 297 U. S. 422, 56 S. Ct. 513; Crescent Cotton Oil Co. v. Mississippi 257 U. S. 129, 42 S. Ct. 42; Central Lumber Co. v. South Dakota 226 U. S. 157, 33 S. Ct. 66; Paramount Pictures v. Langer 23 Fed. Supp. 890. While regulation of such public practices as are deemed to be contrary to the public policy of the state is a proper exercise of its police power, yet the exercising of such power is subject to the restrictions imposed by the Federal Constitution, which must of course be recognized as the supreme law of the land. A state statute, though

enacted in pursuance of the police power, is void if in contravention of any express provision of the Federal Constitution or of a valid federal statute, or if it constitutes an interference with matters that are within the exclusive scope of federal power.

[4-6] The Act of March 4, 1909, Chap. 320, Sec. 1 (e) 35 Stat. 1073, Title 17, U. S. C. A., Secs. 1-63, enacted pursuant to the grant of power in Article 1, Section 8 of the Constitution, was intended to grant valuable enforcible rights to authors and publishers without burdensome requirements, in order to afford greater encouragement to the production of literary works of lasting benefit to the world. Washingtonian Pub. Co. v. Pearson 306 U. S. 30, 59 S. Ct. 397. The policy and purpose of the statute is to grant to the individual the right to control the use of the production covered by the copyright. Of course, the Act gives him no right to combine with others to insure control of prices and the consequent power of monopoly of an entire field by combination. Plaintiffs urge necessity as a justification or warrant for their organization. It is urged that without some such means of protection, the individual copyright owner is helpless to protect his rights, but if the statute violates no rights guaranteed to the plaintiffs by the Constitution or laws of the United States, the motive for the organization or acts of ASCAP, however impelling, is not material.

[7-8] It is contended that the state statute deprives copyright owners of the right to control public performances for profit of their copyrighted musical compositions, apart from the sale of sheet music. The copyright is distinct from the material object copyrighted. It is an intangible incorporeal right in the nature of a privilege or franchise quite independent of any material substance such as the manuscript or the plate used for printing. King Features Syndicate v. Fleischer (CCA2) 299 Fed. 533. The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms. He

has an individual right of exclusive enjoyment similar to that of a patentee of an invention. United States v. Dubilier Condenser Corp. 289 U. S. 178, 53 S. Ct. 554; United States v. American Bell Telephone Co. 167 U. S. 224, 17 S. Ct. 809; Burrow-Giles Lithograph Co. v. Sarony 111 U. S. 53, 4 S. Ct. 279; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 S. Ct. 72; Caliga v. Inter Ocean Newspaper Co. 215 U. S. 182, 30 S. Ct. 38; Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. (CCA7) 154 Fed. 358. The Society as an assignee of the rights of each author is a representative of that individual right. There are, too, individual plaintiffs before the courts, and they are interested individually in the public performance rights of particular musical compositions.

In American Tobacco Co. v. Werckmeister, *supra*, it is said [207 U. S. 284]:

> " . . . the law recognized the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced."

While the Copyright Act may not enhance the right of proprietorship, it certainly does not lessen that right. As said by the Supreme Court in Caliga v. Inter Ocean Newspaper Co., *supra* [215 U. S. 182],

> "The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period."

[9-10] The right of an author in his intellectual production is similar to any other personal property right. It is assignable and it may be sold and transferred in its entirety, or a limited interest therein, less than the whole property,

may be sold and assigned, and the various rights included in the entire ownership may be split up and assigned to different persons. Sales may be absolute or conditional and they may be with or without qualifications, limitations or restrictions. Atlantic Monthly Co. v. Post Pub. Co. (D. C. Mass.) 27 Fed. (2D) 556; American Tobacco Co. v. Werckmeister, *supra.*

Section 2 (A) of the state statute requires the author, composer or publisher to specify legibly upon the musical composition, in whatever form it may be published, "the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes."

[11] The right of public performance in connection with the composition includes separate and distinct rights, among them being: (1) the right of publication; (2) the motion picture rights; (3) the stage rights; (4) the recording rights; and (5) the radio reproduction rights. The copyright owner might wish to grant one of these rights to one party and another right to a different party. As the exclusive owner, he is entitled to that right. The above statute, however, interferes with his so doing.

Section 2 (B) of the statute provides that,

> "In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private and public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation, so using or rendering the same shall

> be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state."

Under this subsection, the copyright owner in effect must offer the public performance rights of his copyrighted composition for sale and use in Nebraska, and if he does not choose so to do any person purchasing the composition may use it in the state for public performance without any liability to the copyright owner. This provision, we think, clearly deprives the owner of the copyright of rights to which he is entitled under the Copyright Act. As observed, his rights of ownership entitle him to sell or offer to sell, or to withhold from sale, as he may choose.

[12-13] The state statute can not be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use. Panhandle Eastern Pipe Line Co. v. State Highway Commission 294 U. S. 613, 55 S. Ct. 563.

[14] While the power reasonably to restrain unlawful monopolistic trade-restraining combinations from exercising any rights in the state may be conceded, an act which compels the owner of a copyright to offer it for sale in a certain way, and if he fails so to do to take it from him without compensation, violates the due process and equal protection clauses of the Constitution, and it is also violative of the Federal Copyright Act.

The state statute contains a separability provision (Section 12), which provides that,

> "If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act."

[15] The Supreme Court of Nebraska has held that a statutory expression of the separability of various sections or provisions of a statute is an aid merely to judicial interpretation. First Trust Co. v. Smith 134 Neb. 84, 277 N. W. 762; Laverty v. Cochran 132 Neb. 118, 271 N. W. 354; Hubble Bank v. Bryan 124 Neb. 51, 245 N. W. 20. In Laverty v. Cochran, *supra*, the court in speaking of a severance clause contained in a statute said:

> "The rule is that, although a statute may be invalid or unconstitutional in part, the other parts will be sustained where they can be separated from the part which is void. Muldoon v. Levi, 25 Neb. 457, 41 N. W. 280. But the parts of the statute which are valid must be capable of being executed independently of the invalid parts in order to be operative. State v. Ure, 91 Neb. 31, 135 N. W. 224. The statutory provision expressing legislative intent as to the separability of the various parts of a statute is merely an aid to judicial interpretation."

[16] But where the connection between the invalid parts and the other parts of the statute is such as to warrant the belief that the legislature would not have passed the act without the invalid parts, the whole act must be held inoperative. The provision of the statute which we are here considering is such an essential part of the statute as not to be separable.

[17] In view of our conclusion on this phase of the case, it is unnecessary to consider the other contentions that have been ably argued and elaborately briefed by counsel for the respective parties.

We conclude that permanent injunction restraining the enforcement of this statute must be granted. Counsel for plaintiffs may prepare findings of fact and conclusions of law, together with form of decree in accordance with this opinion.

Buck v. Harton, 33 F. Supp. 1014 (1940, M. D. Tenn.).

(Tennessee Statute printed at p. 132, *infra.*)

In Equity. Action by Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, and others against John W. Harton, as State Treasurer of Tennessee, and others to restrain the defendants from bringing any proceeding for purpose of enforcing a certain statute of the state of Tennessee against the complainants and others similarly situated, their representatives, employees or agents, and for other relief.

Judgment for the complainants in accordance with opinion.

Cornelius, McKinney & Gilbert, of Nashville, Tenn., and Schwartz & Frolich, of New York City (Charles L. Cornelius and William Neel McKinney, both of Nashville, Tenn., and Louis D. Frohlich and Herman Finkelstein, both of New York City, of counsel), for complainants.

Roy H. Beeler, Atty. Gen., for Tennessee, and W. F. Barry, Jr., Asst. Atty. Gen., for defendants.

Before HICKS, Circuit Judge, and DAVIES and TAYLOR, District Judges.

PER CURIAM.

This suit having been duly commenced on April 18, 1938 by filing a subpoena and bill of complaint in this Court, and personal service of copies thereof having been made on said date upon the defendants originally named in this action, and the defendants John W. Harton, John J. Jewell, Marion S. Boyd and Glenn Woodlee (said last named defendants having been substituted by stipulation in place and stead of Grover Keaton, W. B. Knott, W. T. McLain and A. T. Stewart), and this Court having duly granted a temporary injunction on December 1, 1938, and

this cause having come on for hearing on the 19th day of February, 1940 at the Courthouse of the District Court of the United States, Eastern District of Tennessee, at Knoxville, Tennessee, and complainants having appeared by Cornelius, McKinney & Gilbert, Esqs. (Charles L. Cornelius, William Neel McKinney, Louis D. Frohlich and Herman Finkelstein, of Counsel), and defendants having appeared by Honorable Roy H. Beeler, Attorney-General of the State of Tennessee, and Honorable P. W. Barry, Assistant Attorney-General, and this cause having been submitted upon all the papers and proceedings heretofore filed and had herein, and counsel for defendants having consented in writing to the entry of a final decree in favor of complainants upon said papers, and due deliberation having been had, the Court hereby makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. The State of Tennessee enacted a Statute entitled Chapter 212 of the Tennessee Laws of 1937 on May 21, 1937 which Statute became effective immediately. Said Statute is hereinafter referred to as the "Statute".

2. The plaintiff, American Society of Composers, Authors and Publishers, is a voluntary unincorporated association organized in 1914 under the General Associations Law of New York. Its membership consists of a substantial number of persons, firms and corporations who own or control copyrighted vocal or instrumental musical compositions, as authors, composers and publishers. It brings this suit through Gene Buck, its President, who has been duly authorized to bring this suit on behalf of the Society and all its members. Other plaintiffs are certain individuals and corporations who are

members of the Society and are interested in copyrighted musical compositions. They are all citizens and residents of States other than Tennessee.

3. The State Treasurer, the Secretary of State and the Attorney-General all of the State of Tennessee, as well as the District Attorneys-General of various circuits of Tennessee, all citizens and residents of Tennessee, are the defendants.

4. There are approximately 1,000 composer-members of the American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP"), in the United States, and 123 publisher-members who constitute some of the principal publishers of the country. Each member has assigned to the Society the exclusive right of public performance for profit of his copyrighted musical compositions for periods of five years at a time, the present contracts between ASCAP and its members expiring December 31, 1940. ASCAP has issued blanket licenses to the users of its copyrights, by which the latter are permitted to perform publicly for profit at any time, all the musical compositions owned, written or composed by members of the Society without requiring further consent of the owner of the particular composition performed. These blanket licenses include not only the right to perform the works of the members of the Society, but also grant the right to perform the works of some 44,000 members of other similar societies throughout the civilized world, with which societies ASCAP has contracts authorizing ASCAP to grant such licenses.

5. At the time the Statute was enacted, there were in existence 217 signed contracts between ASCAP and establishments in the State of Tennessee, engaged in the business of publicly performing copyrighted musical compo-

sitions for profit. During the year 1936, these licensees paid ASCAP $69,073.19 pursuant to such contracts. Among such licensees of ASCAP were the owners of 166 motion picture theatres, 38 dance halls, hotels and miscellaneous establishments and 13 radio broadcasting stations. Among the 13 radio stations in Tennessee licensed by ASCAP, five are affiliated with the Columbia Broadcasting System, four with the National Broadcasting Corporation, three with the Mutual Broadcasting System and four with the Dixie Network. Part of the programs broadcast by the affiliated stations emanate from points outside of the State and the remaining part initiate in the studios of such Tennessee broadcasters or elsewhere within the State. There are 459,900 radio receiving sets in private homes in the State of Tennessee. No license fees are paid by the owners of these receiving sets inasmuch as they do not engage in public performance for profit. The cost of operation of ASCAP is approximately 17% of the gross amount received.

6. ASCAP is given by its members the exclusive right to make collections, fix prices for blanket licenses, and otherwise carry on the licensing of the right of public performance for profit of all the musical compositions copyrighted by its members. Fifty percent of such net income was divided among the composer- and author-members and the other fifty percent was divided among the publisher-members in accordance with a method of classification defined in the Articles of Association of ASCAP.

7. Prior to the organization of ASCAP, authors, composers and publishers who had obtained copyrights for their productions had no practical means of enforcing the exclusive right given them by the Copyright Act. They were not so equipped nor organized to discover violations of their rights, and it would require much time and a large

amount of money to detect infringement and to enforce their rights by means of litigation. None of them secured any revenue from the public performance for profit of their copyrighted musical compositions. Users of music, on the other hand, who wished to obtain the rights of public performance for profit, were unable to ascertain who the copyright owner was and to whom to go and could not economically obtain individual licenses for the separate performance of the large numbers of works required by them daily. It was for the purpose of protecting the legal rights of its members in their copyrighted musical compositions against infringement by public performance for profit and to give users ready access to a substantial repertoire of music for such purposes that ASCAP was organized.

8. ASCAP and its members, including the other complainants, come within the purview, terms, conditions, penalties, forfeitures, prohibitions, restrictions and regulative provisions of the Statute, and the members of ASCAP including complainants are affected in their rights by the terms and provisions thereof.

9. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of ASCAP who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of ASCAP.

10. The value of the matter in dispute herein between each of complainants and defendants is in excess of the sum of $3,000, exclusive of interest and costs.

11. The copyrights of musical compositions owned by each of the corporate plaintiffs are worth in excess of $1,000,000, and the interests in copyrights of the individual plaintiffs, including the value of their renewal rights, are in excess of $100,000 as to each of them.

12. The contracts between the individual composer- and author-members of ASCAP, including the individual plaintiffs, and their respective publishers do not give the publisher the right to dispose of the right of public performance for profit, nor do they have any provision for payment by the publisher to the writers of any royalties secured from issuing such licenses. Before ASCAP was formed, there were no royalties from this source and since the formation of ASCAP, both writers and publishers have relied upon ASCAP to collect royalties from this field on behalf of both and to distribute it equitably for the equal benefit of writers and publishers.

13. Users of music, including users in Tennessee, have uniformly objected to dealing with individual copyright owners for the licensing of the public performance for profit of musical compositions. ASCAP's practice has been to grant blanket licenses to theatres according to their seating capacity, to radio broadcasting stations according to their income, power and coverage, and to hotels, cabarets and dance halls according to their respective size, business done, number and size of orchestras, methods of performance, income and standing. Many of such users have for many years consistently refused to pay license fees to ASCAP or its members, until investigations were made by ASCAP, infringements ascertained and suits brought.

14. The radio broadcasting stations in the State of Tennessee are members of the National Association of

Broadcasters, which association on behalf of its members, for many years last past, has acted and presently acts collectively in dealing with ASCAP.

15. Under the contracts between ASCAP and said foreign societies, the latter are not required to, and never have, filed with ASCAP or with any State Authority, copies of the respective compositions copyrighted by their respective members, or lists of such compositions.

16. Many thousands of the copyrighted musical compositions owned and published by complainants, as well as others similarly situated, have been recorded under the compulsory license provision of Section 1(e) of the Copyright Act by manufacturers of phonograph records, music rolls and electrical transcriptions. Such manufacturers have paid to copyright owners not more than two cents for each record and said copyright owners have no right to demand any further sums from such manufacturers; complainants and others similarly situated have no control over the sale or disposition of such phonograph records, music rolls or electrical transcriptions and they cannot compel the manufacturers thereof to affix any price upon them or to collect a price for the public performance for profit thereof, or if collected, to remit or give to them the sums so collected respectively for the public performance for profit thereof. Such manufacturers have no right, title or interest in the public performance for profit of such copyrighted compositions.

17. Complainants and others similarly situated are not willing to permit their musical compositions to be performed within the State of Tennessee publicly for profit on any basis wherein the price for such performance would be fixed upon a so-called per piece basis. Licensing on such basis would not be feasible and would be tantamount

to depriving complainants of their exclusive right of public performance for profit.

18. The musical compositions of ASCAP's members and complainants have been for many years last past, and are presently being performed within the State of Tennessee in hotels, dance halls, taverns, motion picture theatres and broadcasting stations.

19. If the members of ASCAP including complainants tried to comply with the Statute they would each have to ascertain separately the nature of each establishment in the State of Tennessee, size of each orchestra, fame or celebrity of each artist, size of each establishment, its volume of business, its probable profits, elaborateness of the production, and size of its audience; they would each have to employ a corps of clerical assistants for the purpose of ascertaining the above information, investigators to detect infringement and competent counsel to obtain redress for the same; they would have to attempt to fix a separate price for each such establishment and to file a list with all the information required by the Statute; this would add substantially to the cost of the sheet music sold within the State of Tennessee, and would make it so great as to encourage infringement and interfere with, if not destroy, the sale of copyrighted sheet music in the State of Tennessee.

20. The Statute cannot possibly be complied with because:

(a) the public performance rights for profit fluctuate in value over the years; it is impossible for individual members of ASCAP, including the complainants, to specify at the time of publication of their musical compositions in the State of Tennessee what the price should be for various public performances for profit of their respective musical compositions;

(b) the members of ASCAP, acting singly, do not have the financial resources, experience or ability to obtain the information necessary to enable them to designate a fair price of the public performance for profit of their musical compositions in the State of Tennessee, or to detect or redress infringement of their compositions in that State;

(c) it would be impossible under the Statute to protect large investments made in motion pictures and dramatico-musical productions which contain individual musical compositions, the separate and unrestricted public performance of which would destroy the value of such motion pictures and dramatico-musical productions; complainants would be compelled by the Statute to refrain from copyrighting the compositions embraced in such motion pictures and dramatico-musical productions in order to protect their investment therein; this would materially reduce the number of works copyrighted annually;

(d) it would cost complainants approximately $300,000 to attempt to compile and file the list required by the Statute and $50,000 additional each year to supplement such list annually.

(e) the Statute cannot be complied with unless all complainants surrender their membership in ASCAP; this would entail a loss to each of the complainants in excess of $5,000 annually, representing the amounts which they normally receive annually from ASCAP; in some cases, such loss would be in excess of $50,000 annually; if not for the revenue received from ASCAP, complainant-publishers would be unable to continue in business.

21. The constant use of music by radio has shortened the life of a song resulting in a diminution ranging from 70% to 80% in the income to authors and composers from sales of sheet music and books of music. Sales of "hit"

songs have fallen from an average in excess of 1,000,000 copies prior to 1927, to an average of 30,000 to 150,000 today. The income from mechanical royalties diminished ninety-seven percent.

22. A system of blanket licensing is necessary in the field of public performance of musical compositions for profit because:

(a) Many request numbers are played as spontaneous encores in the course of an evening's entertainment in dance halls, cabarets, hotels and radio. This is possible only under some form of blanket license, which allows users to make last minute substitutions made necessary by operating difficulties, failure of artists to show up, etc.; except in rare instances, radio broadcasters in the State of Tennessee and elsewhere have always taken blanket licenses for the right of public performance for profit whether such licenses were obtained from ASCAP or from others; if the Statute were upheld, the broadcasters in Tennessee would attempt to obtain the benefit of blanket licenses by purchasing from publishers entire catalogues; such users would not and do not propose to deal with individual copyright owners for specified compositions; users in Tennessee have no intention of dealing with individual composers or authors.

(b) It is difficult for users to report accurately the music performed by them. Large establishments with expert staffs keep no logs or records of such performances; it is inevitable that small stations would have greater difficulty because of lack of facilities and would be required to spend as much for this purpose as larger stations with substantially larger income; the clerical expense alone would be greater than the license fees now paid to ASCAP; by the use of the reservoir of available music, under a blanket license, users are saved expendi-

tures that would be entailed if each musical composition had to be separately applied for, cleared and reported;

(c) Dance halls and taverns utilizing the services of orchestras habitually permit their orchestra leaders to choose the music played; such orchestra leaders buy a considerable part of their own copies of music although some of it is obtained in the form of professional copies; orchestra leaders cannot tell when they purchase the music, at what establishments the same will be played or where the same will be performed, or under what circumstances; the purchase of music is an important item which must be taken into consideration by them and orchestra leaders cannot afford to pay any sums in excess of the sums which they now pay for sheet music.

23. Compliance with the Statute would require ASCAP and its licensees to abandon the contracts between them and would also compel each complainant as well as all the members of ASCAP to rescind their respective contracts with ASCAP.

24. Although complainants will be able to license users of their music in the State of Tennessee without doing any act in said State, the Statute prohibits complainants from so doing without incurring the penalties of said Statute.

25. Said Statute is class legislation; it is aimed only at proprietors of music copyrights and no other copyrights, and it exempts the performance of musical works which are protected only at common law. A great many forms and varieties of copyrighted works other than musical compositions are presently and constantly dealt in, licensed, sold and otherwise made available within the State of Tennessee.

26. Said Statute is not a reasonable exercise of the police power of the State of Tennessee; it was enacted, not in the public interest, but rather for the private benefit and gain of a group of users of music in an organized effort to enable such users to have free access to the copyrighted works of complainants and others similarly situated.

27. The system of licensing provided for in said Statute would deprive complainants and others similarly situated of their exclusive rights under the Copyright Act.

28. Defendants have threatened to and will enforce such Statute against these complainants and others similarly situated in the event that such complainants and others similarly situated refuse to comply with said Statute or do any of the acts made unlawful by said Statute.

29. Said Statute is in its terms so drastic, and the penalties attached to the violation of the terms thereof are so great, that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the Courts of the State of Tennessee; if complainants attempt to issue licenses or collect from licensees or attempt to detect infringements of their copyrighted works in the 65 counties of the State of Tennessee where their works are being publicly performed for profit, they will be subjected to a multiplicity of suits and prosecutions; unless defendants are restrained, complainants will be unable to secure any compensation for the public performance for profit of their respective copyrighted musical compositions within the State of Tennessee.

30. Unless this Court determines the invalidity of the Statute, complainants and others similarly situated will

be deprived of the exclusive rights granted to them under the United States Constitution and the Copyright Act, and will be without any remedy for the enforcement of such rights within the State of Tennessee, therefore deprived of their property and liberty without due process of law, and denied the equal protection of the laws, in contravention of Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2, and Article VI, Section 2 of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States, and are deprived of their rights in their respective copyrights under the Copyright Act of March 4, 1909 as amended.

31. Complainants have no adequate remedy at law and are relievable only in this Court of equity.

Conclusions of Law

I. The Statute makes it impossible for complainants to issue licenses in the State of Tennessee for the public performance for profit of their copyrighted musical compositions, except at the risk of incurring prohibitive civil and criminal penalties of said Statute, and the confiscation of their copyrights.

II. The Statute destroys, nullifies and repudiates copyrights granted by the United States Government to complainants and their predecessors in interest.

III. The said Statute violates the treaties made between the United States and foreign countries, under which the nationals of such foreign countries are given reciprocal rights with American citizens with respect to American copyright, and in reliance upon the continued effectiveness of which ASCAP entered into various con-

tracts with similar societies in said foreign countries, particularly with societies of the following countries: Argentina, Austria, Belgium, Brazil, Bulgaria, Czecho Slovakia, Denmark, England, Finland, France, Germany, Hungary, Italy, Jugoslavia, Norway, Portugal, Rumania, Spain, Sweden and Switzerland.

IV. The Statute cannot be justified as a method of exercising the police power. The police power may not be extended to the extent of taking private property for a public use, as is done by this Statute.

V. Said Statute denies to complainants equal protection of the laws, and denies to the complainants due process of law.

VI. Said Statute impairs obligations of contracts entered into between complainants and 217 users of music within the State of Tennessee; and contracts between members of ASCAP and ASCAP; and contracts between ASCAP and similar societies operating in foreign countries; and contracts between writers and composers and their respective publishers.

VII. Said Statute interferes with complainants' liberty of contract in the State of Tennessee and elsewhere.

VIII. Said Statute deprives complainants of their right of free access to the Federal Courts to maintain suits for infringement for the unlawful public performance for profit of their copyrighted musical compositions.

IX. Said Statute is vague, uncertain and indefinite and fails to apprise complainants and others similarly situated, of what acts they may omit or commit which would constitute a crime under said Statute.

X. Said Statute subjects complainants to a multiplicity of suits by each of the 217 users within the State of Tennessee with whom they have contracts, by each of the District Attorneys-General in the State of Tennessee and by the Attorney-General of said State.

XI. The said Statute violates Article I, Sections 8, 9 and 10, Article III, Section 2, Article IV, Section 2 and Article VI, Section 2 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

XII. Complainants have no adequate remedy at law and are relievable only in this Court of equity, and if complainants are not afforded the equitable relief prayed for in the Bill of Complaint, but are required to resist, when criminal prosecutions and other suits or proceedings are instituted under said Statute, it will result in such a multiplicity of suits and entail such delay and so jeopardize and injure complainants in their persons and property as to make the remedy at law grossly inadequate; the penalties for violation of the Statute are so drastic that complainants have no adequate means of testing the validity of the Statute by violating the same and defending against a criminal or civil prosecution in the Courts of the State of Tennessee.

XIII. Complainants are entitled to a decree granting a permanent injunction restraining defendants, and each of them, from bringing or permitting to be brought, directly or indirectly, any proceedings at law or in equity for the purpose of enforcing said Statute against complainants and others similarly situated, their representatives, employees, agents or any of them; from demanding that lists of complainants' musical compositions and other data be filed; from taking any steps to adjudicate the

ownership of complainants' copyrights; from attempting to appoint a receiver; from interfering with existing contracts between complainants and others, including the Society and citizens and residents of the State of Tennessee; from enforcing or threatening to enforce against citizens or residents of the State of Tennessee, the penalties of said Statute in the event such citizens and residents desire to carry out their contracts with the Society; from prosecuting criminally the members of the Society including complainants and their representatives or agents, or any of them, for doing any act or thing to detect infringement and to enforce their respective rights under the Copyright Act; and generally from doing any act or thing to carry out or enforce any of the provisions of said Statute.

XIV. Complainants are jointly interested in the subject of the action and in obtaining the relief demanded; the questions raised by the Bill of Complaint are of common and general interest to all the members of ASCAP who constitute a class so numerous as to make it impracticable to bring them before the Court; complainants herein are suing on their own behalf and on behalf of all the members of ASCAP; Gene Buck, as President of ASCAP, is authorized to bring this suit on its behalf.

XV. Said Statute and each and every part and section thereof is invalid and is hereby declared to be unconstitutional, illegal and void, and a decree may be entered making such declaration and granting the relief hereinabove provided for, and denying any relief to the defendants.

The Washington State Statute.

(Considered in Buck v. Gallagher, 307 U. S. 95.)

Chapter 218, Washington Laws, 1937, page 1070, reads as follows:

AN ACT in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Washington by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the Washington constitutional provisions prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of constitutional provisions; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of this state; repealing certain acts; creating a State Anti-Monopoly Board for a particular function to be exercised only in the event of abuses and violations hereof; defining its duties, and the jurisdiction and duties of courts of record, the duties of the prosecuting attorneys, county auditors, the state treasurer and the secretary of state; and providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on nonresidents, prohibiting certain acts; and providing penalties for violation hereof and repealing section 2690 of Remington's Revised Statutes.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2690 of Remington's Revised Statutes is hereby repealed.

Section 2. It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy of any substantial part thereof.

Section 3. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups

and persons affected by this act, are prohibited from d
criminating against the citizens of this state by chargi
higher and more inequitable rates per piece for music
censes in this state than in other states: Provided, furth
Where the owner, holder, or person having control of a
copyrighted work has sold the right to the single use
said copyrighted work, where its sole value is in its use
public performance for profit, and has received any c
sideration therefor, either within or without the sta
then said person or persons shall be deemed to have s
and parted with the right to further restrict the use of s
copyrighted work or works.

Section 4. In the event two or more persons holdi
separate copyrighted musical works, or any rights flowi
therefrom, whether by assignment, agency agreements,
by any form of agreement, pool their interests, or combi
or conspire, federate, or join together in any way, whet
for a lawful purpose or otherwise, a complete list of th
copyrighted works or compositions shall be filed once e
year in the office of the secretary of state of the St
of Washington, together with a list of the prices charg
or demanded for their various copyrighted works; no p
ment or filing fee shall be required by the secretary
state, and said persons, corporations, or association, f
eign or domestic, shall state therein under oath, that s
list is a complete catalogue of the titles of their clain
compositions, whether musical or dramatic or of any ot
classification, and in addition to stating the name and t
of the copyrighted work it shall recite therein the date e
separate work was copyrighted, and the name of the auth
the date of its assignment, if any, or the date of the assi
ment of any interest therein, if any, and the name of
publisher, the name of the present owner, together with
addresses and residences of all parties who have at
time had any interest in such copyrighted work. The se
tary of state shall require two copies of said list, one

which he shall keep on file, the other shall be forwarded to the offices of the state treasurer at Olympia.

Section 5. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 6. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this act, need not file any such list.

Section 7. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price-fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this act, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentali-

ties in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based in threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, The legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Washington.

Section 8. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons,

even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisons in their behalf, as they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Washington by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same lega

force and validity as if served on him or them personally within the State of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2) with the secretary of the State of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: Provided, That notice of such service and a copy of the summons or process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendants return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

Section 9. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said persons in the superior court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding section; and the court shall enjoin all persons

from violating the provisions of this act and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all

choses of action and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the State Anti-Monopoly Board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and said board, of which the state treasurer shall be chairman, shall have only one function, the discouragement of price-fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and

price-fixing, and preventing violations of this act, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said Anti-Monopoly Board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the prosecuting attorney shall be attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said

defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day perod, and take oath that they will abide by the future orders of the court and the provisions of this act, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, however, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assign-

ment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund: Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 10. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action,

for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law.

Section 11. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500), or imprisonment in the county jail for not more than six months, or both such fine and imprisonment.

Section 12. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, sub-

division, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 13. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the stage of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

1937 Florida Statute.

(Ch. 17807, Laws, 1937)

(Considered in Gibbs v. Buck, 307 U. S. 66; Buck v. Gibbs, 34 F. Supp. 510)

AN ACT declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which determine the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composers, copyright owners, or their heirs, successors, or assigns, to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of any combination as herein declared unlawful in determining license fees and other rights; to require the author, composer and publisher to specify upon the musical composition the selling price thereof, including public performance for profit; to declare that any purchaser thereof, who pays such price therefor shall have the right to render such music privately or publicly for profit; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit, made with any combination, firm or corporation herein declared unlawful, to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit without interference by such unlawful combination; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting

and radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside of the State of Florida, against the collection of license fees or other exactions by such out of the State affiliates for or on account of any combination herein declared unlawful; to provide all liability for any infringement of copyrighted musical compositions conveyed by radio broadcasting, air, wire, electrical transcription or sound producing apparatus, or by personal performance coming outside of the State of Florida and used herein to rest exclusively on the out of the State person, firm or corporation originally sending the same into this State for use herein; to provide penalties for the violation hereof; to empower the State's Attorney, under the direction of the Attorney General, upon the complaint of any party aggrieved by any violation hereof to proceed to enforce the penalties hereof against such combination and any of its members, agents or representatives; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions herein; to provide for the recovery of costs, expenses and attorney's fees; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof.

Be It Enacted by the Legislature of the State of Florida:

Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the members therein constitute a substantial number of the persons, firms or corporations within the United States

who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; and the collection or attempted collection of such license fee or other exaction so fixed and determined by any member, agent, or representative of such combination herein declared unlawful, from any person, firm or corporation within this State, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, hotels, restaurants, clubs, dance halls, recreation rooms, pavilions, colleges, universities, churches, or any one who uses music in the conduct of his business, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered or permit to be rendered such copyrighted vocal or instrumental musical compositions privately or publicly for profit through personal performance, or through radio or any instrumentality or sound producing apparatus, shall be and the same are hereby declared unlawful and illegal; and such license fees or other exactions by such combination or its agents, members, or interested parties shall not be collected in any Court within the boundaries of this State; and such collection or attempted collection of such license fee or other exaction by such combination or its agents, members or interested parties, shall be a separate offense hereunder; and any such combination of authors, composers or publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this State; and the fixing of prices or exactions for use or rendition of copyrighted musical compositions and the collecting or attempting to

collect such license fees or other exactions by it or for its members or other interested parties, is hereby declared illegal and in restraint of trade; and such collection or attempted collection is declared to be an intra-state transaction within this State, and shall be subject to the terms and penalties of this Act.

Section 2-A. All authors, composers or publishers, and their heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition, the selling price thereof so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this State and pays the selling price so specified thereon to the seller or publisher of such musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered, the said copyrighted musical composition by persons individually or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radio loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise, and the same may be so rendered either privately or publicly for profit without further license fees or other exactions; and such copyright owner or proprietor in such event shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private and public performance for profit.

Section 2-B. In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails to affix on the musical composition the selling price, and collect the same, for private or public performances for profit,

at the time and in the manner specified in this Act, then any person, firm or corporation in this State who may have purchased and paid for such copyrighted musical composition, may use the same for private or public performance for profit without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages instituted by such copyright proprietor or owner in any Court within this State.

Section 2-C. Nothing in this Section or this Act shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish or vend the same; nor to prevent authors and composers from determining and fixing the price to be charged for the use or rendition of their copyrighted musical compositions provided such authors and composers act independently of any such combination as in Section 1 hereof declared unlawful.

Section 3. All existing contracts, agreements or licenses now existing within this State, made by any person, firm or corporation with any combination declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any Court within this State, and are hereby declared to have been entered into as intra-state transactions with such unlawful combinations and in restraint of trade. And all such contracts, agreements, licenses and the attempted enforcement thereof may be enjoined by any person, firm or corporation sought to be bound thereby; and any agent, member or representative of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, agreement or license, shall be guilty of a violation of the terms of this Act; and for any

collection or attempted collection of moneys set out in the illegal contract, agreement or license, shall be subject to the penalties of this Act.

Section 4-A. Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

Section 4-B. When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this State from whence copyrighted vocal or instrumental compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this State, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this State, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this State, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this State to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm

or corporation, collecting or attempting to collect such license fee or other exaction against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5-A. Any person, firm or corporation who owns, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this State, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered, by the personal performance of artists, singers, musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever, copyrighted vocal or instrumental musical compositions, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

Section 5-B. When such theatre or theatres, moving picture house or houses, or other places for amusement or performance is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this State, or supplying such

persons, firms or corporations in this State with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly rendered for profit, then such person, firm or corporation outside this State shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this State, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this State against such persons, firms or corporations within this State for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this State is hereby declared to be an agent and representative of such combination declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner

of copyrighted vocal or instrumental musical compositions, and which radio stations and theatres, and other persons, firms or corporations aforementioned, are affiliated with persons, firms or corporations outside this State from whence said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or by furnishing a person or persons to play or sing such music within this State, then the responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this State shall rest with and be upon such affiliated person, firm or corporation from outside this State who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this State; and the owner or proprietor of the copyrighted vocal or instrumental musical compositions shall be and is hereby prohibited from suing for infringement, loss or damage within the boundaries of this State, for the use or rendition of such copyrighted vocal or instrumental musical compositions because such persons, firms or corporations used, rendered or performed the same within the State; and said copyright owner or proprietor shall make his collection therefor from the person, firm or corporation from outside this State from whence the use of said copyrighted vocal or instrumental musical compositions originally emanated; the use or rendition by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers, players and musicians sent into this State, or otherwise, of such copyrighted musical compositions within this State in the manmen set forth in this section, shall be considered for the purpose of this Act, as intra-state business of this State and subject to the control, regulation and prohibition set

forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this State.

Section 7-A. Any person, firm or corporation within this State who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this State, and service of any process against such combination may be had upon such representative or the agent of such representative as herein defined; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this State.

Section 7-B. Furthermore, any person or persons who negotiates for, or collects, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared to be unlawful, and any other person, firm or corporation acting or attempting to act within this State in violation of the terms of this Act, or any representative or agent of any person, firm or corporation who aids or attempts to aid any such unlawful combination as defined in Section 1 hereof, in the violation of any of the terms of this Act, in any manner whatsoever, shall be punished by a

fine of not less than $50.00 or more than $5,000.00, and by imprisonment in the penitentiary not less than one or more than ten years, or by either such fine or imprisonment.

Section 9. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act anywhere within this State, it shall be the duty of the State's Attorneys in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both, under the terms hereof, against any combination as defined in Section 1 hereof, and against any of its members, agents or representatives as herein defined, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided, or to dissolve any such combination as declared unlawful by Section 1 hereof. In civil actions such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 10-A. Any person, firm or corporation in this State aggrieved by reason of anything forbidden in this Act may sue therefor in any Circuit Court in the circuit in which the violation or a part thereof took place, to recover any damages assessed as a result of the violation of the terms of this Act, and shall be entitled to recover his or its costs, including reasonable attorney's fees to be fixed by the Court in such acti .

Section 10-B. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Section 11-A. In any proceeding brought under the terms of this Act, any attorney of record for the Plaintiff may file with the Clerk of the Court in which such action is pending, a petition praying that the defendant or defendants be required to file with the Clerk of said Court exact copies of all documentary evidence, records or data in the possession or under the control of said Defendant or Defendants pertaining to the issues as alleged by the Plaintiff in the cause; and the Circuit Court, upon the presentation to it of such petition, shall determine what part, or all, or any of such evidence shall be produced, and enter an order to that effect. A copy of such order shall be mailed to each Defendant at his, her or its last known address, which shall be deemed sufficient notice and service upon such Defendant or Defendants. Or, the same may be served by mail in the same manner upon the attorneys of record for the Defendant or Defendants, and this shall be deemed sufficient notice and service upon said Defendant or Defendants.

Section 11-B. If said Defendant or Defendants shall fail to file with the Clerk of the Court in which such action is pending said copy or copies of documentary evidence, records or data, and within the time provided in said order, the Court shall adjudge such Defendant or Defendants guilty of contempt and shall assess a fine of $100.00 against such of the Defendants for each and every day that such Defendant or Defendants fail to comply with said order,

and judgment shall be entered accordingly. And the Plaintiff may collect the same against the Defendant or Defendants with interest thereon and costs, including a reasonable attorney's fee. And the Court shall determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs and attorney's fees.

Section 12. If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconstitutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part or parts, shall be held and deemed to be valid as if such excluded parts had not been included herein.

Section 13. Nothing in this Act shall be construed as repealing any other laws or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Florida.

Section 14. This Act shall become effective immediately upon its becoming a law.

Approved by the Governor June 9, 1937.

Filed in Office Secretary of State, June 10, 1937.

1939 Florida Statute.

(CHAPTER 19653, FLORIDA LAWS, 1939)

(Considered in Buck v. Gibbs, 34 F. Supp. 510)

AN ACT relating to public performing rights in copyrighted musical compositions and dramatico-musical compositions; defining the same; regulating licensing of same; prescribing filing fees; making provisions for a resident agent in the state; levying a tax on the gross receipts from the licensing of such rights within the State of Florida; providing for the enforcement of this Act; the promulgation of rules and regulations, governing the enforcement of this Act; appropriating the proceeds of the tax and fees levied herein and repealing certain laws in conflict herewith.

Be It Enacted by the Legislature of the State of Florida:

Section 1. As used in this Act, "person" means any individual, resident or non-resident, of this state, and every domestic or foreign or alien partnership, society, association or corporation; the words "performing rights" refer to "public performance for profit"; the word "user" means any person who directly or indirectly performs or causes to be performed musical compositions for profit; the term "blanket license" includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners; the term "blanket royalty or fee" includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights.

Section 2. It shall be unlawful for any person to sell, license the use of, or in any manner whatsoever dispose of, in this state, the performing rights in or to any musical

composition or dramatico-musical composition which has been copyrighted, and is the subject of a valid existing copyright, under the laws of the United States, or to collect any compensation on account of any such sale, license, or other disposition, unless such person:

(a) Shall first have filed with the Comptroller on forms prescribed by the Comptroller a list describing each such musical composition and dramatico-musical composition, the performing rights in which said person intends to sell, license or otherwise dispose of in this state, which description shall include the following; The name and title of the copyrighted composition, the date of the copyright, the number or other identifying symbol given thereto in the United States copyright office, the name of the author, the name of the publisher, the name of the present owner of the copyright to said composition, and the name of the present owner of the performing rights thereto. Additional lists of such copyrighted compositions may be filed by any such person from time to time, and shall be subject to all the provisions of this Act. A filing fee of two cents a composition shall be required by the Comptroller for filing any list under this Act.

(b) Shall simultaneously file an affidavit which shall describe the performance rights to be sold, licensed or otherwise disposed of and shall state that the compositions so listed are copyrighted under the laws of the United States, that the facts contained in the list to which said affidavit relates are true, that affiant has full authority to sell, license or otherwise dispose of the performing rights in such composition; and the affidavit shall set forth the name, age, occupation and residence of the affiant; and if an agent, the name, occupation and residence of his principal.

Section 3. The list provided for in the preceding section shall be made available by the Comptroller to all persons for examination, and taking of copies, in order that any user of such compositions in this state may be fully advised concerning the performing rights therein, and avoid being overreached by false claims of ownership of said performing rights, and also avoid committing innocent infringements of said works. The Comptroller may, if in his discretion he deems it necessary, in order to prevent such overreaching and to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, cause a list of all such copyrighted material filed with him to be published once a year or oftener in a form and medium which he shall deem suitable for said purpose. A duplicate of any list so filed by any such person shall at his request be certified by the Comptroller and shall by the Comptroller be given or delivered to such person, who shall exhibit the same on demand of anyone to whom such person seeks to sell, license or otherwise dispose of said performing rights.

Section 4-A. It shall be unlawful for two or more owners of the copyrights of musical compositions or dramatico-musical compositions to associate or combine together in any manner, directly or indirectly, for the purpose of issuing blanket licenses for the public performance for profit of their compositions upon a blanket royalty or fee covering more than one, or all, of such compositions owned or controlled by the members of such association unless each individual copyright owner included in such association, or such association in behalf of each individual copyright owner, also shall make available to each user of such compositions within the state, at the option of the user, the right to perform publicly for profit each such copyrighted musical composition owned by him or it at a price established for each separate performance of each such

composition. To this end, there shall be filed with the Comptroller, either as a part of the list required by Section 2 hereof or as a separate document by such copyright owner, or by such association in behalf of such owner, a schedule of prices for the performing rights to each separate performance for profit of each such composition contained in such list, together with an affidavit of the copyright owner of such compositions that the price so stated has been determined by such copyright owner acting for himself and not either directly or indirectly in concert or by agreement with the owner or owners of any other copyrights. Such schedule of prices may contain reasonable classifications determined by use and function, or either, of the users of said compositions, with separate price for each classification, provided that there is equal treatment of all persons within each classification and that there is no unreasonable discrimination between classifications. Any copyright owner may at his election fix one price which shall be applicable to each rendition of each of such compositions owned by him except to the extent that he elects to name specific compositions and to fix other prices for each rendition thereof, and said prices shall remain in force and effect until a new schedule of prices with respect to the performing rights to such compositions has been similarly filed in the office of the Comptroller, at any time, at the election of such owner, changes in prices to become effective seven days from the date of filing thereof. The schedule of prices provided for herein shall be made available by the Comptroller to all persons for examination and the taking of copies and may be published by him in the same manner as provided in Section 3 hereof.

Section 4-B. Any person issuing a blanket license for performance rights shall file with the Comptroller within thirty days from the date such blanket license is issued a true and complete copy of each such license issued or sold

with respect to performance within this state, together with the affidavit of such person that such copy is a true and complete copy of the original and that it sets forth each and every agreement between the parties thereto with respect to such performing rights. The Comptroller shall charge for filing such contracts the same fee allowed clerks of the circuit court for similar services.

Section 4-C. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of, in this state, the performing rights in or to any musical composition or dramatico-musical composition, to make any charge or to contract for or collect any compensation as a condition of using said performing rights based in whole or in part on any program not containing any such composition, and any such charge or contract for compensation shall be valid and enforceable only to the extent that it is based and computed upon a program in which such composition is rendered.

Section 4-D. It shall be unlawful for any person selling, licensing the use of or in any manner whatsoever disposing of or contracting to dispose of in this state public performing rights in or to any musical composition or dramatico-musical composition to make any charge or to contract for or collect any compensation for the use or performance of any such composition that has not been listed with the Comptroller as provided in Section 2.

Section 5. At the time of filing the information required in Sections 2 and 3, the owner of said performing rights shall execute and deliver to the Secretary of State on a form to be furnished by the Secretary of State, an authorization empowering the Secretary of State to accept service of process on such person in any action or proceeding, whether cognizable at law or in equity, arising under this

Act, and designating the address of such person until the same shall be changed by a new form similarly filed; and service of process may thereafter be effected in this state on such person in any such action or proceeding by serving the Secretary of State with duplicate copies of such process; and immediately upon receipt thereof the Secretary of State shall mail one of the duplicate copies by registered mail to the address of such person as stated on authorization last filed by him. A filing fee of $5.00 shall accompany this notice and the Secretary of State shall deposit same in the General Revenue Fund of the State of Florida.

Section 6. No person shall be entitled to commence or maintain any action or proceeding in any court with respect to such performing rights, or to collect any compensation on account of any sale, license or other disposition of such performing rights, in this state, except upon pleading and proving compliance with the provisions of this Act.

Copies, certified by the Comptroller as such, of each or all of the lists, license agreements, affidavits and other documents filed with the Comptroller pursuant to the requirements of this Act, shall be furnished by the Comptroller to any person upon request at the prices regularly charged by a clerk of the circuit court for such work. Such certified copies shall be admitted in evidence in any action or proceeding in any court to the same extent as the original thereof.

Section 7. From and after the effective date of this Act there is hereby levied, and there shall be collected, a tax for the act or privilege of selling, licensing, or otherwise disposing of performing rights in such compositions in this state, in an amount equal to three per cent of the gross receipts of all such sales, licenses or other dispositions of performing rights in this State, payable to the State Comptroller on or before the fifteenth day of March, 1940, with

respect to all such gross receipts for the portion of the calendar year 1939 after the effective date of this Act, and annually thereafter, on or before the fifteenth day of March of each succeeding year, with respect to the gross receipts of the preceding calendar year. A return on a form prescribed by the Comptroller shall be made by all persons subject to this tax on or before the 15th day of March of every year which shall accompany a remittance of the tax due.

The Comptroller shall have authority through his authorized agents to examine and audit the books and records of any person he may deem subject to the tax or fees under this Act and may require such persons to appear before him at his office in the Capitol, in the City of Tallahassee, Florida, with such records and papers as may be necessary after giving thirty days' notice to such person through said person's authorized agent, the Secretary of State.

The Comptroller shall also have authority through his authorized agents to examine and audit the books, records and accounts of any licensee or user making payments for use of public performing rights in the State of Florida to any person in order that the Comptroller may determine or check on gross receipts of those selling or licensing public performing rights in the State of Florida. Any person refusing the Comptroller or his duly authorized agents access to such books, records and accounts shall be subject to penalties prescribed in Section 9 hereof and may be required to appear in person with all books, papers and accounts required by the Comptroller at the Comptroller's office in the Capitol, Tallahassee, Florida, within ten days after receipt of notice which the Comptroller shall send by "registered mail, return receipt requested."

Should the Comptroller determine that any person liable for any tax or fees under this Act has made an incorrect return or has made no return at all, or has failed to pay

any tax or fees due, the Comptroller shall after determining the amount of such tax or fees due the State of Florida, from the best information at his command, certify such claim for delinquent taxes to said person through his duly designated agent, the Secretary of State, and unless payment of such delinquent tax is received within thirty days of delivery of said notice to the Secretary of State the Comptroller shall apply to a Circuit Judge in Leon County for the appointment of a receiver to take over and administer all assets of said delinquent taxpayer in the State of Florida.

The Circuit Judge, upon the Comptroller's application properly authenticated, shall appoint some agent of the Comptroller as receiver, to serve without further compensation, but who shall be allowed all actual expenses. After posting such bond as the judge may determine proper, the said receiver shall take over and administer the affairs of said delinquent taxpayer within the State of Florida, collect accounts and do all things necessary to protect the interests of both the State of Florida and the said delinquent taxpayer from such collections as he may make, he shall first pay the expenses of the receivership and any litigation incident thereto and the tax plus interest at the rate of 2% per month or fraction thereof from the last day of the year for which the tax was due.

After having satisfied the claims of the State and paid all costs of the receivership, the receiver shall make a return to the court, which shall order all assets returned to the taxpayer.

Section 8. It shall be unlawful for any person, without the consent of the owner thereof, if said owner shall have complied with the provisions of this Act, publicly to perform for profit, in this state, any such commission, or for any person knowingly to participate in the public performance for profit of such composition, or any part thereof.

Section 9. Any violation of this Act shall constitute a misdemeanor, to be punished as provided elsewhere in the laws of this state.

Section 10. Any person or persons who negotiates or collects or attempts to collect license fees or other exactions or acts in any capacity whatsoever as a representative or agent for any person owning public performing rights of any copyrighted composition shall be subject to all the penalties in this Act provided for violations thereof.

Section 11. Any person in this State aggrieved by reason of any violation of this Act may sue thereof in the circuit court in which he resides or in the circuit in which the violation took place to recover any damages as the result of the violation of the terms of the Act or to require specific performance under the provisions of this Act and shall be entitled to recover his costs, including reasonable attorneys' fees to be fixed by the court.

Section 12. The several Circuit Courts of this State shall have jurisdiction to prevent and restrain violations of this Act, and, on the complaint of any party aggrieved because of the violation of any of the terms of this Act, anywhere within this state, it shall be the duty of the State's attorney in their respective circuits, under the direction of the Attorney-General, to institute proceedings, civil or criminal or both under the terms hereof, to enforce any of the rights herein conferred, and to impose any of the penalties herein provided. In civil actions such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of have been duly notified of such petition, the Court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such

petition and before final decree, the Court may at any time make such temporary restraining order as shall be deemed equitable.

Section 13. In the event of the failure of the State's Attorney and Attorney-General to act promptly, as herein provided, when requested so to do by any aggrieved party, then such party may institute a civil proceeding in his own behalf, or upon behalf of Plaintiff and others similarly situated, as the State's Attorney and the Attorney-General could have instituted under the terms of this Act.

Secion 14. After the costs and expenses of enforcing this act and the collection of the taxes and fees herein levied and imposed are deducted, the amount of which costs and expenses are hereby appropriated to be paid from the proceeds of this act, there is hereby appropriated the entire balance paid into the Comptroller under and by virtue of this act to the General Revenue Fund of the State of Florida.

Section 15. All laws or portions thereof whether general, special or local, which relate to the same subject matter as this Act and which are inconsistent with the provisions of this Act, are hereby superseded by the provisions of this Act to the extent that such inconsistency exists.

Nothing contained in this Act shall be so construed as to impair or affect the obligation of any contract or license which was lawfully entered into prior to the effective date of this Act.

Provided, however, nothing in this Act shall be construed to repeal, supersede or modify any of the statutes of the State of Florida pertaining to monopoly or restraint of trade, including but not limiting the generalities of the foregoing Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14 of Chapter 17807, Laws of Florida, 1937. Provided, further, the revenue provisions of this Act shall take effect

immediately it becomes a law and persons having contracts to sell public performing rights to users in the State of Florida shall file copies of such contracts with the Comptroller within thirty days of the date this act becomes a law and shall within ninety days of the time this Act becomes a law comply with other provisions of this Act that require filing of any date.

Section 16. Any section in this Act, or any part of any section that shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions hereof.

Section 17. This Act shall take effect immediately upon its becoming a law.

The Nebraska Statute.

(Considered in Buck v. Swanson, 22 F. Supp. 377)

Chapter 138, Nebraska Laws, 1937, reads as follows:

AN ACT relating to monopolies, declaring to be an unlawful monopoly and its purposes to be in restraint of trade, any combination of persons, firms or corporations which fixes and determines the amount of money to be paid to it or to its members for the privilege of rendering privately or publicly for profit within this state copyrighted vocal or instrumental musical compositions, when such combination is composed of a substantial number of all musical composition copyright owners or their heirs, successors or assigns; to require each composer and each author of vocal or instrumental copyrighted musical compositions to act independently of each other and of any combination as herein declared unlawful in determining license fees and other rights within this state; to require the author, composer, printer and publisher to specify upon the musical composition the selling price thereof for all uses that may be made thereof including public performance for profit within this state; to declare that any purchaser thereof, who pays such price therefor, shall have the right to render such music privately or publicly for profit within this state; to declare all existing agreements requiring license fees or other exactions for the privilege of rendering copyrighted musical compositions publicly for profit within this state with any combination of persons, firms or corporations herein declared unlawful to be void and nonenforceable; to permit the present owners, possessors and users of such copyrighted music to render the same privately or publicly for profit within this state without interference by such unlawful combination; to provide for the appoint-

ment of a receiver and injunctive relief and the dissolution of such combination as here declared unlawful; to determine in such action the legal owner of such copyrighted musical compositions; to adjust and fix in such action the license fee to be paid, if any, and the terms for the use of such musical compositions in this state; to provide for the protection of theatres, moving picture houses, hotels, places for education and public performance or amusement, radio broadcasting, radio receiving and radio re-broadcasting stations affiliated with other persons, firms or corporations outside the State of Nebraska against the collection of license fees or other exactions by such out-of-the-state affiliates for or on account of any combination declared unlawful under Section 1 hereof; to provide that the responsibility and all liability for any infringement of copyrighted musical compositions conveyed by radio broadcast, air, wire, electrical transcription, or sound production apparatus, or by personal performance coming from outside this state, and used herein, to rest entirely with the out-of-the-state person, firm or corporation originally emanating or sending the same into this state for use herein; to provide penalties for the violation hereof; to empower the County Attorneys and the Attorney General, upon complaint of any party aggrieved by any violation hereof, to proceed to enforce the penalties hereof against such combination and any of its representatives, members or agents, and against the property of such unlawful combination within this state; to define the method of service of process upon such combination as herein declared illegal; to empower any party aggrieved by any violation hereof to proceed in his own right hereunder; to define the legal procedure required to carry out the provisions hereof; to provide for the recovery of costs, expenses and attorney's fees; to provide for the filing of each said composition in the office of the Secretary of State before sell-

ing or disposing of the same, together with the amount of filing fee therefor; to provide that the terms of this Act shall be cumulative; to provide that any part of this Act declared illegal shall not affect the validity of the remaining parts hereof; and to declare an emergency.

Introduced and read first time February 15, 1937.
Final Form Sent to Printer May 12, 1937.

Be It Enacted By The People of The State of Nebraska:

Section 1. It shall be unlawful for authors, composers, proprietors, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, club, firm, partnership, corporation, or other group or entity, called herein a combination, either within this state or outside thereof, when the members, stockholders, or interested parties therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when at least one of the objects of any such combination is the determination and the fixation of license fees or other exactions required by such combination for itself or its members, stockholders or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit within this state for the purpose of preventing free competition among or with different and competing copyright owners or among or with persons, firms, corporations or associations in this state using or rendering such copyrighted matter by public performance for profit; or for the purpose of dividing among them the proceeds of the earnings of such copyright owners; or for the purpose of fixing the exactions and fees for the rendition or use of copyrighted matter which any copyright

owner must charge; and the collection or attempted collection within this state of such license fee or other exaction so fixed and determined, by any member, agent or representative of any such combination herein declared unlawful, from any person, firm, corporation or association within this state, including theatres, radio receiving, radio broadcasting and radio re-broadcasting stations, moving picture houses, athletic associations, hotels, cafes, restaurants, clubs, dance halls, recreation rooms, amusement parks, pavilions, churches, colleges, schools, universities, or the officers, directors, proprietors, managers, owners or representatives thereof, who render or cause to be rendered, or permit to be rendered, such copyrighted vocal or instrumental musical compositions privately or publicly for profit within this state through personal performance, or through radio, or any instrumentality or sound producing apparatus, shall be and the same is hereby declared unlawful and illegal; and such license fees or other exactions shall not be collected in any court within the boundaries of this state; and each collection or attempted collection of such license fee or other exaction by such combination or its agents, representatives, members, stockholders or interested parties shall be a separate offense hereunder; and any such combination of authors, composers, publishers, or their heirs, successors or assigns, as herein defined, is hereby declared to be an unlawful monopoly in this state; and such fixing of prices for use or rendition of copyrighted musical compositions within this state by such unlawful combination and the collecting or attempting to collect such license fees or other exactions by it or for its stockholders, members or other interested parties within this state is hereby declared illegal and in restraint of trade, and such collection or attempted collection thereof is declared to be an illegal intrastate transaction within this state and shall be subject to the terms and penalties of this Act. In any action, civil or criminal, instituted

under the provisions of this Act, it shall be *prima facie* evidence against any party to such action of the existence of such unlawful combination for the purposes in this Act enumerated, if a substantial number of all authors, composers, proprietors, publishers, owners or their heirs, successors or assigns of copyrighted vocal or instrumental musical compositions in the United States, are shown to be members of any society, association, club, firm, partnership, corporation, group or entity.

Section 2. (A). All authors and composers, and their heirs and assigns, shall have within this state all the benefits conferred by the Copyright Laws of the United States, being the act of March 4, 1909, c. 320, Section 1 (e), 35 Stat. 1073, Title 17, U. S. C. A. Each author, composer and publisher shall act independently of any and all substantial number or numbers of other authors, composers and publishers, and also independently of any such combination as in Section 1 hereof declared unlawful, in determining and fixing the price to be charged for the use or rendition of his copyrighted musical compositions within this state, and the author, composer or publisher, or his, her, or its heirs, successors or assigns, shall specify or cause to be specified legibly upon the musical composition, in whatever form the same may be published, printed, manufactured or otherwise prepared for use or rendition within this state, the selling price thereof for private rendition or public rendition for profit if made available for such public rendition so arrived at and determined for all uses and purposes; and when any purchaser or user acquires the same within this state and pays the selling price so specified thereon to the seller or publisher of said copyrighted musical composition, then said purchaser or user may use or render, or cause or permit to be used or rendered within this state, the said copyrighted musical composition by persons individually

or with other performers, actors and singers, or by an individual instrument player, or by orchestras and bands, or over or through or by means of radios, loud speakers, radio receiving, radio broadcasting and radio re-broadcasting stations, electrical transcriptions, musical records, sound apparatus or otherwise within this state, and the same may be so rendered either privately or publicly for profit when so purchased and paid for without further license fees or other exactions; and such copyright owner or proprietor, in the event of such payment, shall be deemed to have received full compensation for the rendition and all uses of such musical compositions for private purposes or for public performance for profit by such purchaser within this state.

(B.) In the event any author, composer or publisher, or any of his heirs, successors or assigns, fails or refuses to affix on the musical composition the selling price, and collect the same, for private and public performances for profit, at the time and in the manner specified in this Act, then any person, firm or corporation in this state who may have purchased and paid for such copyrighted musical composition may use the same for private or public performance for profit within this state without further license fee or other exaction; and such person, firm or corporation so using or rendering the same shall be free from any and all liability in any infringement or injunction suit, or in any action to collect damages, instituted by such copyright proprietor or owner in any court within the boundaries of this state.

(C.) Nothing in this section, or this Act, shall be construed to give to any purchaser of copyrighted musical compositions, as herein provided, the right to resell, copy, print, publish, or vend the same.

(D.) Any composer, author or publisher of vocal or instrumental copyrighted musical compositions, or any person, firm or corporation controlling the sale or distribution

of said compositions, whether or not within the purview of the combination described in Section 1 of this Act, shall, before selling or disposing of any such composition in this state, file in the office of the Secretary of State a copy of each said composition upon which shall be written, printed or typed over his or its signature a statement to the effect that he or it controls the sale or disposition of such composition; and provided further, said person, firm or corporation who shall make such filing shall accompany the same with a fee of Twenty-five Cents (25¢) with each copy of said composition so filed to reimburse the Secretary of State for keeping in current and convenient form, easily accessible to the public, the titles of said compositions and the names of the persons, firms or corporations who shall file said copies from time to time; and provided further, said Secretary of State shall deposit all the fees received hereunder weekly with the State Treasurer who shall credit said fees to the general fund of the state.

Section 3. All existing contracts, agreements, licenses or arrangements now existing within this state made by any person, firm or corporation with any combination, declared unlawful under Section 1 hereof, are hereby declared void and non-enforceable in any court within the boundaries of this state, and are hereby declared to have been entered into as intrastate transactions with such unlawful combination and in restraint of trade; and further, all such contracts, agreements, licenses, arrangements and the attempted enforcement thereof within this state, may be enjoined by any person, firm or corporation sought to be found thereby; and any member, representative or agent of such unlawful combination enforcing or attempting to enforce the terms of such existing contract, license or arrangement within this state shall be guilty of a violation of the terms of this Act, and for each such collection or attempted collection shall be subject to the penalties hereinafter provided.

Section 4. (A). Any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, shall be and is hereby authorized to receive, broadcast and re-broadcast copyrighted vocal or instrumental musical compositions within this state, the copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination or to its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms hereof.

(B.) When such radio receiving, radio broadcasting or radio re-broadcasting station is affiliated with any other person, firm or corporation owning, leasing or operating a radio broadcasting station outside this state from whence copyrighted vocal or instrumental musical compositions originate or emanate, and which are received, used, broadcast or re-broadcast within this state, in accordance with the terms of any affiliation agreement or other contract, then such person, firm or corporation owning, leasing, operating or managing a radio broadcasting station outside this state, shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect, from any person, firm or corporation who owns, leases, operates or manages a radio broadcasting, radio receiving or radio re-broadcasting station within this state, any herein declared non-collectible license fee or other exaction, for the purpose of paying or repaying the same outside this state to any combination, or its members, stockholders or other interested parties, declared unlawful by Section 1 hereof; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible within this

state shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 5. (A.) Any person, firm or corporation who owns, leases, operates or manages any theatre or theatres, moving picture house or houses, or a similar place or places for amusement and public performance within this state, shall be and is hereby authorized to receive, use and render, or cause to be received, used and rendered within this state, by the personal performance of artists, singers musicians, orchestras, bands, or actors, or by loud speakers, radio, sound production or re-production apparatus or instrumentalities, or electrical transcriptions, or by any other means of rendition whatsoever within this state, by the personal performance of artists, singers, musicians, copyrights of which are owned or controlled by any such combination declared unlawful by Section 1 hereof, without the payment, to such combination, or its agents, representatives or assigns, of any license fee or other exaction declared illegal and non-collectible by the terms of this Act.

(B.) When such theatre or theatres, moving picture house or houses, or other places for amusement or performance within this state is or are affiliated or under contract in any manner whatsoever with any other person, firm or corporation furnishing in any form or manner copyrighted musical compositions from outside this state, or supplying such persons, firms, or corporations in this state with radio broadcasts or electrical transcriptions, sound production instrumentalities or apparatus, or artists, performers, musicians, singers, players, orchestras, bands or other artists or talent, wherein or whereby copyrighted vocal or instrumental musical compositions are privately or publicly ren-

dered for profit, then such person, firm or corporation outside this state shall be and is hereby prohibited from in any manner charging or attempting to charge, or collecting or attempting to collect within this state, from any such person, firm or corporation who owns, leases, operates or manages such theatre or theatres, moving picture house or houses, or other places for amusement or public performance within this state, any license fee or other exaction for the purpose of paying or repaying the same to any such combination declared unlawful by Section 1 hereof for the use, rendition or performance of such copyrighted musical compositions within this state; and any such person, firm or corporation, collecting or attempting to collect, such license fee or other exaction from outside this state against such persons, firms or corporations within this state for the purpose of paying or reimbursing itself for having paid any such license fee or other exaction herein declared unlawful and non-collectible, shall be deemed guilty of a violation of the provisions of this Act; and such person, firm or corporation from without this state is hereby declared to be an agent and representative of such combination as declared illegal and unlawful by Section 1 hereof, and shall be subject to all the penalties hereof.

Section 6. Whenever any person, firm or corporation who owns, leases, operates or manages a radio receiving, radio broadcasting or radio re-broadcasting station, or theatre or moving picture house or similar place for amusement and public performance or for the rendition in any manner of copyrighted vocal or instrumental musical compositions within this state, and which radio stations and theatres, and other persons, firms or corporations, aforementioned, are affiliated with persons, firms or corporations outside this state from where said copyrighted vocal or instrumental musical compositions originally emanate either by radio, sound production instrumentalities or apparatus, or

by furnishing a person or persons to play or sing such music within this state, then any responsibility and liability for the use of all copyrighted vocal or instrumental musical compositions thus emanating from outside this state and thus rendered in this state shall rest with and be upon such affiliated person, firm or corporation from outside this state who originates the broadcasting or the performance or the sound production instrumentality or apparatus, or sends the personal singers or performers into this state; and, if the owner of any copyrighted musical composition commences any action within this state on account of any use or rendition thereof in this state through such affiliate or affiliates, then any defendant in such action may interplead such affiliate or affiliates in such action; and any judgment which may be rendered in favor of the copyright owner shall be paid and satisfied by such affiliate or affiliates; and, if paid or satisfied by the defendant user in this state, such defendant shall be subrogated in said action or otherwise to all rights of the plaintiff in said judgment as against said affiliate or affiliates, whether the latter is or are a party or parties in said action or not; and in any event such affiliate or affiliates shall be liable to such user to the full extent of his liability to such copyright owner, in the absence of any agreement to the contrary; and any combination declared unlawful by Section 1 of this Act which is the owner or proprietor of or controls the copyrighted vocal or instrumental musical compositions, its agents or representatives shall be and are hereby prohibited from suing for infringement, loss or damage within the boundaries of this state, for the use or rendition of such copyrighted vocal or instrumental musical compositions so originating or emanating because such persons, firms or corporations used, rendered or performed the same within this state; the use or renditions by radio broadcast, radio re-broadcast or sound producing instrumentalities or apparatus, or electrical transcription, or by the personal performance of singers,

players and musicians sent into this state, or otherwise, of such copyrighted musical compositions within this state in the manner set forth in this section, shall be considered, for the purpose of this Act, as intrastate business of this state and subject to the control, regulation and prohibitions set forth in this Act notwithstanding that such copyrighted musical compositions originated or emanated from without this state.

Section 7. (A.) Any person, firm or corporation within this state who shall act as the representative of any combination herein declared unlawful as defined in Section 1 hereof, shall, for the purpose of this Act, be deemed an official representative and agent of such unlawful combination and shall be construed to be doing business within this state, and service of any process against such combination may be had upon such representative or the agent of any such representative as herein defined within this state; and when so served, such process shall have the same legal effect as if served upon a duly elected officer or managing agent or other official representative upon whom service might otherwise be made upon such combination within this state.

(B.) Furthermore, any person or persons who negotiates for, or collects within this state, or attempts to collect license fees or other exactions, or who acts as the representative or agent for any combination declared unlawful in Section 1 hereof, shall, for the purpose of this Act, be considered as a part of said unlawful combination; and such person, firm or corporation shall be subject to all the penalties in this Act provided for violations thereof.

Section 8. Any combination as in Section 1 hereof declared unlawful and any other person, firm or corporation, acting or attempting to act, within this state in violation of the terms of this Act, or any representative or agent of any

person, firm or corporation who aids or attempts to aid any such unlawful combination, as defined in Section 1 hereof, in the violation of any of the terms of this Act in any manner whatsoever within this state, shall be deemed guilty of a misdemeanor and shall be fined in any sum not more than $5,000.00 or imprisoned for not more than one (1) year, or both, such fine and imprisonment for each and every violation of the terms hereof.

Section 9. (A). The County Attorney in each county in this state wherein a violation of any of the terms of this Act takes place, in whole or in part, is hereby authorized upon the complaint of any party aggrieved to institute a civil or criminal action, or both, under the terms hereof against any combination declared unlawful as defined in Section 1 hereof, and against any of its members, stockholders or other interested parties, and its agents or representatives as herein defined, and to enforce any of the rights herein conferred, and to impose any of the penalties herein provided.

(B). The Attorney General of the State of Nebraska is hereby empowered to proceed upon the request of any County Attorney to aid and assist, or to take charge of, any prosecution or suit for any violations of any of the terms hereof.

(C). Or, the Attorney General, on the complaint of any party aggrieved, because of the violation of any of the terms of this Act anywhere within this state, shall proceed in the District Court in any county in which all or any part of the offense or violation was committed, to institute action against any combination defined as unlawful by Section 1 hereof, and against the representatives or agents of any such combination, either in a criminal action to enforce the penalties hereof, or in a civil action to enforce all rights hereunder, or to dissolve any such combination as declared

unlawful by Section 1 hereof, or he may proceed by both civil and criminal actions; in such action or actions, the plaintiff shall be the State of Nebraska; and any interested party may, upon application, be granted leave to intervene in such a civil action.

(D). The District Court shall, in such dissolution or other civil suit, upon the application and intervention in said action of any member, stockholder or other interested party of said unlawful combination, adjudicate the ownership of any copyrighted vocal or instrumental musical composition theretofore owned or controlled by said unlawful combination; and furthermore, such District Court shall have and is hereby granted the power and authority to appoint a receiver and to issue injunctive and mandatory temporary and permanent orders in reference to any of the issues involved in such action; and any person, firm or corporation within this state who is a user in any manner of any copyrighted vocal or instrumental musical compositions theretofore owned or controlled by such unlawful combination may, upon application, intervene in such action and therein have adjusted, determined and adjudicated all rights for or against the person, firm or corporation whom the Court shall finally determine to be the owner or proprietor of such copyrighted vocal or instrumental musical compositions; and said parties shall be permitted no other remedy in any other court within the boundaries of this State, whether the same be for damages, infringement or otherwise, until final decree has been had in said action determining the ownership and terms for use of such copyrighted musical compositions.

Section 10. (A). Any person, firm or corporation within this state aggrieved by any violation of the terms hereof by any unlawful combination, as defined in Section 1 hereof, or any of its representatives or agents, may proceed in his

or its name and right in the District Court in the county in which the violation, or a part thereof, took place, to recover any right, loss or damage that may have resulted from any violation of the terms hereof; the plaintiff in such action shall be entitled to recover his or its costs and expenses and a reasonable attorney's fee to be fixed by the court in such action.

(B). In the event of the failure or refusal of a County Attorney, or the Attorney General, to promptly act, as herein provided, when requested so to do by any aggrieved party, then such party may institute in his own behalf, or upon behalf of the plaintiff and all others similarly situated, the same civil action as such County Attorney or Attorney General might have instituted under the terms of this Act, and with like procedure, powers, authority, rights, privileges, effect a final decree as the said County Attorney or Attorney General might have done under the terms of this Act.

Section 11. (A). In any action, either civil or criminal, that may be had or instituted under the provisions hereof for any violation of the terms hereof, the plaintiff in any form of action brought hereunder, and in which action any combination declared unlawful, as defined in Section 1 hereof, or the members, stockholders, or other interested parties, or their agents or representatives of such unlawful combination, are defendants, any attorney of record for the plaintiff may file a request in writing with the Clerk of the District Court in which said action is pending, demanding that the defendant or defendants furnish plaintiff, or file with the Clerk of the Court, in which the action is pending, exact copies of all documentary evidence, facts and figures, records or data in the possession or under the control of the defendant or defendants pertaining to the issues as alleged by the plaintiff to establish or refute any issues in the case;

and the District Court, upon the presentation to it of such written demand by the plaintiff, shall thereupon determine that part or all of such evidence which shall be produced, and shall enter an order fixing a time for the defendant or defendants to furnish and file such information as ordered. A copy of said order shall be mailed to each defendant at his or its last known address, which shall be deemed sufficient notice and service upon said defendant or defendants; or the same may be served by mail in the same manner upon each attorney of record for the defendant or defendants, and when so served, the same shall be deemed notice and service upon the defendant or defendants for whom said attorneys appear of record.

(B). If said defendant or defendants shall fail to furnish plaintiff or his or its attorney, or file with the Clerk of the Court in which the action is pending, said copy or copies of said documentary evidence, facts, figures, records, books and data set forth in said order within the time specified in said order, the Court shall adjudge said defendant or defendants guilty of contempt of court, and the Court shall assess a fine of $100.00 against such of the defendants for each and every day that such defendant or defendants fails to comply with said order; and judgment shall from time to time be rendered therefor, and the plaintiff may collect the same against the defendant or defendants with 6% interest thereon and the costs, including expenses and attorney's fees to be fixed by the Court, in the same manner as other judgments are collected in this state. The Court shall find and determine when the judgment is rendered what disposition shall be made of the proceeds collected after the payment of costs, expenses and any attorney's fees that may be allowed.

Section 12. If any section, subdivision, sentence or clause in this Act shall, for any reason, be held void or non-

enforceable, such decision shall in no way affect the validity or enforceability of any other part or parts of this Act.

Section 13. Nothing in this Act shall be construed as repealing any other law or parts of laws in reference to any of the matters contained in this Act; and the rights and remedies and provisions herein provided shall be and are hereby declared to be cumulative to all other rights, remedies and provisions now provided under the laws of the State of Nebraska.

Section 14. Whereas an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

Tennessee Statute.

(Considered in *Buck* v. *Harton*, 33 F. Supp. 1014. This Statute is substantially identical with Ch. 218, Washington Laws, P. 1070, involved in *Buck* v. *Gallagher*, 307 U. S. 95, and before this Court in the case at bar.)

(CHAPTER 212, TENNESSEE LAWS, 1937)

SENATE BILL No. 1020

AN ACT entitled an Act in aid of the Federal Copyright Laws, to assist in effectuating their true intent and their enforcement in the State of Tennessee by removing and declaring illegal certain monopolistic abuses and activities wrongfully practiced under the guise of copyrights within the state by price fixing combinations, monopolies, and pools; to enforce the laws of the State of Tennessee prohibiting price fixing monopolies and combinations in restraint of commerce and trade; providing penalties for combining rights granted by the copyright laws where the effect of such combination results in the use of copyright privileges as instrumentalities of oppression and extortion within the state in violation of law; and encouraging the rendition, creation and production of copyrighted works among the school children and citizens of the State of Tennessee; encouraging the marketing and acceptance of copyrighted works, created by the citizens of this state; defining the jurisdiction and duties of courts of record, the duties of the district attorneys, receivers, the state treasurer and the secretary of state; providing for the appointment of a receiver in certain instances; defining certain terms; providing for service of process on non-residents; prohibiting certain acts; and providing penalties for violation hereof.

Be it Enacted by the General Assembly of the State of Tennessee:

Section 1. It shall be unlawful for any person without the consent of the owner thereof, to cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or to knowingly sell a substantial copy of any substantial part thereof.

Section 2. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the State, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: Provided, however, Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: Provided, further, This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicily perform his or her individual copyrighted work or works: Provided, further, Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group of persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher

and more inequitable rates per piece for music licenses in this state than in other states: Provided, further, Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works.

Section 3. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the Secretary of State of the State of Tennessee, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or associations, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The Secretary of State shall require two copies of said list, one of which he shall keep on file, the other shall be filed in the offices of the state treasurer.

Section 4. The foregoing list of names and titles provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.

Section 5. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this act, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: Provided, however, Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or group, or association of persons, as prohibited by this act, need not file any such list.

Section 6. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the consitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this Act, and the administration thereof, shall at all times effectuate the enforcement, the true intent and meaning of the United States copyright laws within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme de-

signed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this act and of the state constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this act shall be deemed to have used their property within this state in such a way that same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: Provided, further, the legal situs of any copyrighted work is co-extensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the State of Tennessee.

Section 7. All persons, groups, corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the ccpyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations

and persons, even though non-residents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this act, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any non-resident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this act; and all licensees of any violator of this act shall be deemed as aiders and abettors of said persons and subject to the provisions of this act unless they forthwith indicate their obedience herewith; and the acceptance of the general privileges of the State of Tennessee by any non-resident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider or abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time, shall be deemed equivalent to and construed to be an appointment by such non-resident or non-residents, as the case may be, of the secretary of state of the State of Tennessee to be his or their true and lawful attorney upon whom may be served all summonses and processes against him or them and growing out of a violation of this act, in which said non-resident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be

of the same legal force and validity as if served on him or them personally within the State of Tennessee. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars ($2.00) with the secretary of the State of Tennessee, or in his office, and such service shall be sufficient and valid personal service upon any such non-resident defendant, copyright holder or owner, persons, or defendants, combinations, entity, or organization, as aforesaid: Provided, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery by the prosecutor bringing any action under this act, to any defendant at his last known address, and the defendant's return receipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof; Provided, further, The court in which any action is brought may order such continuances as may be necessary to afford any non-resident defendant or groups, or entity, a reasonable opportunity to defend the action: Provided, further, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on non-resident persons or individuals, entities, firms, or corporations violating this act.

Section 8. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a non-resident corporation, person or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this act, then the district attorney of any county where complaint is made of any violation shall institute injunction proceedings against said persons in the proper court, and valid personal service may be had upon any non-resident defendant as set forth in the preceding

section; and the court shall enjoin all persons from violating any provisions of the act and the constitutional provisions prohibiting price fixing, monopolies, and combinations; and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents shall be enjoined by the court from aiding and furthering in any way a continuation of any violation of this act, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three (3) days' notice be given said defendant or defendants as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint a receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and monies derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action and all sums due on contracts and licenses, and

hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this act, and to compel any defendant to abide herewith: Provided, Any sums paid on licenses violating this act shall only be continued in the court's direction or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this act: Provided, further, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this act or the court's orders ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this act, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then determine the question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and price-fixing, and preventing violations of this act, the court shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, after determining such rate, the court shall immediately advise the receiver of the findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public

performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the ruling of the court and the provisions of this act; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the district attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the State of Tennessee and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the State of Tennessee; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this act, then the

court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: Provided, further, The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this act; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, aforesaid, or fail to appear at the end of ten days as ordered and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the State of Tennessee, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all of the legal and equitable titles to all of the copyrighted works of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.: and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the State of Tennessee who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this act, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund; Provided, further, The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this act.

Section 9. That in the event any person, or any of the defendants, or non-residents, or non-resident copyright owners or holders are proceeded against as herein outlined, and are served with process according to law, or any non-resident is served with process as outlined in the preceding sections of this act, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of the process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this act solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: Provided, however, This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this act, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person, or members of any defendant combination, entity, pool or monopoly of their rights or property without full and complete due process of law.

Section 10. Every person, in addition to the other penalties provided in this act, who violates or who procures, or aids or abets in the violating of any provision of this act, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this act, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this act, or to render ineffectual any valid order of any court in connection with the enforcement of this act shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500.00), or imprisonment in the county jail for not more than six months or both such fine and imprisonment.

Section 11. In case any part or portion of this act shall be held unconstitutional, such holding shall not affect the validity of this act as a whole or any other part or portion of this act, and if any clause, sentence, paragraph, subdivision, section or part of this act shall for any reason be adjudged invalid, such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed.

Section 12. In the event more than one injunction suit provided for in this act is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective courts hearing the causes may issue orders against said defendants in the county, but in the event any of the various county proceedings enter in the state of receivership, as herein pro-

vided then the judges hearing the respective cause shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state for the property of the same defendant or defendants.

Section 13. BE IT FURTHER ENACTED, That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed May 18, 1937.

BYRON PAPE
Speaker of the Senate.

WALTER M. HAYNES
Speaker of the House of Representatives.

GORDON BROWNING
Governor.

APPROVED
5-21-37

Opinion in Final Hearing in *Buck* v. *Gallagher*, 36 F. Supp. 4 (W. D. Wash., Dec. 23, 1940, unreported).

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, Complainants, *vs.* PHIL H. GALLAGHER, as State Treasurer of Washington, *et al.*, Defendants.	In Equity Cause No. 606

Before: HANEY, Circuit Judge, and BOWEN and BLACK, District Judges.

HANEY, Circuit Judge.

This is a suit to enjoin enforcement of a Washington statute on the ground of its unconstitutionality. The cause has been submitted on an application for a permanent injunction.

Briefly stated, the statute attacked declares it to be unlawful for separate copyright owners to pool the copyrights in order to fix prices, collect fees, or issue blanket licenses for the use of such copyrights, except where the licenses are issued assessing rates on a "per piece" system of usage. The detailed provisions of the statute need not be discussed.

The bill prayed for a permanent injunction restraining defendants from taking any act or proceeding under the statute, and for a decree declaring such statute unconstitutional. It is alleged in the bill that on February 13, 1914, a small group of composers, authors and publishers organized a voluntary unincorporated non-profit association under the laws of New York, which they designated as the American Society of Composers, Authors and Publishers, hereafter called the Society, for the purpose of licensing to users of music throughout the country the right to publicly perform for profit the works of its members. It was further alleged that there are approximately 123 publisher members of the Society and about 1000 writer and composer members of the Society; that such members assign their respective exclusive right of public performance for profit in their respective musical compositions; that similar organizations exist in foreign countries, and the Society has the exclusive right to and does license within the United States, the public performance for profit of the musical compositions copyrighted by all members of such foreign societies; and that the Society's blanket license permits the licensee to use many hundreds of thousands of compositions composed and written by more than 44,000 members of such foreign societies.

It appears that the members assign to the Society the exclusive right of public performance, and the Society then has the exclusive right to permit by licenses, licensees to use or not to use the compositions of the Society's members, to fix the prices for licenses, to sue for infringement, and in general, to manage the right of public performance in the same manner as the owner of the copyright.

The motion to dismiss on behalf of the defendants was based on several grounds, one of which was: "That mere unconstitutionality, even assuming it to exist, does not warrant injunctive relief, but that the facts alleged must bring the case within the recognized rules of equity relating

to injunctions, and that complainants have not done so." The motion to dismiss filed by intervener K M O, Inc., states a number of grounds, one being that the plaintiffs are not entitled to equity because they were a monopoly. Although no answers have been filed, we may treat the motions to dismiss as answers. Intervener Lockhart argues the monopoly question, but his motion to dismiss does not present such question. We treat his motion as an answer and amended so as to present the question.

Regarding the completeness of the monopoly of the Society, it is said in *Buck* v. *Swanson* (D. C. Neb.), 33 F. Supp. 377, 386:

> "* * * Of the popular music necessary for the successful operation of radio stations, dance halls, hotels and theaters, the society has control of about 85% or 90% and also has control of from 50% to 75% of the standard or older music that is played occasionally. All of the large and more influential publishers of music in the United States are members of the society. The users of music in Nebraska can not successfully carry on their business except they deal with the plaintiff Society because there is no place where nor person or agency to whom users of music in Nebraska may go in order to deal for public performance rights and negotiate for music in any substantial amount sufficient to meet the ordinary needs of music users in the state, except the society."

Mr. Justice BLACK in *Gibbs* v. *Buck*, 307 U. S. 66, 81, says:

> "* * * This combination apparently includes practically all (probably 95%) American and foreign copyright owners controlling rendition of copyrighted music for profit in the United States. Not only does this combination fix prices through a self-perpetuating board of twenty-four directors, but its power over the business of musical rendition is so great that it can refuse to sell rights to single com-

positions, and can, and does, require purchasers to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination."

In the instant case the testimony of the operators of two of the largest radio broadcasting stations in Washington was that it would be impossible to operate such stations without the music controlled by the Society. The Society has neither submitted evidence, nor made argument to the contrary.

On the hearing for an injunction pendente lite, we dismissed the cause for lack of jurisdiction. *Buck* v. *Case*, 24 F. Supp. 541. On appeal our decree was reversed with directions to take evidence on the jurisdictional question. *Buck* v. *Gallagher*, 307 U. S. 95. Subsequently, we referred the case to a special master for the taking of evidence on the question, and directed him to make findings. The special master found facts disclosing jurisdiction in the court below. Believing that the evidence supports such findings, we sustain them as not being clearly erroneous.

Plaintiffs contend that the Washington statute is unconstitutional for a number of reasons, and rely on *Buck* v. *Swanson* (D. C., Neb.), 33 F. Supp. 377, *Buck* v. *Harton* (D. C. Tenn.), 33 F. Supp. 1014, and *Buck* v. *Gibbs* (D. C. Fla.), 34 F. Supp. 510, holding somewhat similar statutes unconstitutional. Before passing on that question, it is necessary to determine whether or not plaintiffs may invoke the aid of a court of equity. If a party "has been engaged in an illegal business and has been cheated, equity will not help him." *Wheeler* v. *Sage*, 68 U. S. (1 Wall.) 518, 529. In other words, before plaintiffs may invoke the aid of a court of equity, they must come into court with clean hands. *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 244. If the Society exists in violation of the Sherman Anti-Trust Act, it, and the members composing it, are not entitled to a decree for its benefit.

Section 1 (15 U. S. C. A. Sec. 1) of the Sherman Anti-Trust Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *."

Section 2 (15 U. S. C. A. Sec. 2) of such act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Whatever the distinction between these two sections may be,[1] the Supreme Court has recently said that Congress, by the act in question, "extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498. The "effects" mentioned were "business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." Id., p. 493. Such effects were brought about by "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide market-

[1] *C. E. Stevens Co.* v. *Foster & Kleiser Co.*, 9 Cir., 109 F. (2d) 764, 770.

ing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." Id., p. 497.

There can be little question here that the Society has the power to fix prices for the right to publicly perform compositions for profit. Likewise, it has restricted substantially all competition in the sale of such right, because it has all such rights. Since the interstate commerce feature is conceded to be present, the Society clearly violates the act in question (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223) unless the right to publicly perform for profit is not embraced within the act. Upon that point the act says nothing expressly about rights or commodities. The statute is aimed at "restraints" of trade and commerce, and not at the "subjects" of the trade or commerce. Rights may be and often are the subject of trade or commerce, and the Sherman law limits restraints of trade in "rights" as well as commodities. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. The restraint here is the power acquired by the assignments of the Society's members, to deal in a right acquired by copyrights, and thus we have a contract or combination in restraint of trade. *Straus* v. *Am. Publishers' Assn.*, 231 U. S. 222, 234.

Plaintiffs contend that if the activity of the Society "affects trade or commerce, it promotes rather than restrains it." Here, we are not concerned with such question. Congress has decided that if such a combination has acquired power to fix prices, it is an illegal combination in restraint of trade. Plaintiffs further contend that the power to fix prices, as here, is not the odious "price-fixing" condemned by the act in question. They say that while a gallon of oil is the same no matter who sells it, musical compositions are not gallons of oil, but each of them is different. As we have said before, it is immaterial what

the subject of the trade or commerce may be. The fact is that the Society has acquired the power to fix the prices at which rights of a particlar nature may be purchased by prospective users. We think that is sufficient under the statute.

Buck v. *Swanson* (D. C. Neb.), *supra*, *Buck* v. *Harton* (D. C. Tenn.), *supra*, and *Buck* v. *Gibbs* (D. C. Fla.), *supra*, do not involve the point herein taken.

Let the bill be dismissed.

BERT EMORY HANEY,
Bert Emory Haney, Circuit Judge.
JOHN C. BOWEN,
John C. Bowen, District Judge.

I concur in the result.

LLOYD L. BLACK,
Lloyd L. Black, District Judge.

Decision of Supreme Court of Louisiana Invalidating Louisiana Statute Imposing License Fee of $5,000 for Privilege of collecting royalties on copyrighted music in Each Parish of the State.

***State of Louisiana* v. *J. Studebaker Lucas*, 199 So. 126.**

(Decided November 4, 1940.)

Appeal from the Twenty-fourth District Court, for the Parish of Jefferson.—L. ROBERT RIVARDE, Judge.

Eugene Stanley, Attorney General of Louisiana, Niels F. Hertz, Special Assistant Attorney General, John E. Fleury, District Attorney, Ernest M. Conzelmann, Assistant District Attorney, for Appellants.

Nicholas G. Carbajal, Louis D. Frohlich, and Herman Finkelstein, for Appellees.

O'NEILL, C. J.:

The defendant was indicted for violating Act No. 137 of 1934, which undertakes to impose a license fee for the privilege of collecting any money or other valuable consideration for rights, royalties or rents on copyrighted music books, recorded music for mechanical reproduction, or radio programs. The license fee is $5,000 to be paid to each and every parish in which any such collection is made or attempted to be made. And a fine of $2,000 and imprisonment for a term not exceeding a year is imposed upon any one who violates the act. The defendant filed a motion to quash the indictment on the ground that the statute was unconstitutional. The court sustained the motion, declared the act unconstitutional, and dismissed the prosecution. The State is appealing from the decision.

The principal ground on which the defendant pleaded that the statute was unconstitutional—and the ground on which the plea was sustained—was that the so-called license fee was exorbitant and oppressive, and had the purpose and effect not of licensing the business which it was imposed upon, but of destroying the business, which was not objectionable to the public in any sense. Hence the defendant pleaded—and the judge maintained—that the statute was violative of the Fourteenth Amendment of the Constitution of the United States, in that it denied the defendant the equal protection of the law, and deprived him of his property without due process of law, by depriving him of the benefit of his copyrights, and of his right to conduct the business in which he was engaged.

The so-called license fee is exorbitant, and the terms of the statute are oppressive. A license fee of $5,000 to be paid to each and every parish in the State means that the license fee would amount to $320,000 for the privilege of doing business throughout the State. The gross amount collected by the defendant in 1939, the year in which he was indicted, on the business done in the whole State, was $65,297.39. The gross amount collected on the business done in that year in the Parish of Jefferson, in which the defendant was indicted, was $2,228.62. The average gross amount collected per parish was $1,053.18. It would be impossible for any person, firm or corporation engaged in the business to collect enough to pay the license tax in any parish. A statute which purports to levy a license tax upon a particular business or occupation, but which makes the tax so exorbitant that no one can pay it and carry on the business or occupation profitably, does not in fact license the business or occupation, but undertakes to abolish it. Such a statute is violative of the Fourteenth Amendment of the Constitution of the United States in so far as it deprives any one of his right to carry on a lawful business or occupation.

The judgment is affirmed.

Decree in

State of Washington v. *American Society of Composers, Authors and Publishers.*

(June 8, 1936, unreported.)

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON, *ex rel.* G. W. HAMILTON, Attorney-General,

Plaintiff,

—vs.—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association, et al.,

Defendants.

FILED Superior Court Thurston Co. Wash. JUNE 8 3:01 PM 1936 ELLIS C. AYER, Clerk By Edwidge LaFond, Deputy

No. 16114

DECREE

This matter coming regularly on before the court for a hearing upon the petition of the defendant, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"), a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a convenience and necessity to the users of music in obtaining the performing rights.

3. That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.

4. That the Society was formed for lawful purposes and that the plan being used by the American Society of Com-

posers, Authors and Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors and Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not violative of any of the laws of the State of Washington, or of the Constitution.

5. That the Society serves a beneficial and useful purpose as a clearing house through which users may obtain and clear performing rights in musical compositions.

6. The Receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid directly to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annulled, and any and all such assignments of copyright or

rights in copyrights are hereby cancelled and annulled, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. That the complaint herein be dismissed upon the merits.

11. It is further ORDERED, ADJUDGED AND DECREED that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

DONE in open court this 8th day of June, 1936.

(Signed) D. F. WRIGHT,
Judge.

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 610

J. Tom Watson (Gibbs), individually and as Attorney General of the State of Florida, *et al.*,

Appellants,

vs.

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

No. 611

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

Appellants,

vs.

J. Tom Watson (Gibbs), individually and as Attorney General of the State of Florida, *et al.*,

On Appeals from the District Court of the United States for the Northern District of Florida.

REPLY BRIEF OF APPELLEES IN NO. 610, AND APPELLANTS IN NO. 611.

Thomas G. Haight,
Frank J. Wideman,
Louis D. Frohlich,
Herman Finkelstein,
Manley P. Caldwell,
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April, 1941.

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Supreme Court of the United States

OCTOBER TERM, 1940

J. TOM WATSON (GIBBS), individually and as Attorney General of the State of Florida, *et al.*, *Appellants*, *vs.* GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,	No. 610
GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, *Appellants*, *vs.* J. TOM WATSON (GIBBS), individually and as Attorney General of the State of Florida, *et al.*,	No. 611

REPLY BRIEF OF APPELLEES IN CASE NO. 610, AND APPELLANTS IN CASE NO. 611 (Plaintiffs Below).*

Defendants rely upon two propositions:

1. That, regardless of the extent to which the State Statutes may invade plaintiffs' constitutional rights, plaintiffs may not be heard to complain because they are allegedly violating the Sherman Act;

*Italics throughout this brief are ours.

2. That, although one of the purposes of the State Statutes was admittedly bad, to wit: "to allow users of copyrighted music for profit under certain specified conditions to use music without payment for it" (Def. Br. p. 36), the Statutes had another purpose, namely, "to make unlawful and prohibit the operation in this State of price-fixing combinations dealing in copyrighted music" (Def. Br. p. 36). Defendants state that the latter purpose was the "fundamental" one, and that "if the 'without pay' sections are stricken, we have a complete workable anti-monopoly statute independent of the other sections remaining * * *" (Def. Br. p. 36).

I. The Defense of Unclean Hands is Without Merit.

(Answering Point I of Defendants' Brief.)

Point I of defendants' brief charges that plaintiffs are engaged in violating the Sherman Act and therefore, should be barred from any relief in equity.

In our main brief we showed that plaintiffs were not engaged in violating the Sherman Act, but that even if they were, they would be entitled to equitable relief against the deprivation of their constitutional rights by statutes such as those at bar (Pltf. Br. pp. 90-92). It was demonstrated that the statutes were of the same nature as in the case of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, where this Court granted equitable relief against enforcement of such a statute (Pltf. Br. pp. 68-71). It is perfectly clear from the part of the opinion quoted on page 68 of our main brief that this Court rejected the proposition that one has "no standing in equity" to challenge the validity under the Federal Constitution of a state statute allegedly made necessary by "plaintiff's conduct". It should be further noted that in the synopsis of the arguments in the report of the *McFarland* case the point that the plaintiff could not be afforded relief in equity because of unclean

hands based on an alleged monopoly was made by the State, and specifically denied by the plaintiff as applicable to a case where one asks "relief from the enforcement of an unconstitutional statute". It should also be noted that when the instant case was before this Court on the appeal from the preliminary injunction, defendants urged that the bill should not be maintained because of the same alleged unclean hands as now relied upon (Appellants' Br. p. 49, Case # 276, October Term 1938).

Defendants rely upon the decision in *Buck* v. *Gallagher*, 36 F. Supp. 405 (W. D. Wash., 1940) to support the defense of unclean hands. That decision was commented on in our main brief in a footnote at page 77. An appeal to this Court from that decision was filed on April 15, 1941, after a motion for a new trial was denied on that day. The decision of the Washington District Court is manifestly contrary to the decisions of this Court in *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79.

The decision of the District Court in the *Gallagher* case is criticized in a carefully prepared comment entitled *"The Sherman Act As a Clean Hands Defense,"* 50 Yale L. J. 1114 (April, 1941).

Although defendants devote a substantial part of their brief in an effort to prove that the Society has violated the Sherman Act, we might well rest our answer on the proposition of law laid down by this Court in the *McFarland* case and the lower court decisions referred to in our main brief (p. 92). However, we have determined to discuss briefly the various facts relied upon to support the defendants' position (Def. Br. pp. 9-28).

(a) They state that prior to 1937 there existed in Florida "a deplorable situation affecting the users of copyrighted music" (p. 9). The record is barren of any such evidence. On the contrary the uncontradicted evidence is that large industries had been built up in Florida which catered to public entertainment—hotels, motion-

picture theatres, dance-halls, taverns and radio broadcasters. An integral underlying factor in the operation of these industries has been the use of copyrighted music in public performance for profit. Vast sums of money are collected annually from the public in Florida by these industries.

In 1935 these industries had the following revenues (Pltf. Dep. Ex. 52, 53, 54; R. I, 444-5, R. II, 1057):

10 Broadcasting Stations	$ 580,000
1173 Hotels	21,761,000
383 Theatres, tracks, dance-halls, skating rinks, and miscellaneous establishments	10,902,000
Total	$33,243,000

All of these Florida industries *combined* paid the Society a total gross revenue that year of $47,481.24 for the raw material so necessary to their operations (Pltf. Dep. Ex. 39, R. I, 419, R. II, 1039).

(b) Defendants argue that the users were forced to buy all or none of the music, i. e., take a blanket license, and "could not deal directly with any separate copyright owner" (Def. Br. p. 9). But the testimony showed that when they dealt "directly" with any separate copyright owner, he was at their complete mercy; and as a rule they never even bothered to deal with him, but helped themselves to his works without compensation (R. II, 756-61; 850-1; R. I, 242-3, 274, 305, 365, 386-7, 441, 594).

Defendants' witness L. S. Mitchell, the owner of a radio broadcasting station in Florida, who had the so-called newspaper contract under which he paid the Society only for those programs on which music in the Society's repertoire was used (R. I, 582-6), had every incentive to eliminate the Society's music from his radio programs and thus avoid payment to the Society. Nevertheless the only other license that he had was one with SESAC (Society of

European Stage Authors and Composers [R. I, 583]). He could not even state (in answer to a question by defendants' counsel) whether it would be profitable or favorable to negotiate and arrange for the use of musical compositions with individual holders of copyrighted music based on what is called a "per use" or "per piece" basis (R. I, 585).

Defendants' witness Malec, who operated a large dance-hall making substantial use of music (R. II, 836), testified that he exercised "no power over the music that the orchestra brings along when they play their engagements" (R. II, 840). He gave the orchestra leader carte blanche and told him to go ahead and play what he wanted without keeping any log or record of the pieces played; he merely told the orchestra leader the tempo of the music but left it to his discretion what kind of music he would play (R. II, 849-50). For three months he had no license from the Society or from anyone else, yet he continued to perform publicly for profit the compositions in the repertoire of the Society without paying anything either to the Society or to any individual composer, author or publisher, whether a member of the Society or not (R. II, 850-1). He never made any effort to find out who owned the particular music played in his establishment, or to pay any author, composer or publisher a license fee for the use of such music (R. II, 851).

The record is replete with evidence that the only objection of the users to the Society is that it serves effectively to protect the interests of composers, authors and publishers against wilful infringement. The desire of the proponents of the State Statutes to do away with the Society is apparent from the following question which defendants' counsel asked Dr. Sigmund Spaeth, one of the members of the Society (R. II, 661):

> "Q. If the public performance rights will be included in the sales price and the sales price were

> arranged by yourself and your publisher high enough to cover a substantial and reasonable income for yourself, then you would have no necessity of an organization such as ASCAP?"

No method of licensing other than that adopted by the Society has ever been devised, whether by the Society or anyone else. The manager of the National Association of Broadcasters admitted that the broadcasters were never able to devise any other system, or at least they never submitted any such plan to the Society or anyone else during all of the years of their negotiations (R. I, 573-4). As will be pointed out hereinafter, the United States Government has recognized the propriety and legality of the Society's operations, after certain changes which the Society agreed to and which do not affect this case.

(c) There is no evidence to support the defendants' assertion that users "may have had no desire to use the music of more than one copyright owner, and not all of that" (Def. Br. p. 10). On the contrary the evidence is that users such as dance-halls and broadcasters required many and varied numbers—dance-halls, between one and two hundred compositions a week (R. II, 852-3), and broadcasters, between two hundred fifty and six hundred per day (R. I, 499-500), and that there was no attempt made to check on the compositions being performed, or to ascertain their copyright status or to obtain a license; nor was any record kept of the compositions actually performed, regardless of whether or not the user had the Society's license (R. II, 810, 812, 818, 849-51, 890, R. I, 523, 593).

Motion-picture theatres exhibit and perform all numbers which are on the sound track of a film, and they rely upon the Society's license for protection against infringement (R. II, 818-19).

(d) There is no evidence that the Society ever exercised any "vicious restraints" (Def. Br. p. 10). Its rates have

always been reasonable and moderate; and there is not a scintilla of evidence that *any user in the United States* was ever forced out of business or injured by any fees that he paid to the Society.

(e) Defendants stress the terms "price-fixing combination" (Def. Br. p. 11), "declared purpose of fixing prices" (Def. Br. p. 11), "power to dominate and fix prices" (Def. Br. p. 12) and "license fee fixed and determined" (p. 13) as if the record contained evidence to support these charges.*

On the contrary, the record clearly and unequivocally shows that the Society always negotiated for its fees with its licensees (most of whom acted in groups or users associations [R. II, 759]) and that the fees paid to the Society were agreed upon in open (and often protracted) negotiations. There is no evidence that arbitrary rates were sought, or imposed.

E. C. Mills, formerly general manager of the Society, described the negotiations with the motion-picture theatre owners since 1920, the latter always acting as a group. After the terms were agreed upon and recommended by the theatre associations *to their own members,* individual contracts were made with each theatre (R. I., 488-9).

The same procedure was followed in negotiating with broadcasters. Mills testified on cross-examination (R. I., 513):

> "A. * * * The prices and terms upon which they [compositions in the Society's repertoire] are used are fixed as the *result of negotiations* with committees authorized to act as between the management of the Society and the Committees, then, the manage-

* Defendants quote plaintiffs' bill as alleging that the blanket license fee is "fixed and determined" by the Society (Def. Br. p. 13). Had they quoted the *entire* clause of that sentence it would read "fixed and determined by the Society *in negotiations with the respective users*" (R. I., 20).

ment of the Society goes to the Board of Directors for approval of the formula and rate which has been set up.

Q. The board is the agency as between the copyright members and the users, or associations of users, with whom negotiations are conducted—they approve the prices for the copyright members of the Society?

A. *After those prices have been negotiated with the Committees representing the users.*"

Gene Buck testified (R. II, 795):

"Q. The prices charged for the public performance rights in the State of Nebraska are fixed by your Board of Directors?

A. No, no. Let us get that straight. The prices as charged in the State of Nebraska—we sat down and negotiated, sir, so that we get the whole picture.

Q. Please answer my question.

A. I want to answer the question. You say we fixed it—we did not fix it. We negotiated with the National Association of Broadcasters who fixed it, and we sat down with the *Hotel Owners Association* and fixed it, and sat down with the *Motion Picture Operators* of the State of Nebraska and fixed it. I want that record clear. There was a period of negotiations. It was not fixed by any individual writer or board of directors of the American Society. It was fixed by negotiation."

These witnesses were corroborated by defendants' witness, J. W. Baldwin, former managing director of the National Association of Broadcasters, who described the negotiations that had taken place from time to time between his group and the Society, and who said that the main dissatisfaction of his group was *not* with the price, but with the blanket license (R. I., 568-9; 575). Although the witness claimed that the prices and terms were fixed

by the Society (R. I, 570), his testimony clearly showed long series of negotiations with the Broadcasters' Association extending back over the years (R. I, 567-75).

Baldwin admitted that he did not want to see the Society destroyed, because some central agency, whether it was the Society or some other, was necessary (R. I, 571-2). His group had never presented a per piece plan or formula to the Society (R. I, 573) and while they negotiated such a plan with the Warner Brothers (after the latter had withdrawn from the Society), they could not work it out (R. I, 574).

(f) Defendants argue that the contracts between the Society and newspaper-owned broadcasters were discriminatory as against commercial broadcasters (Def. Br. p. 16). This was answered in our main brief (p. 90, footnote). Mills' explanation of these contracts is uncontradicted (R. I, 595-6):

> "A. There was a long series of negotiations between a committee representing ASCAP and a committee representing the National Association of Broadcasters. As a result of those conferences a formula for commercially operated stations was devised and a contract was drawn up under that formula. The formula was approved by the National Association of Broadcasters and the Society. After it had been approved within a week or so a committee called on us representing the so-called newspaper owned broadcasting stations of which there were at that time some fifty-five, according to my recollection. This was in 1932. They represented to us that the newspapers, throughout the country, devoted a great deal of white space to the furtherance of the cause of music, and that they ought to have some sort of special consideration from the composers and authors of music, because of the added interest in music through them. They wanted to negotiate a special agreement adapted to their particular needs—they didn't operate commercial

stations in those days; their chief function at that time was the distribution of weather and crop reports, financial reports and so forth. They seemed to make a good case and we listened to them. *Then, we consulted the executives of the National Association of Broadcasters, who had approved the other agreement, and we asked them if they had any objections to our dealing with these newspaper owned stations and they said, no, and these negotiations resulted in a different form of contract—the so-called newspaper owned station contracts.* It was adopted and each newspaper in the United States was offered the option of the commercial contract or the newspaper owned contract, and the best evidence of the fact that it is not as advantageous as may seem when compared to the other contract is that *of the fifty-five newspaper owned stations at that time only fifteen elected to take that contract.* It had certain stipulations that more than balance its advantages. *It was submitted to the National Association of Broadcasters and approved by that association before we agreed to make that newspaper contract* • • •

Q. Were these negotiations had again in 1935 with the newspaper owned stations?

A. No, sir, with the National Association of Broadcasters only.

Q. Did you inform the NAB then that you were renewing the newspaper contracts?

A. Yes, sir.

Q. It was done with their full knowledge?

A. Yes, sir."

He pointed out that the newspaper contract called for a minimum guaranty (R. I, 598-9), a factor not present in the commercial contract.

(g) Defendants attempt to fasten upon the Society a restraint upon commerce in sheet music citing the experience of Warner Bros. Picture Corp. (Def. Br. pp. 19-20). The

uncontradicted testimony, however, is that the Society does not publish or in any wise deal in sheet music (R. II, 769, 670; R. I, 523). The fact that the sheet music sales of the Warner Brothers publishers fell off during the period of their withdrawal from the Society was due to a number of causes, not the least of which was the boycotting of their works in the same manner as the radio networks are today boycotting all works of all members of the Society. The power of radio broadcasters to conduct such a boycott was fully exposed by the Federal Communications Commission in the Report of June 12, 1940 filed by its Committee to Supervise the Investigation of Chain Broadcasting (Commission Order No. 37—Docket No. 5060—see Memorandum of Submittal, pp. i-vi; ch. III entitled "Broadcasting and the Supply of Talent", pp. 101-7; "Transcription Services and the Broadcasting Industry", pp. 108-14, and the Conclusions of the Committee, pp. 133-8).

In any event, the record in the case at bar does not justify any inference that the Society was responsible for the decline in sales of sheet music of the Warner group. So serious a charge should be supported by evidence rather than mere speculation.

The most eloquent indication of the reason for the failure of Warner Bros. to succeed as an independent agency is the testimony of Mr. Malec in answer to a question put by the Court, that when Warner Bros. quoted a license fee "we just ignored the letter, and there was nothing more heard by us from Warner Bros." (R. II, 842). If the other 32,000 establishments using music commercially did likewise it can readily be seen that Warner Bros. would lose all incentive to invest in the publication of new music. The testimony of Dr. Spaeth on cross-examination shows that Warner Bros. were confronted with that very situation (R. II, 661-2):

> "Q. You don't suppose those people would cease to use music simply because the public performance price was put on the music?

"A. I can answer that question in this way; I believe that they would automatically cease to use it because they couldn't afford to pay the price which the publisher would want; and the case was very clearly proved when the Warner Brothers with their publishers ceased; rather than pay the prices that Warner expected them to pay, they said, 'We would rather not use your music,' and no Warner music was used during that entire period; *the entire time that Warner was outside the ASCAP the music of Warner was boycotted by the radio stations and all others using music.*

"Mr. Hotz: I move to strike out the entire answer as not responsive.

"Q. Warner Brothers were assuming a similar position to music that ASCAP did?

"A. Yes.

"Q. And it became necessary for users of music to have two licenses if they wished to be free from infringement?

"A. They didn't have to have two licenses, if they wanted to substitute the Warner license for the ASCAP license. I have heard of no cases where anyone chose the Warner license in place of the ASCAP license. In most cases I found that the user simply refused to deal with Warner. The only exceptions were certain small stations. Warner licenses were so much higher than the comparatively small charge by ASCAP. Users of music in general refused to do business with any such concern like that which controlled large publishers and several motion picture houses and controlled one of the large motion picture companies."

(b) Defendants claim that the Society's publisher-members obtain control of many compositions by the requirement that five compositions of writers must be published through members of the Society before they are admitted.

This apparently is intended to show a restraint of interstate commerce. But the United States Government seeks to *increase* membership in the Society. Consequently the consent decree lowers the requirement to *one* composition (Appendix "B", Art. II, par. 11).

Defendants point out that the number of composer and author members in the Society has increased from 1,000 in 1937 to 1,477 in 1939 and that the publisher-members increased from 123 to 131 in the same period (Def. Br. p. 11). This increase indicates that 477 composers and authors, and eight publishers, to whom no payments had been made by users for public performances of copyrighted works for profit prior to 1937 (the evidence showing conclusively that no such fees were paid by the bulk of the users to the unorganized composers, authors and publishers [R. I, 242-3, 274, 305, 365, 386-7, 441, 594; R. II, 756-61, 850-1]), will share in such royalties hereafter. The addition of new members does not increase the cost to the users under a blanket license; it merely decreases the aliquot share of royalties received by those who were theretofore members of the Society. The number of members is bound to increase much more rapidly in the future in view of the position taken by the Government that *interstate commerce will be promoted by increasing rather than decreasing the number of members in the Society.* It is quite obvious that the Society will admit more composer- and author-members on the basis of one composition making them eligible than on the basis of five compositions.

It can hardly be urged that the Society constitutes a monopoly or a combination in restraint of trade. On the contrary, it supplies the only medium ever devised for the licensing of performing rights through an effective agency operated jointly by the creators and the copyright owners.

(i) The suit in equity brought by the Government in the Southern District of New York against the Society in 1934 to which defendants refer (Def. Br. p. 10), was discon-

tinued on March 4, 1941 (a copy of the order of discontinuance is annexed hereto as Appendix "A"). In a new action thereupon filed in the same district, the Society on March 4, 1941, entered into the consent decree mentioned above (Appendix "B"). This decree establishes that the Government is satisfied that the Society is operating in a lawful manner.

(j) The charge that the Society is an association of publishers, with authors as "window-dressing" (Def. Br. p. 18) is wholly unsupported. On the contrary, the protection which the Society affords to the composer and author against the exploitation of the users has been overwhelmingly established. This is true to such an extent that the consent decree permits the Society to protect its members against the broadcasters "by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc.,* the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the Society" (Appendix "B", Art. II, Par. (1), subd. "e").

The 1939 Act would allow users to obtain licenses from the "copyright owner" alone (Section 4-A). This deliberately ignores the composer and author. The United States Government recognizes the extent to which the Society protects the composer and author, and consequently the consent decree permits the Society to prevent users from obtaining licenses of performing rights from members of the Society unless the consent of the *composers and authors* as well as the publishers, is obtained; in order to insure the bargaining position of the composers and authors, the

*Broadcast Music Inc. was organized by the radio broadcasters as a source of music supply controlled by them to compete with the Society (R. I, 531-2, R. II, 902-4).

Society must be apprised in advance of the intention of its members to issue such licenses (Appendix "B", Art. II, par. (1), subds. "b" and "d").

It has always been customary for the author to give the publisher the right to secure copyright (R. II, 798). Since the organization of the Society, however, the funds received from licensing the right of public performance for profit have been divided *equally* between the publishers on one hand and the authors and composers on the other hand (R. II, 794), and the authors and composers have an equal voice with the publishers in the management and operation of the Society (R. I, 53). *This is uncontradicted.*

The present standard form of contract between composers and publishers, as approved by the Songwriters Protective Association (an association of composers and authors) is Defendants' Dep. Exhibits "A" and "B" (R. II, 1072A-1078, R. I, 213, 397). This may be compared with an earlier standard form of agreement made in 1932 (Pltf. Dep. Ex. 7, R. II, 990A, R. I, 396), which was the first contract between publisher and author recognizing the latter's right of collective bargaining through the Songwriters Protective Association.

Defendants' witnesses would ignore the composers and authors in acquiring performing rights. They would secure them solely from the *publishers* on the theory that they are the copyright owners (R. II, 904-5). The notion that these rights are owned solely by the publishers is advanced in defendants' brief (Def. Br. pp. 11-12), as well as in Section 4-A of the 1939 Act.

(k) Defendants submit figures attempting to show that a great many copyrights are embraced in the Society's repertoire. That is necessarily true. The cooperative and non-profit nature of its operation attracts many of the most renowned composers, authors and publishers in the world. Their strength enables the Society to protect the less powerful and less prominent members—particularly the young

composer and author who would be at the users' mercy were it not for the Society.

The Society is akin to a labor union.* It seeks to protect its members in a situation where they would be helpless without collective action. It is unique in that capital (the publishers) has a fifty percent. interest in this cooperative enterprise. Thus the rights of all are protected. The United States Government recognizes the need for *increasing*, rather than *decreasing*, the membership of the Society, as will be shown in discussing the consent decree. There can be no economic dislocation resulting from "jurisdictional disputes" so long as membership in the Society is open to all meritorious composers and authors. This is now assured by the consent decree.

II. The several provisions of the 1937 Act and the 1939 Act are not separable. Both Acts are invalid in their entirety.

A. Answering Point II of Defendants' Brief.

Defendants urge in their Point II that Sections 2-A, 2-B and 6 of the 1937 Act are separable; that they were allegedly repealed by the 1939 Act; that defendants have no duties to perform in regard to those sections; and that their provisions are independent of the alleged anti-monopoly provisions. Defendants also urge that Sections 4-A, 4-B, 5-A and 5-B of the 1937 Act "are merely subordinate and supplementary to Section 1," and, therefore, separable from the other provisions of the Act (Def. Br. p. 7).

(1). We showed in our main brief that Sections 2-A, 2-B and 6 of the 1937 Act were not repealed by the 1939 Act

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* It has recently been held in several cases that labor unions acting within their appropriate scope, are not subject to the provisions of the Sherman Act. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Hutcheson*, 61 Sup. Ct. 463 (1941).

(Pl. Br. p. 36). On the contrary, the Florida legislature in 1939 removed all doubt as to its intention respecting those sections. The 1939 Act was introduced in the Florida legislature on May 8, 1939 as House Bill 1103 and Senate Bill 635 (Supp. Compl. R. I, 112; admitted, R. I, 185). The sponsors of that bill simultaneously introduced a companion bill designated as House Bill No. 1110; Senate Bill No. 636 (Supp. Compl. par. 15(a), R. I, 118; admitted, R. I, 186). The latter bill provided for the amendment of the 1937 Act by eliminating Sections 2-A, 2-B and 6, and amending Section 8 by reducing the minimum prison sentence from one year to ninety days (R. I, 139-41). Prior to that time the defendants had argued in this Court that they had no duties to perform under Sections 2-A, 2-B and 6 and that those sections were separable (Appellants' Brief on previous appeal in this case, pp. 8-9, 56-62). This Court, however, affirmed an interlocutory injunction against the *entire* Act on April 17, 1939. *Gibbs* v. *Buck*, 307 U. S. 66.

Both bills in question were obviously introduced as an answer to the decision of this Court. But the bill seeking to repeal Sections 2-A, 2-B and 6, and to amend Section 8 of the 1937 Act failed of passage (Supp. Compl., par. 15(b), R. I, 118; admitted, R. I, 186). The legislature thereby indicated, first, that it was *opposed* to the repeal or amendment of those sections; and secondly, that Sections 2-A, 2-B and 6 were an integral part of the 1937 Act and should not be excised from it. Defendants now call upon this Court to amend an act of the Florida legislature in a manner which the legislature itself has already rejected. That, we submit, would trespass upon a field reserved to the state legislature.

(2) The defendants' duties in respect of Sections 2-A, 2-B and 6 are clear. In asserting that they have no duties to perform as to these sections, defendants ignore the provisions of Section 8 of the 1937 Act, as well as the express refusal of the legislature to repeal those sections. Section

8 imposes heavy fines and imprisonment on any combination and "any *other* person, firm or corporation acting or attempting to act * * * in violation of the terms of this Act." Thus if any person, firm or corporation *other than a combination condemned in Section 1* should violate any section of the Act, he is subject to the penalties imposed in Section 8. Such person is made guilty of a felony. Who is supposed to prosecute and impose the penalties for such felonies?

If plaintiffs fail to comply with the requirements of Sections 2-A, 2-B and 6 and attempt to enforce their rights in a manner prohibited by these sections, they will have violated the terms of the 1937 Act contained in those sections. For example, if the copies of musical compositions sold by plaintiffs in Florida should be sold at a price which includes only the right of private use or public non-profit uses, and if plaintiffs should thereafter attempt to treat as an infringement the unauthorized public performances for profit given by the purchaser of such sheet of music in the State of Florida, plaintiffs will have violated Sections 2-A and 2-B and will be subject to all the penalties contained in Section 8, regardless of whether or not they are a combination condemned in Section 1. The duty to prosecute them will obviously rest upon these defendants. They are the law enforcement officers in the State, and admit that they will perform "all duties imposed upon them" (R. I, 187).

Likewise, if plaintiffs should sue a Florida broadcasting station or motion picture theatre for infringement, loss or damage in the State of Florida by reason of re-broadcasting a musical composition emanating from outside the State (or if the performers come into the State from without the State), they will violate Section 6 of the Act and will likewise be subject to the penalties contained in Section 8.

The duty of defendants to enforce these sections by invoking the criminal provisions of Section 8 is clear.

(3) Sections 2-A, 2-B, 4-A, 4-B, 5-A, 5-B and 6 of the 1937 Act are not separable from the other provisions of the 1937 Act. We have already discussed Sections 2-A, 2-B and 6. Sections 4-A, 4-B, 5-A and 5-B are analyzed at pages 31-3, 46-7, 56-7, 58, 59, 65-6 and 85-6 of plaintiffs' main brief.

In commenting upon these sections, Judge HUTCHESON, speaking for the court below, said (34 F. Supp. 510, 516; R. II, 1099-1100):

> "Defendants concede the invalidity of Sections 2-A, 2-B and 6. Indeed at one stage of the proceedings before us they offered to submit to a permanent injunction as to them. They insist, however, that the vice of these sections is peculiar and confined to them and does not pervade the Act, and that because this is so and particularly because the Act contains a separability clause, Sec. 12, and because, in the reference in the 1939 Act to sections of the 1937 Act as unrepealed, these sections were not included, these invalid sections should, by a kind of judicial surgery, be excised from the Act, leaving it to stand in its other provisions as an anti-monopoly statute."

In discussing the possible separability of the various sections of the Statute, the court below said (R. 1100-1):

> "But, law making at last, is a legislative and not a judicial function and the search of the Court in the end is not for a law the legislature could or might have validly enacted but for the valid law it did enact. When, therefore, the vice of a statute runs through the whole of it, Courts may not, by lopping and paring away, create a statute which the structure and context of the Act as a whole shows the legislature did not intend to, indeed did not, enact. Williams v. Standard Oil Co., 278 U. S. 235, 241, 49 S. Ct. 115, 73 L. Ed. 287, 60 A. L. R. 596; Sage v. Baldwin, D. C., 55 F. 2nd 968, and cited cases.

> *Looked at in this light when the whole purpose of the 1937 Act to outlaw ASCAP and its contracts and to permit users in Florida to perform compositions, dealt with in them, without pay, is kept in mind,* we think it clear that the Act, in spite of its separability provision, is so far indivisible that with all the 'without pay' sections stricken as invalid, the whole Act must fall. For, it may not be supposed that the legislature intended to strike down the contracts and leave both ASCAP and its members, and the users in Florida who had been dealing with ASCAP, up in the air, with contracts already entered into and a considerable part of the compensation already paid, with no right in ASCAP or its members to collect the balance due, and none in the Florida users, without paying again under separate arrangements, to use the music they had contracted and partly paid for. We, therefore, conclude as the Court did in Buck v. Swanson, supra, that the whole Act is invalid and must fall."

The court then pointed out that the legislature itself by passing the 1939 Act had expressly provided that existing Florida laws pertaining to monopoly or restraint of trade "including * * * Sections 1, 2-C, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13 and 14" of the 1937 Act should not be repealed by anything contained in the 1939 Act. The court below said that the Florida legislature "by grouping all of these sections together makes it clear that they are regarded by the legislature as forming a harmonious whole and not as isolated and independent separate laws and as a whole, they must stand or fall together" (R. II, 1101).

B. Answering Point III of Defendants' Brief.

In Point III of their brief, defendants admit that Sections 3, 4-A, 4-B, 5-A, 5-B, 7-A, 7-B, 8 and 9 of the 1937 Act are invalid if Section 1 is invalid (Def. Br., p. 39). Defend-

ants urge that Section 1 of the 1937 Act is lawful because its alleged purpose is to make price-fixing combinations unlawful.

In the court below, defendants cited the recent case of *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, in support of the proposition that price-fixing is *per se* illegal. In that case, this Court held that an agreement to fix prices of a commodity flowing in the channels of interstate commerce is *per se* an illegal restraint of trade.

The 1937 Act does not purport to deal with fixing prices of commodities. No commodities are involved here. Nor are the plaintiffs engaged in fixing any such prices. Defendants quote a part of the following allegation of the bill of complaint:

> "The license fees in all these cases are fixed and determined by the Society on behalf of all its members after negotiations with either the trade association or the individual user."

The defendants claim that this amounts to "price-fixing."

It has been conclusively shown that the right to perform a single musical composition is worthless unless a vast number of other compositions is included and a blanket license is given for the right to perform those works. It is obvious that a blanket license cannot be given unless the owners of the rights on the one hand, and the users on the other, agree upon the price. The plaintiff Society, like all other organizations, acts through a Board of Directors and in negotiations with users, the Board of Directors of the Society acts on behalf of all its members.

If the agreement which results from negotiations between the Board or its representatives and users constitutes price fixing, then all agreements between owners of a number of copyrighted musical compositions in which such owners fix a price for the right to perform their works, constitute price fixing. "Price fixing" in the odious sense in which it is

used in enforcement of the anti-trust laws, is illegal and in restraint of trade, whether done by one or by many. The 1937 Act permits individuals or corporations to swallow up all the copyrights in the United States for the purpose of determining or fixing license fees for the use or rendition of their copyrighted musical compositions, provided those individuals or corporations do not constitute "a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions." In other words, if the thousand members of the Society and the 45,000 members of affiliated foreign societies sold all their copyrights outright to one corporation such as the Broadcast Music, Inc. (the creature of the broadcasting companies) or to one of the foreign licensing agencies such as the Society of European Stage Authors and Composers (SESAC) or Associated Music Publishers, or G. Ricordi of Milan, the purchasers would be exempt from the operation of this statute because they would not constitute a substantial number of the persons within the United States who own copyrights in musical compositions.

The willingness of the State of Florida to permit the acquisition of a large body of copyrights by a single corporation and to permit them to issue licenses at fees fixed and determined by such corporation while it denies that right to cooperative associations such as the Society, shows clearly that the evil aimed at is not the alleged price fixing but rather the licensing through a cooperative association.

Price fixing consists of fixing the price at which a certain commodity is sold. A gallon of oil is the same no matter who sells it, and if anyone in combination with others and by whatever means, fixes the price at which a gallon of oil shall sell in the market, he is guilty of restraining trade. But musical compositions are not gallons of oil. Every musical composition is different. As the evidence shows, there cannot in any real sense, be competition between

musical compositions. The price fixed for the performance of one musical composition or one group of musical compositions cannot affect the price charged for other musical compositions or other groups of them. There is no proof in this record, and indeed there could be none, that the charges made by the Society for licensing its own works in any wise affected the charges made by others for licensing other works. The license fees charged by SESAC, Associated, G. Ricordi of Milan, and other licensing agencies have not in any wise been influenced or affected by the Society. There is no evidence that the fees charged by one bear any relation to the fees charged by any other. Thus there has been no price fixing in the sense of the *Socony Vacuum* case nor does the statute condemn the type of price fixing referred to in that case.

C. Answering Point IV of Defendants' Brief.

Defendants urge that Section 4-A of the 1939 Act constitutes a valid regulation of price fixing combinations.

Section 4-A of the 1939 Act is discussed at pages 39, 47-8 and 59-60 of our main brief. It bars two or more owners of copyrighted musical compositions from issuing blanket licenses for joint works unless all their compositions are severally made available to each user of the State at a price fixed in advance for each performance, by each separate copyright owner acting independently. Defendants urge that this is a statute aimed against price fixing. As pointed out by the court below, however (Appendix, p. 48; R. II, 1102),

> "Section 4-A does not concern itself with price fixing or with combinations for price fixing; it deals only with the act of pooling copyrighted pieces to sell them for one royalty, that is, with the selling of two or more pieces under one license."

What the statute *does* do, as pointed out by the court below, is to restrict the rights of copyright owners as to how they will license others to use their copyrighted musical compositions. It seeks to prevent them from adopting a scheme of licensing, which is the only practical one yet devised to enable them to reap any reward for their work. As further said by the court below (Appendix, p. 47; R. II, 1102):

> "A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another. The effort of this section is to compel copyright owners, if they sell to one by a blanket license, to furnish schedules giving prices of the compositions so licensed, and to permit anyone desiring to do so, to perform any piece at the price so fixed. This is a taking of plaintiffs' property in its copyright without due process, and is beyond the power of the state."

This is the thought expressed by this Court as to property generally in *Smiley* v. *Kansas*, 196 U. S. 447, 456 (relied upon by defendant in support of Section 4-C):

> "Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, * * *."

The Act shows on its face that it was not enacted to regulate price fixing combinations. It manifestly abridges the rights given by the copyright statutes to a copyright owner and the ordinary "freedom of contract" which is protected by the Federal Constitution. Section 4-A was passed to circumvent the provisions of Section 25 of the Copyright Act, which subjects an infringer to minimum damages of $250. That section of the Copyright Act has been before

this Court on many occasions. *Douglas* v. *Cunningham*, 294 U. S. 207 (1935); *Jewell-LaSalle R. Co.* v. *Buck*, 283 U. S. 202 (1931); *Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100 (1919); *Brady* v. *Daly*, 175 U. S. 148 (1899).

Under Section 4-A of the 1939 Act, if any infringement is apprehended, the user will exercise the option granted by the Statute and will tender payment of the few cents fixed as a license fee for a single performance. This would entirely circumvent the policy of the Copyright Law as defined in the above decisions of this Court. Moreover, sight must not be lost of the fact that the evidence establishes that there *is no competition between musical compositions.*

D. Answering Point V of Defendants' Brief.

There is little to add to what the court below said as to Section 4-C of the 1939 Act.

Defendants attempt to sustain this section on the ground that the public entertainment business is affected with the public interest and therefore subject to regulation and that "the right to charge for use of a copyright or patent * * * does not embrace a right to compensation for the use of *other* than the protected work or invention" (Def. Br. 53).

Defendants rely upon *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436. As we pointed out in our main brief (p. 82), that case involved an *actual* restraint of trade in fixing the prices of *non-patented* articles moving in interstate commerce. No attempt is made by the plaintiffs in their blanket licenses—and it is those that Section 4-C as well as Section 4-A are aimed at—to extend the monopoly which they have by virtue of the copyrights to any *un*copy-

righted musical composition, or to control the price at which any user of their copyrighted music may render the same in a public performance for profit, or as to how a user may avail himself of his license in the sphere to which the license relates. On the contrary the vice in the *Ethyl* case was the attempt to control the price at which gasoline could be retailed through the veto power which the Ethyl Company exercised over those to whom their licensees could sell. There is not even an intimation in this record that the Society or its members have attempted to fix or affect the price of sheet music, phonograph records, or any other commodity, nor does the price charged by the Society in any wise affect the prices charged by other licensors for the licensing of the right of public performance for profit. The purpose and effect of the formation of the Society is set out at length in our main brief. It is sufficient here to state that its licenses are open to all upon the same terms and no user has ever been refused a license by the Society nor has any one been discriminated against. The Society serves a useful purpose and the combination is a reasonable one within the doctrine laid down by this Court in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (1933).

III. The invalidity of the State Statutes resulting from their encroachment upon the interstate commerce and copyright fields is made manifest by the recent consent decree entered in the Southern District of New York.

Defendants refer to a proceeding in equity brought by the United States against the American Society of Composers, Authors and Publishers in the Southern District of New York (E. 78-388) and state that this culminated on February 5, 1941 by the filing of a criminal information for violations of the Sherman Act in *United States* v.

American Society of Composers, Authors and Publishers (E. D. Wisc. Crim. No. 4492).*

Defendants fail to state, however, that the equity suit in the Southern District of New York was voluntarily discontinued by the United States Government on March 4, 1941 (a copy of the order of discontinuance is annexed hereto as Appendix "A"); that in a suit thereupon instituted by the Government in which no evidence was taken and no findings were made, a consent decree was entered on March 4, 1941 (a copy of the consent decree is annexed hereto as Appendix "B").

As pointed out in our main brief, statutes have been passed in several states to regulate the licensing of performing rights in copyrighted musical compositions, all directed to the same general purpose, *i. e.*, preventing the Society from effectively protecting such performing rights of its members against infringement. These statutes vary in their respective provisions.** The National Government

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* As a part of the negotiations for the entry of the consent decree (Appendix "B"), the proceeding in the Eastern District of Wisconsin was terminated by a consent judgment imposing certain fines upon a plea of *nolo contendere*, the court expressly stating that the adjudication of guilt was "for the purposes of this case only." Such a consent judgment is not *res adjudicata* in any other case under the provisions of Section 16 of Title 15, U. S. C., which reads in part as follows:

> "§16. *Effect of criminal prosecution; evidence; limitations.* A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken."

** The Florida 1937 Act and the Nebraska Act, Case # 312, are substantially the same.

has considered that the activities of the Society sufficiently affect interstate commerce as to justify proceedings against the Society under the Sherman Act. Likewise defendants' main contention in this case is based upon the assumption that the Society and the other plaintiffs have violated the Sherman Act. Plaintiffs' right to license performing rights is derived from the Copyright Act. From what has been said before, and what will presently be stated, it is manifest that to uphold the State Statutes would bring about an intolerable situation, in that there would thus result irreconcilable conflicts between the Copyright Act and the Federal Anti-Trust Acts as interpreted by the Department of Justice on the one hand and the State Statutes on the other.

The consent decree permits the Society to continue as heretofore, with the following exceptions:

(1) The composers, authors and publishers who are members of the Society, may agree upon issuing licenses independently of the Society, but if they do so, the Society may (a) require that all moneys derived from issuing licenses shall be paid to the Society; (b) require members to notify the Society before issuing licenses; (c) prohibit members from issuing exclusive licenses; (d) require the approval of the composer, author and publisher of a work before any license is given; and (e) prohibit members from granting licenses for re-licensing by any others, including Broadcast Music, Inc. (Art. II, Par. 1).

(2) The Society agrees not to discriminate between users similarly situated, in issuing licenses (Art. II, Par. 2).

(3) The Society agrees to offer licenses on a program basis of compensation if requested but it may, if the users so desire, issue licenses in the same manner as heretofore, provided there is no discrimination. (Art. II, Par. 3)

(4) If the Society issues a license to a network, the latter must pay for the right to re-broadcast over all affiliated

stations. This is known as "clearance at the source." (Art. II, Par. 4).

(5) If any manufacturer of electrical transcriptions desires a license for specific commercial performances over broadcasting stations, the Society agrees not to refuse to offer such a license (Art. II, Par. 5).

(6) If any user other than a radio broadcaster, desires a license for a specific musical composition, the Society will not refuse to offer such a license "at a price or prices to be fixed by said defendant [the Society] for the performance of such specific (*i.e.*, per piece) musical compositions, the use of which shall be requested by the prospective licensee" (Art. II, Par. 6).

(7) If radio broadcasters desire a license for particular programs, the Society agrees that it will not refuse to offer a license on a performance or program basis "at a price or prices to be fixed by said defendant [the Society] for the performance of such programs, the use of which shall be requested by the prospective licensee" (Art. II, Par. 7).

(8) The Society agrees to limit the restrictions of its works, provided that nothing contained in the decree "shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein, or to protect dramatic performing rights therein, or as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition" (Art. II, Par. 8).

This provision recognizes the necessity of restricting works, in accordance with the findings of the court below (Finding "18", R. II, 1088-9).

(9) The Society agrees to elect members to the Board of Directors by weighted votes of its members (Art. II, Par. 9).

(10) The Society agrees to change Article XIV, Section 6 of its Articles of Association (R. I, 45-58) by eliminating the provision which permits the Society to take into consideration the length of time during which a composer, author or publisher has been a member of the Society (Art. II, Par. 10).

(11) The Society agrees to amend Article II, Section 1 of its Articles of Association (R. I, 45-51) by providing that composers and authors who have regularly published one work (instead of five works), shall be eligible to membership (Art. II, Par. 11).

The decree does not adjudicate any guilt on the part of the Society. It represents an agreement reached between the Society and the Government. In presenting this decree to the United States District Court for the Southern District of New York, Victor O. Waters, Esq., Special Assistant to the Attorney General, expressly recognized the necessity for the continuation of the Society's existence to furnish an expedient source from which to acquire performing rights and to offer the authors and composers an instrumentality through which they can police copyright infringements and have a collective bargaining agency. A copy of Mr. Waters' statement to the Court in presenting the decree is annexed hereto as APPENDIX "C".

If the Society continues as a collective bargaining agency for composers and authors and fixes prices in the manner not only permitted, but expressly required, by Article II, Paragraphs (6) and (7) of the consent decree, it will violate Section 1 of the 1937 Act, which prevents such collective bargaining by providing as follows:

> "Section 1. It shall be unlawful for authors, composers, publishers, owners, or their heirs, successors or assigns, of copyrighted vocal or instrumental musical compositions to form any society, association, partnership, corporation or other group or entity, called herein a combination, when the mem-

bers therein constitute a substantial number of the persons, firms or corporations within the United States who own or control copyrighted vocal or instrumental musical compositions, and when one of the objects of such combination is the determination and fixation of license fees or other exactions required by such combination for itself or its members or other interested parties for any use or rendition of copyrighted vocal or instrumental musical compositions for private or public performance for profit; * * *"

Section 2-A of the 1937 Act requires that the selling price of musical compositions be "so arrived at and determined for all uses and purposes." The words "so arrived at" obviously refer back to Section 1 which bars collective action.

Section 3 outlaws all existing contracts made by a combination declared unlawful under Section 1.

Under the consent decree, all such contracts are valid, but users having the Society's radio broadcasting license may request an additional option for payment on a so-called per program basis, in which event the Society must quote a price for such programs which will be on a blanket license basis. The consent decree provides (Art. II, Par. [3]):

"With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer a per program basis of compensation on either or both of the following basis which may be specified by the broadcaster:

"(i) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;

"(ii) in respect of commercial programs, a per program license fee, either expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program."

If the broadcaster does not request any such option, the existing contract is entirely lawful. Yet Section 3 of the 1937 Act makes it unlawful to attempt to enforce payment under any existing agreement and the remaining sections of the Statute permit the use of the Society's works, as the court below pointed out, "without pay."

The 1939 Act likewise condemns conduct which is lawful under the consent decree. Section 1 defines a "blanket license" as including "any device whereby public performance for profit is authorized of the combined copyrights of two or more persons" and the "blanket royalty or fee" as including "any device whereby prices for performing rights are not based on the separate performance of individual copyrights."

Section 4-A makes it unlawful for two or more copyright owners to associate for the purpose of granting blanket licenses unless each copyrighted work of each individual copyright owner shall be made available "to each user of such compositions within the state, at the option of the user * * * at a price established for each separate performance of each such composition." In order to permit each user to exercise this option, prices must be scheduled in advance for each user. The consent decree makes no such requirement. That decree does not give broadcasters the right to use compositions on a basis of each separate performance. The decree recognizes that such a system of licensing could not possibly work.

As to users other than radio broadcasters, the Society is required by the consent decree to quote a price for the use of specific compositions *only as to such compositions the use of which shall be specifically requested by such user.*

The consent decree provides (Art. II, Par. [6]):

> "(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license *at a price or prices to be fixed by said defendant* for the performance of such specific (*i. e.*, per piece) musical compositions, the use of which shall be requested by the prospective licensee."

This provision, as well as Article II, paragraph 7 of the consent decree *require* the Society to issue certain licenses "at a price or *prices to be fixed* by [it]." Yet such "fixing of prices" by the Society is made unlawful by the State Statutes!

Defendants claim that all the provisions of the 1939 Act were essential to prevent plaintiffs from restraining trade. Yet none of those provisions was incorporated in the consent decree which had no other purpose than to prevent any possible restraints of trade. How can the requirement that plaintiffs duplicate in the State of Florida all the information filed in the Copyright Office, as required by Section 2 of the 1939 Act, aid in preventing a restraint of trade? The consent decree does not require it, and yet the only claimed justification for this Statute is an alleged combination of publishers none of whom resides or does business in Florida. If there were any restraint, it would be restraint of *interstate* commerce and could only be regulated by the United States.

Defendants do not correctly state the requirements of Section 4-A of the 1939 Act. They state that Section 4-A "permitted combinations not large enough to fall under the ban of Section 1 of the 1937 Act to operate, provided the *proposed licensee* was given the option to take a license on a per piece basis from each of the individual copyright owners in the combination, at prices fixed by the individual owner" (Def. Br. p. 50). Section 4-A of the 1939 Act does not so provide. It makes it unlawful for any association of two or more copyright owners (whether restraining trade or not) to issue blanket licenses, even though such licenses may be voluntarily entered into between the association and the user, unless every composition of every member of the association is made available *"to each user of such compositions within the state,* at the option of the user" at prices fixed in a schedule filed in advance by each copyright owner acting individually.

Section 4-B which requires the filing of copies of all blanket licenses, can have no purpose except to enforce the provisions of Sections 4-A and 4-C which the court below held invalid.

Section 4-C, making it unlawful to issue licenses on any basis other than the program basis therein prescribed, prevents plaintiffs from issuing blanket licenses in conformity with Article II, Paragraph (3) of the consent decree, which permits licenses to be issued on any basis that may be agreed upon between the Society and users, provided there is no discrimination. This section of the 1939 Act cannot be regarded as a reasonable method of preventing restraints of trade in the State of Florida. The sole purpose of this section, as of all the other sections of both the 1937 Act and the 1939 Act, is to so burden the licensing of performing rights that such licensing will be abandoned by the plaintiffs.

If Section 2 of the 1939 Act, which requires a duplication of all information filed in the Copyright Office, is unconstitutional (and we submit that no justification for such duplication has been shown) *all* the remaining sections of the Statute must fall.

Defendants admit that the Statutes have only two purposes, one, to prevent restraints of trade, which purpose, we submit, is a feigned one; the *actual* purpose is the second purpose which the Statutes admittedly sought to accomplish, namely, "to allow users of copyrighted music for profit under certain specified conditions to use music without payment for it" (Def. Br. p. 36).

Some sections of the 1937 Act expressly stated such purpose in clear language. In the 1939 Act, the same purpose is apparent but the draftsman was careful not to state it in so many words. The 1939 Act accomplishes this purpose by making it so difficult to license the right of public performance for profit in the State of Florida, that plaintiffs will of necessity abandon all such licensing if the Act is upheld.

Defendants cite several cases where statutes were upheld, which prevented *actual* restraints of trade. Nowhere in the 1937 Act or in the 1939 Act are *actual* restraints of trade condemned. The conduct proscribed may be entirely lawful. It is clearly lawful under the Sherman Act because it has not been prohibited in a decree entered under that Act. The very fact that conduct which is lawful under the Sherman Act is made unlawful under the State Statutes, plus the fact that the Statutes create *presumptions* with respect to restraining trade, which do not have any basis in fact or in law, show clearly that the Statutes were not passed in the *bona fide* public interest or in pursuance of the police power of the State.

The sole purpose of both State Statutes was to nullify rights granted under the Federal Copyright Act.

Both Statutes should be held invalid in their entirety.

CONCLUSION.

The judgment of the court below, insofar as it holds the 1937 Act entirely invalid, should be affirmed; and insofar as it holds parts of the 1939 Act valid, it should be modified by declaring the entire 1939 Act invalid.

Respectfully submitted,

THOMAS G. HAIGHT,
FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
MANLEY P. CALDWELL,
Counsel for Appellees in No. 610,
and Appellants in No. 611.

April, 1941.

APPENDIX "A".

Order Discontinuing 1934 Suit Brought Against American Society of Composers, Authors and Publishers.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Petitioner, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, Defendants.	In Equity No. E 78-388

ORDER

This cause came on for hearing at this term, upon motion of the petitioner for leave to dismiss the suit, and after hearing counsel, it was ordered, adjudged and decreed that the petition be, and it hereby is, discontinued without prejudice.

Dated, March 3rd 1941

(sgd) HENRY W. GODDARD
HENRY W. GODDARD
United States District Judge.

Filed

The above order is consented to by the Petitioner and the undersigned attorneys for the defendants.

(sgd) VICTOR O. WATERS
Special Assistant to the
Attorney General

Attorneys for the Defendant American Society of Composers, Authors and Publishers.

(sgd) GENE BUCK,
President American Society
of Com., Au. & Pub.

(sgd) SCHWARTZ & FROHLICH,
Attys. for Am. Society
by LOUIS D. FROHLICH

APPENDIX "B".

Consent Decree, March 4, 1941.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

TERM, 1941

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS:
GENE BUCK, President;
GEORGE W. MEYER, Secretary;
and GUSTAVE SCHIRMER, Treasurer,
Defendants.

Civil Action
File No. 13-95

CIVIL DECREE

This cause came on to be heard on this 3rd day of March, 1941, the plaintiff being represented by Thurman Arnold, Assistant Attorney General, Victor O. Waters, Special Assistant to the Attorney General, and Warren Cunningham, Jr., Special Attorney, and the defendants being represented by their counsel, and having appeared and filed their answer to the complaint herein.

It appears to the Court that defendants herein have consented in writing to the making and entering of this decree, without any findings of fact, upon condition that neither such consent nor this decree shall be construed as an admission or adjudication that said defendants have violated any law.

It further appears to the Court that this decree will provide suitable relief concerning the matters alleged in the complaint filed herein and that by reason of the aforesaid consent of defendants and its acceptance by plaintiff it is unnecessary to proceed with the trial of the action, or to take testimony therein, or that any adjudication be made of the facts.

Now, THEREFORE, Upon motion of plaintiff, and in accordance with said consent, it is hereby

ORDERED, ADJUDGED AND DECREED

I. The Court has jurisdiction of the subject-matter set forth in the complaint and of the parties hereto with full power and authority to enter this decree and the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" and the acts amendatory thereof and supplemental thereto.

II. Defendants, Gene Buck, as President of the American Society of Composers, Authors and Publishers; George W. Meyer, Secretary; Gustave Schirmer, Treasurer; and American Society of Composers, Authors, and Publishers, its officers, directors, agents, servants, employees, members, and all persons acting or claiming to act on its behalf are hereby perpetually enjoined and restrained from entering into or carrying out, directly or indirectly, any combination or conspiracy to restrain interstate trade and commerce, as alleged in the complaint, by doing, performing, agreeing upon, entering upon or carrying out any of the acts or things hereinafter in this paragraph II prohibited.

(1) Defendant, American Society of Composers, Authors and Publishers, shall not, with respect to any musical composition, acquire or assert any exclusive performing right

as agent, trustee or otherwise on behalf of any copyright owner, its members, or other owner of the performing right, or pursuant to any understanding or agreement with such owner, or its members, to pay for such right a share of, or an amount measured by, the receipts or revenues of said defendants. Nothing herein contained shall be construed as preventing defendant, American Society of Composers, Authors and Publishers, from regulating the activities of its members in the following respects: (a) By requiring all moneys derived from the issuance of licenses by the respective members of defendant to be paid by the licensee to defendant and distributed in the same manner as other revenues; (b) by requiring of its members that notice be given the defendant of their intent to issue licenses before the issuance of same; (c) by prohibiting the members from issuing exclusive licenses to commercial users of music; (d) by requiring, as a condition precedent to the issuance of a license by an individual member of the Society, the approval and consent, to be obtained by the licensor, of the composer(s), author(s) and publisher subject to such reasonable regulations as may be adopted by the composer(s), author(s) and publisher for that purpose; (e) by prohibiting the members from granting or assigning to persons, firms, corporations or enterprises, including Broadcast Music, Inc., the right to license or assign to others the right to perform publicly for profit the respective copyrighted musical compositions of which performance rights are owned or controlled by the respective members of the defendant Society.

(2) Defendant, American Society of Composers, Authors and Publishers, shall not enter into, recognize as valid or perform any performing license agreement which shall result in discriminating in price or terms between licensees similarly situated; provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this sub-paragraph; and pro-

vided further that nothing contained in this sub-paragraph shall prevent price changes from time to time by reason of changing conditions affecting the market for or marketability of performing rights.

(3) Defendant, American Society of Composers, Authors and Publishers, shall not require, as a condition to any offer to license the public performance for profit of a musical composition or compositions for radio broadcasting, a license fee of which any part shall be (a) in respect of commercial programs, based upon a percentage of the income received by the broadcaster from programs in which no musical composition or compositions licensed by said defendant for performance shall be performed, or (b) in respect of sustaining programs, an amount which does not vary in proportion either to actual performances, during the term of the license, of the musical compositions licensed by said defendant for performance, or to the number of programs on which such compositions or any of them shall be performed; provided, however, that nothing herein contained shall prevent said defendant from licensing a radio broadcaster, on either or both of the foregoing basis, if desired by such broadcaster, or upon any other basis desired by such broadcaster.

With respect to any existing or future performing license agreement with a radio broadcaster, defendant, American Society of Composers, Authors and Publishers, shall not, if required by such broadcaster, refuse to offer a per program basis of compensation on either or both of the following basis which may be specified by the broadcaster:

(i) in respect of sustaining programs a per program license fee, expressed in terms of dollars, requiring the payment of a stipulated amount for each program in which musical compositions licensed by said defendant shall be performed;

(ii) in respect of commercial programs, a per program license fee, either expressed in terms of dollars,

requiring the payment of a stipulated amount for each program in which the musical compositions licensed by said defendant for performance shall be performed, or, at the option of defendant, the payment of a percentage of the revenue derived by the licensee for the use of its broadcasting facilities in connection with such program.

In the event that defendant shall offer to license the public performance for profit of a musical composition or compositions for radio broadcasting upon either or both of the foregoing per program basis, and shall also offer to license such performance on a basis of compensation which shall not vary in direct proportion either to actual performances during the term of the licenses of the musical compositions licensed by said defendant for performance or to the number of programs on which musical compositions licensed by defendant shall be performed, defendant shall act in good faith so that there shall be a relationship between such per program basis and such other basis, justifiable by applicable business factors, including availability, so that there will be no frustration of the purpose of this sub-paragraph to afford radio broadcasters alternative basis of license compensation.

(4) Defendant, American Society of Composers, Authors and Publishers, shall not license the public performance for profit of any musical composition or compositions except on a basis whereby, in so far as network radio broadcasting is concerned, the issuance of a single license, authorizing and fixing a single license fee for such performance by network radio broadcasting, shall permit the simultaneous broadcasting of such performance by all stations on the network which shall broadcast such performance, without requiring separate licenses for such several stations for such performance.

(5) With respect to any musical composition in defendant's catalogue of musical compositions licensed for radio broadcasting and which is or shall be lawfully recorded for performance on specified commercially sponsored programs on an electrical transcription or on other specially prepared recordation intended for broadcasting purposes, said defendant shall not refuse to offer to license the public performance for profit by designated radio broadcasting stations of such compositions by a single license to any manufacturer, producer or distributor of such transcription or recordation or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made who may request such license, which single license shall authorize the broadcasting of the recorded composition by means of such transcription or recordation by all radio stations enumerated by the licensee, on terms and conditions fixed by said defendant, without requiring separate licenses for such enumerated stations.

(6) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by users other than broadcasters, refuse to offer a license at a price or prices to be fixed by said defendant for the performance of such specific (*i. e.*, per piece) musical compositions, the use of which shall be requested by the prospective licensee.

(7) Defendant, American Society of Composers, Authors and Publishers, shall not, in connection with any offer to license by it the public performance for profit of musical compositions by radio broadcasters, refuse to offer a license on a per performance or per program basis as provided for in paragraph II (3) hereof at a price or prices to be fixed by said defendant for the performance of such programs, the use of which shall be requested by the prospective licensee.

(8) Defendant, American Society of Composers, Authors and Publishers, shall not assert or exercise any right or power nor shall any of its members exercise any right or power to restrict from public performance for profit by any licensee of said defendant any copyrighted musical composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; provided, however, that nothing in this sub-paragraph shall prevent said defendant or its members from restricting performances of a musical composition in order reasonably to protect the work against indiscriminate performances or the value of the public performance for profit rights therein or to protect the dramatic performing rights therein, or, as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

(9) The Society shall not elect the members of the Board of Directors in any manner other than by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within the Society in determining the number of votes each member may cast for the election of directors. Upon the expiration of the terms of office of the present directors, the provisions of this section shall apply to the election of their successors. Thereafter, not less than one-twelfth of the total membership of the Board of Directors shall be elected annually.

(10) Defendant, American Society of Composers, Authors and Publishers, shall provide in its by-laws that the Society shall not distribute to its members the moneys received by granting the right to perform copyrighted musical compositions publicly for profit on any basis other than the number, nature, character and prestige of the copyrighted

musical compositions composed, written or published by each member, the length of time in which the works of the member have been a part of the catalog of the Society, and popularity and vogue of such works, all to be determined in a fair and non-discriminatory manner.

(11) Defendant, American Society of Composers, Authors and Publishers, shall not require as a condition precedent to eligibility for author or composer membership in the Society the regular publication of more than one musical composition or writing by any person who regularly practices the profession of writing music and the text or lyrics of musical works.

III. The terms of this decree shall be binding upon, and shall extend to each and every one of the successors in interest of defendant, American Society of Composers, Authors and Publishers, and to any and all corporations, partnerships, associations and individuals who or which may acquire the ownership or control, directly or indirectly, of all or substantially all of the property, business and assets of defendant, American Society of Composers, Authors and Publishers, whether by purchase, merger, consolidation, re-organization or otherwise. None of the restraints or requirements herein imposed upon the defendant shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories and possessions.

IV. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General or an Assistant Attorney General and on reasonable notice to defendant, American Society of Composers, Authors and Publishers, made to the principal office of said defendant, be permitted

(a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this decree; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, and subject to any legally recognized privilege, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

V. This decree shall become effective ninety (90) days after the entry hereof, except that the provisions of subparagraph (6) of paragraph II shall become effective nine (9) months after the effective date of the other provisions of this decree.

VI. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to make application to the Court any time after the effective date hereof for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this decree, for the modification hereof upon any ground for the enforcement of compliance herewith and the punishment of violations hereof. Jurisdiction of this cause is retained for the purpose of granting or

denying such applications so made as justice may require and the right of the defendant to make such application and to obtain such relief is expressly granted.

Approved

HENRY W. GODDARD
United States District Judge.

We hereby consent to the entry of the foregoing decree.

For the complainant:

THURMAN ARNOLD
Assistant Attorney General

VICTOR O. WATERS
Special Assistant to the Attorney General.

WARREN CUNNINGHAM
Special Attorney

For the Defendants:

CHARLES POLETTI

MILTON DIAMOND

SCHWARTZ & FROHLICH
By HERMAN FINKELSTEIN
Member of the Firm

Judgment Rendered
March 4, 1941

GEORGE J. H. FOLLMER
Clerk

APPENDIX "C".

Statement of Victor O. Waters, Esq., Special Assistant to the Attorney General, in presenting the consent decree (Appendix "B" hereof) to the United States District Court.

(United States v. *American Society of Composers, Authors and Publishers, et al.,* Civil Action No. 13-95, S. D. N. Y., March 3, 1941).

"Before speaking briefly of the terms of the proposed decree, I would like to state that throughout these proceedings the government has recognized that there was a necessity for some type of organization such as Ascap, that it was necessary to furnish an expedient source from which to acquire performance rights, because of the nature of music, that it was necessary in order to afford authors and composers an instrumentality through which they can police copyright infringements, and that it was necessary to act as the collective bargaining agency of authors and composers.

"The position of the government has been that the organization of Ascap and the activities of the Society in the issuance of licenses have gone further than was necessary to carry out its legitimate objectives which are recognized by the government.

"The proposed decree in this case I think recognizes the necessity for the existence of Ascap and at the same time eliminates those activities and practices which the department has heretofore deemed as violative of the Sherman Act.

"The restrictive provisions of the decree are in paragraph 2, page 2, if your Honor has a copy before you.

"The Court: No, I haven't.

"(Mr. Waters hands copy to the Court.)

"Mr. Waters: The first sub-paragraph of paragraph 2 prohibits the Society from entering into or asserting any exclusive performing right as agent, trustee or otherwise on behalf of any copyright-owner. That provision is intended to restore competition between the respective members of the organization and the organization itself. However, it is conceded, in entering into the terms of this decree, that in the event the rights were non-exclusive with no power of regulation, without reasonable regulation being permitted, that a non-exclusive arrangement would in essence destroy the organization, which was not the intent of the Department at all.

"There are five provisos as to the non-exclusive provisions. They are not mandatory on the part of the Society to exercise, but in the event that they are exercised by this organization, they shall not be construed as violations of the decree. The first proviso provides that nothing herein contained shall prevent the members from paying money derived from the issuance of licenses independent of the Society to the Society.

"(b) of the provisos states that before the issuance of licenses by the respective members, notice shall be given to the Society of their intent to do so, in order that the organization might carry on its policing activities and know who is licensed and who is not licensed, and therefore be in a position to know who is violating the Copyright Law.

"(c) prohibits the members from issuing exclusive licenses to commercial users.

"Proviso (d) by requiring, as a condition precedent to the issuance of a license by an individual member, the approval and consent, to be obtained by the licensor; to require the consent of the author, composer or publisher involved.

"Proviso (e) prohibits the members from granting licenses for relicensing by others, specifically namely Broadcast Music, Inc.

"It is not the intent of the Department to create a chaotic situation whereby another competing organization might come in and acquire performance rights by its members and therefore create another monopoly which might be more potentially vicious than the one involved in this litigation.

"Sub-paragraph 2 prohibits the Society from discriminating between users of music similarly situated.

"Sub-paragraph 3, although quite lengthy, briefly provides for a per program system of licensing for radio broadcasts, a system of licensing that many broadcasters have desired for several years.

"Sub-paragraph 4 provides for what is commonly known in the industry as clearance at the source. That is, the Society shall issue only one license with respect to network broadcasting operations which will authorize the performance by all of the radio broadcasting stations affiliated within any particular network system.

"Sub-paragraph 5 provides for what is commonly known in the industry as clearance at the source for electrical transcription. That is, an advertiser, utilizing the facilities of mechanical devices, might go to the Society and acquire a license authorizing performance by such radio broadcasting stations as is designated by the prospective licensee.

"Sub-paragraph 6 provides for a per piece system of licensing in the event that a user expresses a desire for such per piece system. That is directed at what is commonly known as the all or none policy in licensing. A user might go to the Society and acquire the right to perform whatever music he desires.

"Sub-paragraph 7 is what you might term a partial repetition of sub-paragraph 3 in that with respect to radio broadcasts the Society shall not refuse to issue a license as provided in sub-paragraph 3.

"Sub-paragraph 8 briefly provides that the Society, nor shall any of its members exercise any right or power to

restrict the musical compositions in its catalog of music for the purpose of permitting the fixing or regulating of fees for the recording rights.

"Sub-paragraph 9 is directed toward what is commonly known as a perpetuating board of directors of the Society. It provides briefly that the members of the board of directors shall be elected by membership vote of the organization.

"Sub-paragraph 10 relates to the manner in which the moneys collected by the Society are to be distributed to the various members. It dispenses with the present practice of the organization of considering the length of time of the services rendered by the various members of the Society in determining how the money shall be distributed.

"Sub-paragraph 11 drops the membership requirements from the publication of five tunes, making an author who has regularly published one musical composition eligible for membership.

"The remaining portions of the proposed decree relate to formal matters.

"Paragraph III provides that the terms of the decree will be binding upon the successors of the organization.

"Paragraph IV provides for reasonable access by the Department of Justice to all records on notice to the Society in order to enforce compliance with the decree.

"Paragraph V relates to the effective date of the decree, to become effective 90 days after the entry, with the exception of sub-paragraph (6) which relates to per piece licensing, which is to become effective nine months after the other provisions of the decree.

"Paragraph VI relates to the Court's retaining jurisdiction in order to afford either party such relief as the Court in the future may deem just and proper."

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 610.

J. TOM WATSON (GIBBS), individually and as Attorney General of the State of Florida, *et al.*, *Appellants*,

v.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

No. 611.

GENE BUCK, individually and as President of the American Society of Composers, Authors and Publishers, *et al.*, *Appellants*,

v.

J. TOM WATSON (GIBBS), individually and as Attorney General of the State of Florida, *et al.*,

ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

SUPPLEMENTAL REPLY BRIEF OF APPELLEES IN NO. 610, AND APPELLANTS IN NO. 611 (PLAINTIFFS BELOW).

THOMAS G. HAIGHT,
FRANK J. WIDEMAN,
LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
MANLEY P. CALDWELL,
Counsel for Plaintiffs.

May, 1941.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

SUPPLEMENTAL REPLY BRIEF OF APPELLEES IN NO. 610, AND APPELLANTS IN NO. 611 (PLAINTIFFS BELOW).

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM.

Upon the argument the court requested a further memorandum relating to the substitution of Hon. J. Tom Watson, the present Attorney General of the State of Florida, as a

defendant in place of his predecessor, Hon. George Couper Gibbs. In addition to that matter, counsel for plaintiffs, in answer to a question of the Chief Justice, stated that he would point out the portions of the consent decree which permit the plaintiff Society to issue blanket licenses.

I.

The Court Below Properly Found that George Couper Gibbs had Threatened to and Would Enforce the State Statutes Against the Plaintiffs Unless Enjoined. J. Tom Watson, Present Attorney General of the State of Florida, Should be Substituted as a Defendant in Place of Said George Couper Gibbs.

(a) The court below found (R. II, 1089):

> "Defendants have threatened to and will enforce such State Statutes against these Complainants and others similarly situated in the event that such Complainants and others similarly situated refuse to comply with said State Statutes or do any of the acts made unlawful by said State Statutes."

That finding was justified by the admissions made by the defendants in their answer as well as in argument before this Court and the court below.

(b) When this suit was brought on February 7, 1938, and a temporary injunction obtained on April 4, 1938, the Attorney General of the State of Florida was the late Cary D. Landis (Complaint R. I, 1; Temporary Injunction, R. I, 84).

(c) On April 25, 1938, an appeal was taken to this Court from said temporary injunction. Before the argument of that appeal and on May 10, 1938, the said Cary D. Landis died. George Couper Gibbs was appointed as his successor on May 16, 1938.

(d) On May 31, 1938, the defendants filed a motion in the court below to vacate the temporary injunction and to dismiss the complaint on the ground that the action had abated upon the death of Mr. Landis. Plaintiffs thereupon moved in that court for an order substituting the said George Couper Gibbs as a defendant in place of Mr. Landis. Both motions were denied on June 11, 1938, the court stating that "the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *ex parte* LaPrade, 289 U. S. 444 said motion is denied."

(e) Thereafter, on August 15, 1938, defendants renewed their motion in this Court and on September 16, 1938, plaintiffs renewed their motion in this Court.

(f) Plaintiffs' said motion on file in this Court outlined all the foregoing facts and annexed a proposed supplemental bill of complaint to be filed against the said George Couper Gibbs wherein plaintiffs alleged the following:

"7. During the lifetime of Cary D. Landis, deceased, he was represented by Tyrus A. Norwood as his assistant, who at all times acted on his behalf and under his direction. At all times since the appointment of said George Couper Gibbs, the said Tyrus A. Norwood has continued to act under the direction of said George Couper Gibbs, with the same effect and in the same manner as he acted for the late Cary D. Landis, since the enactment of the said State Statute.

"8. The late Cary D. Landis through his said assistant, Tyrus A. Norwood, threatened to enforce the State Statute and the penalties thereof against complainants if they should violate or attempt to violate any of the provisions thereof, and more particularly threatened to prosecute complainants thereunder should they attempt to sue for infringement of their copyrights in any Federal Court in the State of Florida. Such threat was made in open court on the application for interlocutory injunction, and by the following letter written on March 7, 1938.

"'State of Florida,

"'Office of the Attorney General,

"'Tallahassee.

"'March 7, 1938

"'Honorable Rufus E. Foster,
Judge, United States Circuit Court of Appeals,
New Orleans, Louisiana.

"'Re Gene Buck *et al.* vs. State of Florida *et al.*

"'Dear Judge Foster:

"'Since returning from New Orleans I have been thinking that a statement I made before you in the argument of the above case to the effect that 'if the plaintiffs in this case sued for an infringement of their copyrights in the Federal Courts within the State of Florida, that the Attorney General and State's Attorneys would not prosecute them', was not absolutely clear.

"'In order to be fair to the Court, I would like to state that what I meant by the above remark was that the Attorney General and the State's Attorneys of this State would not prosecute any of the individual complainants if they brought suit in the Federal Courts of this State against persons residing within the State for infringement of copyrights, but if the Society known as the American Society of Composers, Authors and Publishers should bring suit in the Federal Court for infringement, or a suit on any of the licenses which it has issued, the Attorney General and State's Attorneys would be compelled to prosecute it under the provisions of Section 1 of the Act, regardless of whether the suit was brought in the State or Federal Courts.

"'Yours very truly,

"'(Signed) CARY D. LANDIS,

"'*Attorney General,*

"'By TYRUS A. NORWOOD,

"'*Assistant Attorney General.*

"'TAN-a

"'CC: Hon. A. V. Long, Gainesville, Florida.
"'Hon. Louis W. Strum, Jacksonville, Florida.
"'Hon. Frank Wideman, West Palm Beach, Florida.'

"9. Upon information and belief, said Tyrus A. Norwood has been instructed by said George Couper Gibbs to act in his capacity as Assistant Attorney General in appearing for the State's Attorneys in this action; the purpose and object of the appearance of said Tyrus A. Norwood in this action since the death of the late Cary D. Landis, has at all times been to have the interlocutory injunction heretofore entered herein vacated so that the said George Couper Gibbs and the said Tyrus A. Norwood and the said defendant State's Attorneys will be free to enforce the terms and provisions of the State Statute against the complainants herein.

"10. Said George Couper Gibbs directly and through his assistant, Tyrus A. Norwood, has adopted and continues and threatens to adopt and continue the action of his predecessor Cary D. Landis, deceased, in enforcing the State Statute, which is in violation of the Constitution of the United States; upon information and belief, said George Couper Gibbs, individually and as an official charged with the duties of enforcing said State Statute will enforce said State Statute in each and all of its terms, and the whole thereof, and particularly against these complainants and others similarly situated, individually and as members of the Society, in the event that such complainants and others similarly situated refused to accept or submit to a system of compulsory licensing; and said George Couper Gibbs will enforce the penal and confiscatory provisions of such Statute against complainants and others similarly situated in the event complainants and others similarly situated attempt to enforce the existing contracts between themselves and the Society and between the Society and citizens and residents of the State of Florida; or license or attempt to license persons, firms or corporations to publicly perform outside of the State of Florida musical compositions, which performances may be reproduced and reperformed within the State of Florida; or enter into license agreements without the State of Florida with residents or citizens of that State for the right or license to perform publicly for profit

the musical compositions of the complainant and others similarly situated within the State of Florida; or enter into license agreements within the State of Florida with persons, firms or corporations, residents or citizens of that State, for the purpose of licensing them to publicly perform for profit the musical compositions of complainants and others similarly situated within or without the State of Florida; or take any means to detect infringements of their copyrighted musical works within the State of Florida; or bring any suits for infringement of their copyrights in their respective compositions by means of public performances for profit in the Federal Courts within or without the State of Florida; or fail or refuse to submit to the jurisdiction of the State Courts of Florida; and said George Couper Gibbs has threatened in the event of the aforesaid contingencies, or any of them, to enforce the penalties provided for in said State Statute, and to proceed to prosecute complainants and others similarly situated, their employees and agents, criminally, for an alleged violation of said Statute."

(g) Thereafter, on October 10, 1938, this Court denied defendants' motion to vacate the decree and granted plaintiffs' motion to substitute. The order granting plaintiffs' motion is printed at R. I, 94.

(h) The appeal from the temporary injunction was argued in this Court on January 9, 1939, and the decision of this Court affirming the temporary injunction was announced on April 17, 1939. This Court's opinion stated:

"The allegations in the bill of threats of enforcement and the declaration in the affidavit of the Attorney General of the State, the officer charged with supervision of enforcement, of readiness and willingness 'to prosecute any violations of said act' sufficiently establish the immediate danger from enforcement."

(i) The affidavit of the Attorney General referred to in that opinion is one made by the late Cary D. Landis on February 28, 1938, shortly after this action was instituted. In that affidavit Mr. Landis stated (Record on Appeal from Temporary Injunction, 211):

"That, although he has been and is *ready and willing to prosecute any violations of said Act, no violations thereof have been called to his attention, and, upon information and belief, avers that there has been no violation of said act in this State since its passage.* That he has not, and has not authorized anyone on his behalf to, threaten anyone for the prosecution of said Chapter 17807, Laws of Florida, 1937."

(j) It is obvious from that affidavit that Mr. Landis drew a distinction between his intention to enforce the statute if violated and the making of actual threats of prosecution. This Court, however, held that an intention to enforce a statute whose penalties are so drastic that a person affected by it will not dare to violate the statute, is sufficient to invoke the equity jurisdiction of the Federal Court as announced in *ex parte* Young, 209 U. S. 123, 165; *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Gibbs* v. *Buck*, 307 U. S. 66, footnote 18.

(k) After the decision of this Court plaintiffs filed in the court below the supplemental bill of complaint referred to in paragraph "(f)" above. On June 6, 1939, defendants moved to dismiss the original and supplemental bill on the ground that Sections 2 (a), 2 (b) and 6 of the 1937 law had been repealed "and that with those sections repealed, said statute is patently within the police power of said State" (R. I, 100).

(l) Thereafter defendants filed their answer in which they admitted the allegations contained in Paragraph 7 of the complaint (set forth in paragraph "(f)" above; R. I, 95); admitted writing the letter of Mr. Norwood quoted in Paragraph 8 (R. I, 96); substantially denied the allegations of paragraph 9 and answered Paragraph 10 by denying that the defendant George Couper Gibbs "has made any such threats as are alleged in said paragraph", and further alleges that Sections 2 (a), 2 (b) and 6 of the 1937 Act were repealed by the 1939 act (R. I, 108).

With respect to Paragraph 10 of the supplemental complaint, the denials and implied admissions (by failure to

deny) by Mr. Gibbs are in substantially the same form as in the affidavit of the late Cary D. Landis, mentioned in paragraph "(i)" above, and referred to in the opinion of this Court on the appeal from the temporary injunction. In other words, Mr. Gibbs admitted that he "will enforce said statute in each and all of its terms, and the whole thereof" (Supp. Complaint Par. 10, R. I, 197), if plaintiffs should violate the same; but he denied that he had threatened to enforce the statute, presumably upon the theory announced by his predecessor that "no violations thereof have been called to his attention".

Mr. Gibbs did not deny the allegation of Paragraph 10 that he "directly and through his assistant Tyrus A. Norwood, has adopted and continues * * * to adopt and continue the action of his predecessor, Cary D. Landis, deceased, in enforcing the state statute * * *" (R. I, 97).

(m) Upon that state of the pleadings, the plaintiffs did not feel called upon to compel the Attorney General to take the witness stand so that his state of mind could be examined. It was felt that the admissions contained in his pleadings were sufficient. The court below apparently was of the same opinion and it was upon that basis as well as upon the statements of Mr. Ellis, the Assistant Attorney General who tried the case below, that said finding was made. Mr. Ellis said (R. I, 478):

> "The state and the Attorney General are charged with the administration of the 1939 act; the '37 act has not been superseded. *We are considerably interested, however, in sustaining the acts and policies of the acts* * * *".

Mr. Ellis further stated (R. I, 481):

> "I don't think, your honor, that there are any dispute of facts * * *".

(n) Neither defendants' assignments of error nor the specifications of errors relied on challenge the court's finding that defendants have threatened to and will enforce the state statutes unless enjoined.

(o) In addition to the foregoing, plaintiffs and defendants, including the said J. Tom Watson, joined in the pending motion in this Court to substitute Mr. Watson for Mr. Gibbs pursuant to 28 U. S. C., Sec. 780 and Rule 19, Sub division 4 of the Rules of this Court, wherein Mr. Watson admits:

> "4. Said J. Tom Watson has adopted and continues, and proposes to continue, the same course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals, that was adopted by his predecessor in office, said George Couper Gibbs, in enforcing said State Statutes.
>
> "5. There is a substantial need for continuing this suit against said J. Tom Watson, individually and as Attorney General of the State of Florida, as grave and important questions of constitutional law are herein involved."

(p) Upon the argument of this cause Mr. Norwood, the Assistant Attorney General who has appeared in this case on behalf of all three Attorney Generals (Messrs. Landis, Gibbs and Watson), stated that the defendants would enforce all provisions of the 1937 act and the 1939 act except Sections 2 (a), 2 (b) and 6 of the 1937 act.

(q) When the same question was before this Court on the previous application to substitute Judge Gibbs for Mr. Landis, the parties fully briefed the subject, discussing particularly the *LaPrade* case as well as *Allen* v. *Regents of University System*, 304 U. S. 439. The allegations of the present motion to substitute are identical with those of *Allen* v. *Regents, supra*, the provisions of Section 11 of the Act of February 13, 1935 (28 U. S. C., Sec. 780), Rule 19, Subdivision 4 of the Rules of this Court, and Rule 25, Subdivision (d) of the new Rules of Civil Procedure. The latter Rule requires only that it be shown that the successor "adopts or continues *or* threatens to adopt or continue the action of his predecessor * * *". The said J. Tom Watson admits that he "has adopted and continues, and proposes

to continue, the same course of conduct in the enforcement of the statutes * * * that was adopted by his predecessor in office".

II.

The Consent Decree Permits the Society to Issue Blanket Licenses Whereas the State Statutes Prohibit the Society from Doing so.

(a) The consent decree (Appendix B of Plaintiffs' Reply Brief (39-48); Appendix B of Defendants' Reply Brief (58-68)) permits the Society to continue to do business in the same form that it now does business except for the matters specifically enjoined by the decree. The decree does not contain an injunction against issuing blanket licenses. It merely provides that the Society shall not discriminate in price and terms between licensees similarly situated (Article 2, Subdivision 2, Plaintiffs' Reply Brief, 41).

(b) As to radio broadcasters, it provides that the Society shall not, *if required by such broadcasters,* refuse to offer a per program basis of compensation (Pl. Repl. Br. 42). It further provides that if the Society offers a program license and a license based upon any other method of compensation there must be such a relationship between the two methods of licensing as to give the broadcasters a bona fide option to accept one method or the other (Page 43).

(c) The program basis of licensing is a blanket license, as defined by Section 1 of the 1939 Act, which states that the term blanket license "includes any device whereby public performance for profit is authorized of the combined copyrights of two or more owners", and that "the term 'blanket royalty or fee' includes any device whereby prices for performing rights are not based on the separate performance of individual copyrights" (Append. in Yellow Book, p. 104).

The program method of licensing required by the consent decree is one under which the combined copyrights of all the

members of the Society must be licensed at a price based upon the performance of unspecified compositions in a particular program. In other words, the consent decree requires a "blanket license" for a "blanket royalty or fee" as defined in Section 1 of the 1939 Act.

(d) With respect to users other than broadcasters the Society must not refuse to fix a price for specific compositions as requested by a prospective licensee (Subdivision 6, p. 44). In view of the fact that no known method has been devised for licensing on that basis, Subdivision 6 does not become effective until one year after the signing of the decree (Article V, p. 47). Even then the 32,000 users other than radio broadcasters who now have the Society's blanket license must elect to continue on a blanket license basis or to abandon the blanket license and substitute a basis of negotiation for a license for each composition. It is not likely that many users will resort to the latter option; yet the Florida statutes make it unlawful for the Society to issue a blanket license.

(e) The inconsistency between the consent decree and the Florida statutes is discussed at Pages 26 to 35 of plaintiffs' Reply Brief. It is there shown that acts which are required by the consent decree are made unlawful by the state statutes. In these respects if plaintiffs should refuse to offer licenses and fix prices as required in the consent decree, they will be in contempt of court; and if they do make such offers and fix such prices they will violate the state statutes and will be subject to the virtual confiscation of their copyrights in addition to the other severe penalties therein set forth.

(f) This inconsistency results from the attempt on the part of the State of Florida to invade two fields exclusively reserved to Congress, namely, the fields of copyright and interstate commerce. The consent decree, though entered pursuant to the commerce clause and the Sherman Act, is limited to copyrighted works. It does not attempt to em-

brace or interfere with the exercise of rights of literary property protected under the common law of the several states. If the several states wish to pass special laws relating to literary property they should likewise limit their legislation to the field of common law rights in such property and to intra-state transactions. The Florida statutes illustrate the conflicts which necessarily result when the states attempt to invade the field reserved to the Federal Government.

Respectfully submitted,

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Counsel for Plaintiffs.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 610

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellees.

No. 611

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellants,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellees.

MEMORANDUM FOR APPELLANTS IN CASE No. 610 (APPELLEES IN CASE 611) CONCERNING SUBSTITUTION OF J. TOM WATSON AS A PARTY DEFENDANT.

J. TOM WATSON,
As Attorney General of the State of Florida.
TYRUS A. NORWOOD,
Assistant Attorney General.
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Counsel for Appellants in Case No. 610, and Appellees in Case No. 611.

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SUPREME COURT OF THE UNITED STATES

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No. 610

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Appellants,

vs.

GEORGE COUPER GIBBS, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL.,

Appellees.

MEMORANDUM FOR APPELLANTS IN CASE No. 610 (APPELLEES IN CASE 611) CONCERNING SUBSTITUTION OF J. TOM WATSON AS A PARTY DEFENDANT.

This memorandum is filed as a result of questions and comment by members of the court when the case was argued orally April 29 and 30, 1941.

The matter is formally before the court upon a "Motion to Substitute Successor in Office" which is signed jointly by counsel for all parties to both appeals. This Motion was submitted to the court by counsel for the plaintiffs below. The Motion sets up the fact (Par. 3) that the term of office of George Couper Gibbs as Attorney General of Florida expired January 7, 1941, and that he was then succeeded by J. Tom Watson, who is now the duly qualified and acting Attorney General of the State of Florida. In paragraph 4 of the Motion, it is stated that:

> "Said J. Tom Watson has adopted and continues, and proposes to continue, the same course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals, that was adopted by his predecessor in office, said George Couper Gibbs, in enforcing said State Statutes."

Hence there arises the question as to just what was the "course of conduct in the enforcement of the statutes of the State of Florida, involved in these appeals" that was adopted by Watson's predecessor in office, George Couper Gibbs. The question has already been before this Court in connection with the first appearance of the case when it came up on the appeal of the State enforcement officers from the order granting the temporary injunction. The case was then identified as No. 276, October Term 1938, *Cary D. Landis, individually and as Attorney General of the State of Florida, et al., Appellants,* v. *Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellees.*

On August 15, 1938, the State's Attorneys, who were defendants in the court below, filed in this Court a motion to vacate the decree below and direct dismissal of the bill of

complaint. The motion contained the following allegations material to the consideration of the instant question:

"1. The death of the said Cary D. Landis May 10, 1938, occurred subsequent to the entry of order allowing appeal to this Court April 25, 1938; thereafter on May 31, 1938, the appellant State's Attorneys as defendants in the court below filed in the District Court suggestion of the death of said Landis and contemporaneously therewith filed their motion to dismiss suit for want of proper parties and on the ground that the question involved in the suit had become moot. A certified copy of said suggestion of death and motion are hereto attached, marked Exhibits 'A' and 'B' respectively, made part hereof.

"2. Thereafter on July 11, 1938, the appellees as plaintiffs in the court below filed in said District Court their motion for leave to file supplemental bill and with said motion tendered a proposed supplemental bill wherein they sought to implead as a party defendant George Couper Gibbs, the successor in office as Attorney General of the State of Florida. A certified copy of said motion is hereto attached, marked Exhibit 'C', made part hereof.

"3. Thereafter on July 11, 1938 the said George Couper Gibbs filed in said District Court his special appearance and objections to being made party defendant to said cause, certified copy of which with its supporting affidavit is hereto attached, marked Exhibit 'D', made part hereof; and on the same day the defendant State's Attorneys filed their objections to the plaintiffs' motion for leave to file supplemental bill, a certified copy of which is hereto attached, marked Exhibit 'E', made part hereof.

"4. Thereupon on the date last mentioned, July 11, 1938, said cause came on to be heard before the special statutory three judge court at Pensacola, Florida, upon the several motions, the special appearance and objections hereinabove referred to and was argued by coun-

sel whereupon said court on said date entered its order denying the motion of the defendant State's Attorneys to dismiss the cause, and denying the motion of the plantiffs for leave to file supplemental bill impleading George Couper Gibbs as party defendant in the place of said Cary D. Landis, deceased. A certified copy of said order is hereto attached, marked Exhibit 'F', made part hereof.

"5. That under Section 9 of the Florida statute attacked by the bill of complaint in this case, viz., Chapter 17807, Laws of Florida, 1937, it is specifically provided that all proceedings, civil or criminal, for the enforcement or violation of said statute are committed to the exclusive direction of the Attorney General of the State of Florida and that without such direction from him none of the State's Attorneys is empowered to take any action whatever. Therefore, the State's Attorneys are not necessary parties and the Attorney General is the only necessary party to this action. A copy of said statute is hereto attached, marked Exhibit 'G', made part hereof.

"6. The District Court correctly decided that the said George Couper Gibbs could not be impleaded as a party defendant in the face of his objections and supporting affidavit. (*Ex parte La Prade,* 289 U. S. 444.) In the absence of the official occupying the office of Attorney General of the State of Florida the controversy therefore became moot and the suit should be dismissed. (*Warner Stock Company* v. *Smith,* 165 U. S. 28; *Chandler* v. *Dix, et al.,* 194 U. S. 590; *Pullman Company* v. *Croom,* 213 U. S. 571; *Pullman Company* v. *Knott,* 243 U. S. 447; *Bernardin* v. *Butterworth,* 169 U. S. 600.)

Attached as exhibits to the motion were the following documents:

Exhibit "A"—Suggestion of the death of Cary D. Landis, Attorney General of Florida, filed in the District Court by the defendant State's Attorneys, who were co-defendants of Landis.

Exhibit "B"—Motion to dismiss suit filed in the District Court by the defendant State's Attorneys. The motion recited the death of Landis, the fact that the power of enforcing the statute was specifically lodged with the Attorney General and that the suit necessarily abated upon his death.

Exhibit "C"—Motion of plaintiffs below for leave to file supplemental brief substituting George Couper Gibbs, the now Attorney General, in place of Landis, deceased.

Exhibit "D"—Special appearance of George Couper Gibbs and objections to being made party defendant in the court below. This motion is verified by the affidavit of Gibbs, in which affidavit the following satement is made:

"I am without knowledge whether it is true as alleged in the original bill of complaint that the said Cary D. Landis was threatening or ever threatened to enforce the said State statute either against these complainants or others similarly situated, whether by enforcing the penal or confiscatory provisions of said statute or otherwise; although, based upon an investigation of the affairs of the office of my said predecessor, I am informed and believe that all such allegations are unfounded and untrue. However this may be, I assert most positively and without qualification that I have never threatened to enforce said State statute or any provision thereof at any time, either against the plaintiffs in said suit or any other persons whomsoever, either upon the contingencies referred to in said supplemental bill or otherwise; nor am I now making such threats or any of them; nor have I directed or authorized any of the parties defendant to said cause to take or to threaten to take any such action against any person, firm, association, or corporation whomsoever.

"No proceeding is now pending in any court looking to the enforcement of said statute under any direction or authority from me; and without such direction or authority no such proceeding may be brought."

Exhibit "E"—Objections filed by the defendant State's Attorneys to the plaintiffs' motion for leave to file supplemental bill.

Exhibit "F"—Order made by the specially constitued three-judge District Court denying the motion of the defendant State's Attorneys to dismiss the suit and denying the motion of the plaintiffs for leave to file the supplemental bill. The part of the order material to the instant situation reads as follows:

"It is the opinion of the Court that the State's Attorneys filing the motion to dismiss the cause are necessary parties defendant to the suit and, therefore, the cause did not abate as to them upon the death of said Honorable Cary D. Landis. Said motion to dismiss is denied.

"It is also the opinion of the Court that the supplemental bill, for which leave to file is asked, in effect substitutes Honorable George Couper Gibbs as a party defendant in the place of Honorable Cary D. Landis, deceased. On authority of *Ex parte La Prade,* 289 U. S. 444, said motion is denied."

On October 10, 1938, this Court entered an order denying the motion of the appellant State's Attorneys to vacate the decree and direct dismissal of the bill. At the same time, this Court directed the substitution of Gibbs, individually and as Attorney General, in the place of Landis, deceased.

After this Court had disposed of the interlocutory appeal, a supplemental bill was filed by the plaintiffs in the District Court May 31, 1939 (R. I, 94). This supplemental bill, after reciting the death of Landis and threats alleged to have been made by him as to enforcement of the 1937 Florida statute, alleged that Assistant Attorney General Norwood had been instructed by Gibbs to have the interlocutory injunction vacated; that Gibbs had adopted and continued the policy of his predecessor, Landis, with reference to enforcement of the statute, and that there was need to sub-

stitute Gibbs as a party defendant in place of Landis (R. I, 97, 98).

On June 19, 1939, the defendants, including Gibbs, filed their answer to the bill of complaint and supplemental bill (R. I, 100). This answer, while admitting the writing of a letter by Assistant Attorney General Norwood to Judge Foster (R. I, 96), the presiding judge of the special three judge court, denied specifically all other allegations of threats made either by Norwood or by Gibbs (R. I, 108).

This raised directly an issue of fact as to what was the conduct and policy of Gibbs with reference to enforcement of the act, and the burden of proof, of course, rested upon the plaintiffs. Nowhere in the entire record is there any evidence in support of the allegations of the supplemental bill as to threats on the part of Gibbs or conduct showing an intention to prosecute the plaintiffs either civilly or criminally.

The instant motion to substitute Watson for Gibbs does not admit either threats on the part of Watson or conduct beyond the admission that his course of conduct is the same as that of Gibbs. Nowhere in the record is there any proof that his conduct was such as to indicate an intention to prosecute.

Attention is directed to the fact that, under both of the Florida statutes, the Attorney General is in charge of all enforcement proceedings (see Section 9 of the 1937 Act, defendant's main brief, pp. 68, 69, and Section 12 of the 1939 Act, ibid., p. 81). The defendant State's Attorneys are, in essence, only formal parties to this suit, since they are powerless to act save under the direction of the Attorney General.

This subject was briefed in connection with the substitution of Gibbs in place of Landis, deceased, in case No.

276, October Term, 1938. We have asked the Clerk to supply the members of the Court with copies of this earlier brief in connection with the submission of this memorandum. The authorities are analyzed so fully in that brief that to reiterate them seems unnecessary.

Now that the case has been fully tried and presented on the merits, we do not deem it our duty to do more than to make available to the Court the exact situation of the record with regard to the attitude of the three Attorneys General who have held office during the pendency of the case.

Whatever may be the ruling on this matter, we earnestly hope that it will be found possible for this Court to indicate its views as to the constitutionality of the two Florida statutes and thus furnish a much needed guide to the legislative and executive branches of the State government.

Respectfully submitted,

(S.) J. TOM WATSON,
As Attorney General of the State of Florida,
TYRUS A. NORWOOD,
Assistant Attorney General,
LUCIEN H. BOGGS,
ANDREW W. BENNETT,
Attorneys for Appellants in Case #610, and Appellees in Case #611.

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SUPREME COURT OF THE UNITED STATES.

Nos. 610, 611.—October Term, 1940.

J. Tom Watson (Gibbs), individually and as Attorney General of the State of Florida, et al., Appellants,
610 *vs.*
Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al.

Gene Buck, individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellants,
611 *vs.*
J. Tom Watson (Gibbs), individually and as Attorney General of the State of Florida, et al.

Appeals from the District Court of the United States for the Northern District of Florida.

[May 26, 1941.]

Mr. Justice Black delivered the opinion of the Court.

In broad outline, these cases involve the constitutionality of Florida statutes regulating the business of persons holding music copyrights and declaring price-fixing combinations of "authors, composers, publishers, [and] owners" of such copyrights to be illegal and in restraint of trade.

The American Society of Composers, Authors and Publishers (ASCAP), one of the appellants in No. 611 and one of the appellees in No. 610, is a combination which controls the performance rights of a major part of the available supply of copyrighted popular music. The other appellants in No. 611 (appellees in No. 610) are individual composers, authors and publishers of music controlled by ASCAP. The appellees in No. 611 (appellants in No. 610) are the Attorney General and all the state prosecuting attor-

neys of Florida who are charged with the duty of enforcing certain parts of the statutes in question.

These two cases were originally a single action, in which ASCAP and its co-parties sought to enjoin the state officials from enforcing a 1937 Florida statute.[1] A federal district court, composed of three judges under § 266 of the Judicial Code, granted a temporary injunction, and this Court affirmed without passing upon the merits of the constitutional questions involved. *Gibbs* v. *Buck*, 307 U. S. 66. A supplemental bill of complaint was then filed, asking that the three judge court enjoin a 1939 Florida statute relating to the same subject.[2] On final hearing, the three judge court again enjoined the state officials from enforcing any part of the 1937 statute, but granted the injunction only as to certain sections of the 1939 act. 34 F. Supp. 510. No. 611 is an appeal by ASCAP and its co-complainants from the refusal to enjoin the state officials from enforcing the remainder of the 1939 act. No. 610 is an appeal by the state officials from the order granting the injunction as to the 1937 act and as to certain sections of the 1939 act.

The court below, without passing at all upon the validity of thirteen out of the twenty-one sections and subsections of the 1937 act, held that the remaining eight sections deprived copyright owners of rights granted them by the federal copyright laws, and that the statute must fall in its entirety. This it did upon the premise that the sections held invalid and the other parts of the bill were intended by the Florida legislature to form "a harmonious whole" and to "'stand or fall together.'" The ultimate questions involved are such that we must first determine whether this ruling was correct. We hold that it was not, for the following reasons.

The Florida legislature expressed a purpose directly contrary to the District Court's finding. For what the legislature intended in this regard was spelled out in section 12 of the Act in the clear and emphatic language of the legislature itself. That section reads:

"If any section, sub-section, sentence, clause or any part of this Act, is for any reason, held or declared to be unconstitutional, imperative [sic] or void, such holding or invalidity shall not affect the remaining portions of this Act; and it shall be construed to have been the legislative intent to pass this Act without such unconsti-

[1] Fla. Laws 1937, ch. 17807.

[2] Fla. Laws 1939, ch. 19653.

tutional, inoperative or invalid part therein; and, the remainder of this Act, after the exclusion of such part of parts, shall be held and deemed to be valid as if such excluded parts had not been included herein."

This is a flat statement that the Florida legislature intended that the act should stand and be enforced "after the exclusion of such part or parts" as might be held invalid. Unless a controlling decision by Florida's courts compels a different course, the federal courts are not justified in speculating that the state legislature meant exactly the opposite of what it declared "to have been the legislative intent." But the Supreme Court of Florida recognizes and seeks to carry out the legislative intent thus expressed. Speaking of a similar severability clause of another statute, that court said: "The Act as a whole evinces a purpose on the part of the Legislature to impose a license tax on chain stores and Section fifteen provides that if any section, provision or clause thereof, or if the Act as applied to any circumstance shall be declared invalid or unconstitutional such invalidity shall not affect other portions of the Act held valid nor shall it extend to other circumstances not held to be invalid. Under the liberal terms of Section fifteen it may be reasonably discerned that the Legislature intended that the Act under review should be held good under any eventuality that did not produce an unreasonable, unconstitutional or an absurd result. . . . The test to determine workability after severance and whether the remainder of the Act should be upheld rests on the fact of whether or not the invalid portion is of such import that the valid part would be incomplete or would cause results not contemplated by the Legislature." *Louis K. Liggett Co.* v. *Lee*, 109 Fla. 477, 481. Measured by this test the court below was in error, for there can be no doubt that section 1 and the other sections upon which the court failed to pass are complete in themselves; they are not only consistent with the statute's purpose but are in reality the very heart of the act, comprising a distinct legislative plan for the suppression of combinations declared to be unlawful. For as pointed out by the court below, the sections that were not passed on are those which outlaw combinations to fix fees and prescribe the means whereby the legislative proscription against them can

be made effective.[3] Since, therefore, that phase of the act which aimed at unlawful combinations is complete in itself and capable of standing alone, we must consider it as a separable phase of the statute in determining whether the injunction was properly issued against the state officials.

As a matter of fact, as the record stands the right of ASCAP and its co-complainants to an injunction depends upon this phase of the statute and is not to be determined at all by the validity or invalidity of the particular sections which the court below thought inconsistent with the federal Constitution and the copyright laws passed pursuant to it. The ultimate determinative question, therefore, is whether Florida has the power it exercised to outlaw activities within the state of price fixing combinations composed of copyright owners. But before considering that question it is necessary that we explain why we do not discuss, and why an injunction could not rest upon, any other phase of Florida's statutory plan.

Defendants in the injunction proceedings are the state's Attorney General, who is charged with the responsibility of enforcing the state's criminal laws, and all of the state's prosecuting attorneys, who are subject to the Attorney General's authority in the performance of their official duties.[4] Under the statutes before us, it is made the duty of the state's prosecuting attorneys, acting under the Attorney General's direction, to in-

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[3] The Court said:

"There remain. Sections 1, 2-C and 3, in effect declaring ASCAP and similar societies illegal associations, outlawing its arrangements for license fees, and proscribing and making an offense, attempts to collect them; Section 7-B making persons, acting for such a combination, agents for it and liable to the penalties of the Act; Section 8 fixing the penalties; Section 9 giving the state courts jurisdiction to enforce the Act, civilly and criminally; and Sections 10-A, 10-B, 11-A and 11-B, prescribing procedure under it." 34 F. Supp. 516. With the possible exception of section 3, nowhere in the course of the opinion were any of these sections held invalid.

[4] The Secretary of State and the State Comptroller were added as parties defendant by a "Further Supplemental Bill of Complaint" filed October 19, 1939. The ground given by the complainants for adding parties was that certain duties were imposed on these officials by the 1939 act. The duties, however, required only that certain fees be collected, and not that actions be brought to enforce the law.

In the course of this litigation, Florida has had three Attorneys General. The present Attorney General took office on January 7, 1941, and all the parties have joined in a motion to substitute him as a defendant in place of his predecessor in office. There is no objection to the substitution, and the motion is granted.

stitute in the state courts criminal or civil proceedings. The original bill alleged that the defendants had threatened to—and would, unless restrained—enforce the 1937 statute "in each and all of its terms and the whole thereof, and particularly against these complainants and others similarly situated . . . ", and that as a consequence complainants would suffer irreparable injury and damages. The supplemental bill contained similar allegations as to the 1939 act. Both bills were drawn upon the premise that complainants were entitled to an injunction restraining all the state's prosecuting officers from enforcing any single part of either of the lengthy statutes, under any circumstances that could arise and in respect to each and every one of the multitudinous regulations and prohibitions contained in those laws. In their answers, the state's representatives specifically denied that they had made any threats whatever to enforce the acts against complainants or any one else. In their answer to the supplemental bill, however, they said that they would perform all duties imposed upon them by the 1939 act. The findings of the court on this subject were general, and were to the effect that "Defendants have threatened to and will enforce such State Statutes against these Complainants and others similarly situated in the event that such Complainants and others similarly situated refuse to comply with said State Statutes or do any of the acts made unlawful by said State Statutes." It is to be noted that the court did not find any threat to enforce any specific provision of either law. And there is a complete lack of record evidence or information of any other sort to show any threat to prosecute the complainants or any one else in connection with any specific clause or paragraph of the numerous prohibitions of the acts, subject to a possible exception to be discussed later. The most that can possibly be gathered from the meager record references to this vital allegation of complainants' bill is that though no suits had been threatened, and no criminal or civil proceedings instituted, and no particular proceedings contemplated, the state officials stood ready to perform their duties under their oath of office should they acquire knowledge of violations. And as to the 1937 act, the state's Attorney General took the position from the very beginning, both below and in this Court, that under his construction of the earlier act no duties of any kind were imposed upon him and his subordinates except with relationship to prohibited combinations of the type defined in section 1.

Federal injunctions against state criminal statutes, either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional. "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seek its aid." *Beal* v. *Missouri Pacific Railroad Corp.*, 312 U. S. 45, 49. A general statement that an officer stands ready to perform his duty falls far short of such a threat as would warrant the intervention of equity. And this is especially true where there is a complete absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute. For such a general statement is not the equivalent of a threat that prosecutions are to be begun so immediately, in such numbers, and in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts. The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified. Yet from the lack of consideration accorded to this aspect of the complaint, both by complainants in presenting their case and by the court below in reaching a decision, it is clearly apparent that there was a failure to give proper weight to what is in our eyes an essential prerequisite to the exercise of this equitable power. The clear import of this record is that the court below thought that if a federal court finds a many-sided state criminal statute unconstitutional, a mere statement by a prosecuting officer that he intends to perform his duty is sufficient justification to warrant the federal court in enjoining all state prosecuting officers from in any way enforcing the statute in question. Such, however, is not the rule. "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such in-

terference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . We have said that it must appear that 'the danger of irreparable loss is both great and immediate'; otherwise the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions." *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95-96.

Such "exceptional circumstances" and "great and immediate" danger of irreparable loss were not here shown. Tested by this rule, therefore, and with the possible exception of that phase of the statute outlawing Florida activities by combinations declared unlawful in section 1 of the 1937 act (which we shall later consider separately), neither the findings of the court below nor the record on which they were based justified an injunction against the state prosecuting officers.

In addition to the fact that the situation here does not meet the tests laid down in the decided cases, the very scope of these two statutes illustrates the wisdom of a policy of judicial self restraint on the part of federal courts in suspending state statutes in their entirety upon the ground that a complainant might eventually be prosecuted for violating some part of them. The Florida Supreme Court, which under our dual system of government has the last word on the construction and meaning of statutes of that state, has never yet passed upon the statutes now before us. It is highly desirable that it should have an apportunity to do so.[5] There are forty-two separate sections in the two acts. While some sections are repetitious, and while other sections are unimportant for present purposes, there are embraced within these two acts many separate and distinct regulations, commands and prohibitions. No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another.

[5] Cf., e. g., Arkansas Corporation Commission v. Thompson, 312 U. S. —, —; Railroad Commission of Texas v. Pullman Co., 312 U. S. —, —; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 311 U. S. 570, 575; Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483; Ex parte Baldwin, 291 U. S. 610, 619; Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 207.

Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. It is sufficient to say that the statutes before us are not of this type. Cases under the separate sections and paragraphs of the acts can be tried as they arise—preferably in the state courts. Any federal questions that are properly presented can then be brought here. But at this time the record does not justify our passing upon any part of the statute except, possibly, that phase which prohibits activities in Florida by combinations declared unlawful. While the proof and findings in this regard are not as clear and specific as they might and should be, we nevertheless, under the circumstances of this case, proceed to this ultimate and decisive question.

In the consideration of this case, much confusion has been brought about by discussing the statutes as though the power of a state to prohibit or regulate combinations in restraint of trade was identical with and went no further than the power exercised by Congress in the Sherman Act. Such an argument rests upon a mistaken premise.[6] Nor is it within our province in determining whether or not this phase of the state statute comes into collision with the federal Constitution or laws passed pursuant thereto to scrutinize the act in order to determine whether we believe it to be fair or unfair, conducive to good or evil for the people of Florida,

[6] We have been referred to a recent consent decree against ASCAP in the federal district court for the Southern District of New York, the theory being that the decree might have some bearing upon the state's power to pass the legislation now under attack. But it has not. In matters relating to purely intrastate transactions, the state might pass valid regulations to prohibit restraint of trade even if the federal government had no law whatever with reference to similar matters involving interstate transactions.

or capable of protecting or defeating the public interest of the state.[7] These questions were for the legislature of Florida and it has decided them. And, unless constitutionally valid federal legislation has granted to individual copyright owners the right to combine, the state's power validly to prohibit the proscribed combinations cannot be held non-existent merely because such individuals can preserve their property rights better in combination than they can as individuals. We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws. We have, in fact, determined to the contrary with relation to other copyright privileges.[8] But complainants urge that there is a distinction between our previous holdings and the question here. This contention is based on the idea that Congress has granted the copyright privilege with relation to public performances of music, and that with reference to the protection of this particular privilege, combination is essential. We are therefore asked to conclude from the asserted necessities of their situation that Congress intended to grant this extraordinary privilege of combination. This we cannot do. We are pointed to nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade. Compare *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 107.

Under the findings of fact of the court below, ASCAP comes squarely within the definition of the combinations prohibited by section 1 of the 1937 act. Section 1 defines as an unlawful combination an aggregation of authors, composers, publishers, and owners of copyrighted vocal or instrumental musical compositions who form any society, association, or the like and the members of which constitute a substantial number of the persons, firms or corporations within the United States who own or control such musical compositions and "when one of the objects of such combination is

[7] The court below concluded as a matter of law that "enactment of the said Statute was not necessary to protect, nor does it serve the public interest of the State of Florida. . . ."

[8] Interstate Circuit, Inc. v. United States, 306 U. S. 208. Cf. Fashion Originators' Guild of America v. Federal Trade Commission, 312 U. S. —; Ethyl Gasoline Corp. v. United States, 309 U. S. 436.

the determination and fixation of license fees or other exactions required by such combinations for itself or its members or other interested parties." Section 8 of the 1937 act makes it an offense for such combinations "to act within this State in violation of the terms of this Act." The court below found that there were 1425 composers and authors who were members of ASCAP; that the principal music publishers of the country are members; that the Society controls the right of performance of 45,000 members of similar societies in foreign countries; and that the Board of Directors of ASCAP have "absolute control over the fixing of prices to be charged for performance licenses . . . ." Since under the record and findings here ASCAP is an association within the meaning of section 1 of the 1937 act, we are not called upon at its instance to pass upon the validity of other provisions contained in the numerous clauses, sentences, and phases of the 1937 or 1939 act which might cover other combinations not now before us. It is enough for us to say in this case that the phase of Florida's law prohibiting activities of those unlawful combinations described in section 1 of the 1937 act does not contravene the copyright laws of the federal Constitution; that particular attacks upon other specified provisions of the statutes involved are not appropriate for determination in this proceeding; that the court below erred in granting the injunction; and that the bill should have been dismissed. All other questions remain open for consideration and disposition in appropriate proceedings. For the reasons given, the judgment below in No. 610 is reversed and the cause is remanded to the lower court with instructions to dismiss the bill. The judgment in No. 611 is affirmed.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.